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Pursuant to Sixth Circuit Rule 206
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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

WARREN DAVIS,

Plaintiff-Appellee,

v.

No.04-3131

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW); UAW
REGION 2B; RONALD GETTELFINGER;
and LLOYD MAHAFFEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 03-01311—Kathleen McDonald O'Malley, District
Judge.

Argued: September 22, 2004

Decided and Filed: December 15, 2004

Before: KEITH, MOORE, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Michael B. Nicholson, ASSOCIATE GENERAL COUNSEL, Detroit, Michigan, for Appellants. David G. Oakley, KRAMER & ASSOCIATES, Cleveland, Ohio, for Appellee. **ON BRIEF:** Michael B. Nicholson, ASSOCIATE GENERAL COUNSEL, Detroit, Michigan, Rory P. Callahan, Frederick G. Cloppert, Jr., CLOPPERT, LATANICK, SAUTER & WASHBURN, Columbus, Ohio, for Appellants. David G. Oakley, Edward G. Kramer, KRAMER & ASSOCIATES, Cleveland, Ohio, Armond D. Budish, BUDISH & SOLOMON, Pepper Pike, Ohio, for Appellee.

OPINION

RONALD LEE GILMAN, Circuit Judge. At the 2002 Constitutional Convention of the International Union of the United Automobile Workers of America (UAW), convention delegates adopted an amendment to the UAW Constitution that dissolved one of the UAW's geographic regions and redistributed its members among three neighboring regions. The amendment also had the effect of setting aside Warren Davis's reelection as a regional director, a result that Davis contends was motivated by illegal age discrimination. Davis therefore sued the UAW and two of its officers, Ronald Gettelfinger and Lloyd Mahaffey, in Ohio state court, alleging state-law claims of age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and slander.

The UAW removed the case to the United States District Court for the Northern District of Ohio, asserting that Davis's state-law claims sought postelection relief and were therefore preempted by Title IV of the federal

Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 481-83 (2004). Finding that there was no federal preemption, the district court remanded the case to the Ohio state court. For the reasons set forth below, we **REVERSE** the district court's remand of Davis's state-law claims and **REMAND** with instructions to dismiss the claims on the basis that they are all precluded by the LMRDA.

I. BACKGROUND

A. Factual background

Davis served for 19 years as an elected member of the governing board of the UAW. After deciding to run for Congress in 2002, Davis announced his intention to vacate his office in the UAW and endorsed his assistant director for his soon-to-be-vacant position. The election for the office, for which Davis's assistant was the sole candidate, was held at the UAW's Constitutional Convention in June of 2002. Due to an apparent last-minute change of heart, however, Davis arranged for his assistant to nominate Davis and then withdraw from the race, resulting in Davis winning the election unopposed.

During his many years of service with the UAW, Davis had been part of an unofficial caucus of politically powerful members who adhered to an informal agreement not to seek elective office after reaching 65 years of age. Angered by Davis's surprise tactics at the convention and his acceptance of an elected position at the age of 67, several members of the unofficial caucus issued a press release calling upon the UAW convention delegates to eliminate Davis's region, redistribute its members among three other regions, and hold new elections. This proposal was adopted by the UAW Constitutional Convention, which promptly dissolved Davis's region the day after his reelection.

B. Procedural background

Davis sued the UAW in the United States District Court for the Eastern District of Michigan, alleging a number of federal claims related to the UAW's elimination of his region and the resulting termination of his elected office. *Davis v. UAW* 274 F. Supp. 2d 922 (E.D. Mich. 2003). The court dismissed the case after finding that it lacked subject matter jurisdiction over Davis's election-related claims because there had been no finding of probable cause by the Secretary of Labor as required by Title IV of the LMRDA, 29 U.S.C. §§ 481-83. The Michigan district court's dismissal of Davis's case was upheld by this court on appeal *Davis v. UAW*, 2004 WL 2812623 (6th Cir. Dec. 9, 2004).

In the present action, Davis has sued the UAW and two of its officers in Ohio state court, advancing state-law claims of age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and slander, all arising out of the events at the Convention. These state-law causes of action are premised on the assertion in his complaint that he "was successfully elected as Director" at the UAW Convention and that the UAW's subsequent actions in reorganizing his region improperly deprived him of his rightful office.

The UAW removed the case to the district court, offering two separate grounds in support of removal. First, the UAW contended that, in deciding Davis's state-law claims, the court would be required to interpret the UAW Constitution, thus making the action completely preempted by the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (2004). Second, the UAW asserted that the adjudication of Davis's state-law claims would necessarily require a determination regarding the validity of the UAW election, an exclusively federal question under Title IV of the LMRDA.

The district court remanded the action to the state court after concluding that it lacked subject matter jurisdiction over the case. In so doing, it found that the UAW's federal preemption claims based on the LMRA were without merit, a decision that the UAW has not challenged on appeal. The district court also rejected the UAW's contention that Davis's state-law claims were preempted by Title IV of the LMRDA, causing it to remand the case back to the state trial court. This timely appeal followed.

II. ANALYSIS

A. Jurisdiction to review the district court's remand order.

A threshold question in this case is whether appellate jurisdiction exists to review the remand order of the district court. As a general rule, remand orders constitute final judgments for purposes of federal appellate jurisdiction and may be reviewed unless some independent bar to appellate review exists. *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (establishing that remand orders are "immediately appealable under §1291 because they conclusively determine a disputed question that is completely separate from the merits of the action") (quotation marks omitted).

Davis contends that we are barred by 28 U.S.C. § 1447(d) from hearing the UAW's appeal from the district court's remand order. Section 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" Despite the sweeping language of this section, however, "[t]he Supreme Court stated long ago . . . that the § 1447(d) proscription is not as broad as it seems." *Baldrige v. Kentucky-Ohio Trans., Inc.*, 983 F.2d 1341, 1343 (6th Cir. 1993).

One significant limitation on the reach of § 1447(d) was explored by this court in *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000), where appellate review of a remand order was sought. Although acknowledging that “the plain language of 28 U.S.C. § 1447(d) suggests that remand orders concerning cases removed pursuant to 28 U.S.C. § 1441 are never reviewable,” *Long*, 201 F.3d at 758, this court concluded that the Supreme Court’s ruling in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), dictated that “§§ 1447 (c) and (d) must be read together” *Long*, 201 F.3d at 758. Section 1447 (c) directs the district court to remand a removed case “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction” After reading § 1447(c) in conjunction with (c) the court in *Long* concluded “that § 1447(d) prohibits review only of remand orders issued pursuant to a finding, under § 1447(c) that the district court lacked subject matter jurisdiction.” 201 F.3d at 758.

In determining “the nature and scope of” remand under § 1447(c), this court has “interpreted that provision as necessarily tied to a temporal reference point, namely, the time of removal.” *Van Meter v. State Farm Fire & Cas. Co.*, 1 F.3d 445, 450 (6th Cir. 1993). For a case to be deemed remanded pursuant to § 1447(c), the district court must find that subject matter jurisdiction was lacking at the time of removal and then remand on that basis; otherwise, § 1447(d) will not prohibit appellate review of the district court’s remand order. *See First Nat’l Bank of Pulaski v. Curry*, 301 F.3d 456, 460 (6th Cir. 2002) (stating that “§ 1447(d) means only that a remand order is unreviewable on appeal when the case was remanded based on the district court’s conclusion that it lacked subject matter jurisdiction over the removed case at the time of removal”) (emphasis in original). Where a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court’s remand order.

See Letherer v. Alder Group, LLC, 328 F.3d 262 (6th Cir. 2003) (exercising appellate review where the district court remanded after concluding that a stipulation between the parties had obviated the need to address the federal question); *First Nat'l Bank of Pulaski*, 301 F.3d at 459 (reviewing a remand order where the district court had resolved the federal claims and then remanded the case after finding that it “lacked jurisdiction to adjudicate the remaining state claims”).

We conclude that § 1447(d) does not bar our appellate review of the remand order in the present case because the district court possessed subject matter jurisdiction *at the time of removal*. The UAW removed this case to the district court, arguing that there was federal question jurisdiction over Davis’s claim for reinstatement because the claim constituted a request for postelection relief under the exclusive jurisdiction of the LMRDA. Only after finding that Davis had “conceded] that the remedy of reinstatement [was not available to him” did the district court conclude that the case must be remanded because subject matter jurisdiction had been lost. The district court found that Davis had expressed his intent to abandon this claim in his memorandum supporting his remand motion, which was filed over a month after the case was removed from the state court.

On this point the district court may have been mistaken, however, because Davis did not amend his complaint to remove his claim for reinstatement and has made clear his intention to preserve the claim. Regardless, the district court plainly relied on Davis’s alleged concession in remanding the case, finding that it “goes a long way toward moot[ing] the defendants’ argument” of preemption by the LMRDA. Because the district court remanded this case only after finding that a post-removal event had deprived it of subject matter jurisdiction, we may exercise appellate jurisdiction over the district court’s remand order. *See First Nat'l Bank of Pulaski*, 301 F.3d at

460 (stating that “a remand order is reviewable on appeal when the district court concludes that the action was properly removed but that the court lost subject matter jurisdiction at some point post-removal”).

B. Federal preemption by Title IV of the LMRDA

1. *Davis’s state-law claims for age discrimination, conspiracy, wrongful termination, and retaliation*

The UAW contends that remand was improper because Davis’s complaint raised exclusively federal questions regarding the validity of the union election, the UAW’s tactics therein, and the appropriateness of Davis’s reinstatement as a remedy. Specifically, the UAW argues that Davis’s claims of age discrimination, conspiracy, wrongful termination, and retaliation all seek postelection relief. Title IV of the LMRDA mandates that challenges to a previously conducted union election may only be brought by the Secretary of Labor. 29 U.S.C. § 483; *Trbovich v. United Mine Workers*, 404 U.S. 528, 533 (1972).

The district court’s application of the LMRDA is reviewed de novo. *Argentine v. United Steel Workers, AFL-CIO*, 287 F.3d 476, 482 (6th Cir. 2002). In remanding the present action, the district court concluded that Davis’s claims were not preempted by the LMRDA because the indisputably federal questions of “whether Davis was elected” and “whether the defendants eliminated Davis’s position” need not be answered in order to adjudicate Davis’s claims. We respectfully disagree. For instance, it is difficult to imagine how the state court could adjudicate whether Davis was wrongfully terminated without first finding that he held a position in the UAW. This apparent

difficulty is confirmed by the fact that the district court felt compelled to address the validity of the UAW election in its remand order, noting that “the Union does not seriously assert that Davis was not elected” and that “the defendants have never denied (and have no basis for denying) that Davis was elected pursuant to a regular and orderly process provided for under the Union Constitution.” To the contrary, the UAW vigorously contests the validity of Davis’s election.

We agree with the district court’s conclusion that the preemptive scope of the LMRDA is narrow but disagree that Davis’s claims are not within that narrow scope. For example, the district court held that Davis’s request for damages in the form of back pay “would not necessarily imply, as defendants assert, that one or more of the Union’s election results were invalid.” But the cases relied upon by the district court do no more than support the proposition that the LMRDA permits an employee to file an age discrimination claim for back wages when improperly *discharged* by the union; they offer no authority for the court’s holding that an employee is not preempted when filing a similar claim in the context of an allegedly unfair union *election*.

Conversely, the two other courts that have addressed this issue in the context of a union election have held that the LMRDA preempts such a claim because “[p]laintiffs can only prevail on . . . the claim for back pay[] if the court determines that the election was improper.” *Calciano v. United Bhd. of Carpenters & Joiners*, No. 92-5715, 1993 WL 138827 at *4 (S.D.N.Y. Apr. 23, 1993); *see also Bermingham v. Castro*, No. 98-15859, 1999 WL 644342 at *2 (9th Cir. Aug. 24, 1999) (holding that damages in the

form of “lost income . . . effectively challenge the validity of the election already conducted, which is an area in which Title IV provides the exclusive remedy”).

Davis’s state-law claims in question, including his requested remedy of back pay, logically hinge on his assertion that he was lawfully elected. As the district court in Michigan correctly concluded, claims for postelection relief are relegated to the exclusive jurisdiction of the Secretary of Labor by the *LMRDA*. *Davis v. UAW*, 2004 WL 2812623 (6th Cir. Dec. 9, 2004). Davis’s claims for age discrimination, conspiracy, wrongful termination, and retaliation should therefore be dismissed by the district court for lack of subject matter jurisdiction.

2. Davis’s state-law claims for libel and slander

Davis’s remaining causes of action for libel and slander arise from a press release issued at the UAW Convention, wherein certain delegates alleged that Davis lied about his plans for retirement and employed an “immoral, deliberate, and fraudulent scheme to deny an honest election to the membership.” Similar sentiments were also vocalized by some of the delegates shortly after the election.

In order for Davis to establish a prima facie case for libel or slander, he must show that the delegates’ statements regarding the impropriety of his actions in the election were false. *See Celebrezze v. Dayton Newspapers, Inc.*, 535 N.E.2d 755, 759 (Ohio Ct. App. 1988) (holding that falsity is an essential element of an Ohio common law defamation claim). To determine whether the statements are false,

however, the validity of the election and Davis's tactics therein must be examined.

But this inquiry has already been conducted by the Secretary of Labor in responding to Davis's Title IV complaint. After acknowledging that some delegates had "privately published and distributed a pamphlet condemning [Davis's] stratagem and purposes," the Secretary nevertheless found that the delegates' actions at the Convention had not violated Davis's election-related rights. Because Davis's claims for libel and slander would necessarily require a court to revisit this finding, these claims are also preempted by Title IV of the LMRDA. *Cf. Henegar v. Banta*, 27 F.3d 223, 226-27 (6th Cir. 1994) (holding that the Railway Labor Act "preempts state law claims based on libel and slander" because the "court would inevitably have to interpret the terms of the collective bargaining agreement," a task within the exclusive jurisdiction of the National Railroad Adjustment Board); *Miller v. Norfolk & W. Ry. Co.*, No. 89-4101, 1990 WL 163302, at *5 (6th Cir. Oct. 25, 1990) (unpublished) (finding libel and slander claims preempted by the Railway Labor Act where, "[a]lthough defamation was not an issue before the [administrative] board," the defamation claim was "based upon a matrix of facts that [was inextricably intertwined with the collective bargaining agreement]").

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the district court's remand of Davis's state-law claims and **REMAND** with instructions to dismiss the claims on the basis that they are precluded by the LMRDA.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

WARREN DAVIS,	:	Case No. 1:03CV1311
	:	
Plaintiff,	:	JUDGE
	:	O'MALLEY
	:	
v.	:	MEMORANDUM &
	:	<u>ORDER</u>
UNITED	:	
AUTOMOBILE,	:	
AEROSPACE AND	:	
AGRICULTURAL	:	
IMPLEMENT	:	
WORKERS OF	:	
AMERICA, et al.,	:	
	:	
Defendant.	:	

Plaintiff Warren Davis originally filed this action in state court against the following defendants: (1) United Automobile, Aerospace and Agricultural Implement Workers of America (“the Union”); (2) Region 2B of the Union (“Region 2B”); (3) Union President Ronald Gettelfinger; and (4) Region 2B Director Lloyd Mahaffey. In his complaint, Davis alleges that, in 1983, he was elected to the position of Director of Region 2. Davis further alleges that the UAW has an unwritten rule that a person may not hold the position of Director after age 65. Davis decided not to adhere to this rule, and ran for re-election in June of 2002, even though he was older than 65. Davis won the election. Davis alleges that the defendants

then punished him for violating the age rule. Davis alleges this punishment came primarily in two forms:

(1) the defendants broke up Region 2, distributed its members to other regions (including Region 2B), and eliminated the position of Director of Region 2; and (2) the defendants issued a defamatory press release, attacking Davis and seeking to lower his reputation with Union members. Davis also alleges the defendants took these actions in retaliation for Davis's having urged other Union members to disregard the unwritten age rule.

Based on these allegations, Davis stated the following claims: (1) age discrimination, in violation of Ohio Rev. Code §4112.02; (2) wrongful discharge, in violation of Ohio public policy; (3) libel; (4) defamation; (5) retaliation, in violation Ohio Rev. Code §4112.02; and (6) conspiracy to discriminate on the basis of age.

Currently pending are the following motions: (1) motion by defendants to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted (docket no. 5); (2) defendants' motion to transfer venue to the United States District Court for the Eastern District of Michigan (docket no. 6); and (3) motion by Davis to remand (docket no.12). For the reasons stated below, the motion to remand is **GRANTED**, and this case is **REMANDED** to the Cuyahoga County, Ohio Court of Common Pleas, where it was originally filed.

Given that the Court concludes it does not have jurisdiction over the case, the Court does not rule on the other motions, leaving them for the state court.¹

I..

In his motion to remand, Davis boils his complaint down to its essence in two paragraphs, as follows:

Plaintiff Warren Davis was a member of UAW since 1954, and became the Director of Region 2, and elected position, in 1983. Pursuant to UAW rule and custom, Plaintiff was expected to retire at age sixty-five. This policy is a blatant violation of Ohio law, and federal law, prohibiting discrimination on the basis of age. Plaintiff declined to retire, ran for re-election, and was re-elected by popular vote to the Region 2 Director position.

Thereafter, the named Defendant publicly chastised Mr. Davis because of his refusal to leave quietly at age sixty-five, and vocally defended their unlawful policy

¹The Court does note, however, that the basis for defendants/ motion to transfer venue has become virtually moot, as the “related case” pending in the United States District Court for the Eastern District of Michigan has been dismissed. The dismissal is currently on appeal. case” pending in the United States District Court for the Eastern District of Michigan has been dismissed. The dismissal is currently on appeal.

of seeking “new and fresh” leadership, meaning persons under age sixty-five. Ultimately, Defendants eliminated Plaintiff’s position by eliminating Region 2 entirely; Defendants also made defamatory statements during and after their campaign to get rid of Mr. Davis.

Memo. In support at 1 (emphasis in original). Davis then explains that, even though the defendants’s actions allegedly violated” Ohio law, *and federal law*, prohibiting discrimination on the basis of age,” he chose to state “six causes of action, all of which are based state law,” and not to state any federal law claims. *Id.* (emphasis added).

Despite Davis’s choice to bring only state-law claims, the defendants removed the action to this Court. Defendants give two reasons why this case is properly removed to this court. First, defendants assert that “adjudication of Davis’[s] claims implicate and will require substantial interpretation of numerous provisions of UAW’s Constitution, making this action one that is completely preempted by LMRA Section 301 and thus properly removable.” Response at vi (citing Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185. Second, defendants assert that “Title IV of the Labor-Management Reporting and Disclosure Act [“LMRDA”], 29 U.S.C. §§481-483, completely preempts Davis’[s] claim for installation in elective union office, the pay and benefits incident to that office, and the invalidation of conflicting results in other union elections.” *Id.* The Court examines these two arguments separately.

A. LMRA Preemption.

As defendants note, LMRA “preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms.” *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir.1994). Under the principle of LMRA preemption, “a suit in state court alleging a violation of a provision of a labor contract must be brought under §301 and be resolved by reference to federal law.” *Id.* (quoting *Allis-Charmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985)). To determine whether a plaintiff’s state law claims are, in fact, subject to LMRA preemption, this Court must take a two- step approach:

First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right both is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is warranted.

Id. (citations omitted). Further, “[i]n order to make the first determination, the court is not bound by the ‘well-pleaded complaint’ rule, but rather, looks to the essence of the plaintiff’s claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim as a tort.” *Id.* (citation omitted). If the plaintiff can prove

all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement. *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 770 (6th Cir. 1989). “[N]either a tangential relationship to the CBA. nor the defendant’s assertion of the contract as an affirmative defense will turn an otherwise independent claim into a claim dependent on the labor contract.” *DeCoe*, 32 F.3d at 216 (citation omitted).² When undertaking this analysis, the Court must strictly construe the notice of removal and resolve all doubts against removal. *Her Majesty the Queen in Right of Province of Ontario v. City of Detroit*, 874 F.2d 332,339 (6th Cir.1989). In addition, “[t]he party seeking removal bears the burden of establishing its right thereto.” *Id.* (citing *Wilson 339 v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921)).

In this case, the defendants recite four different reasons why the Court will have to interpret the Union Constitution in order to dispose of Davis’s claims. First, the Court will have to examine the Constitution to

²In this case, the defendants premise their LMRA preemption arguments not on the implication of the meaning of a *collective bargaining agreement*, but on the implication of the meaning of the *Union Constitution*. The LMRA preemption analysis, however, remains the same. *See United Ass’n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada*, AFL CIO v. Local 334, United Ass’n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, 452 U.S. 615 (1981) (holding that a dispute implicating a union constitution could be subject to LMRA preemption); *Wooddell v. International Broth. Of Elec. Workers, Local 71*, 502 U.S. 93 (1991) (holding that a claim by a union member that union officers violated the union’s constitution could be subject to LMRA preemption).

determine whether Davis was “properly elected” to the position of Director of Region 2. Second, the Court will have to examine the Constitution to determine whether Davis is a “bona fide executive or high policymaker,” which could exempt him from protection under the Ohio Age Discrimination statute. Third, the Court will have to determine whether the defendants’ allegedly defamatory remarks were privileged by the “free speech clause” contained in the Union’s ethical code. And fourth, the Court will have to examine the Constitution to determine whether Davis is entitled to reinstatement, which he requests in his prayer for relief. As explained below, the Court disagrees with the defendants on each count- none of Davis’s claims require anything more than a tangential reference to the Constitution, and will not require substantial interpretation of its terms and provisions.

Addressing the first point, the defendants note that Davis alleges explicitly in his complaint that he was “properly elected” under the Union Constitution, and that the defendants “violated” the Constitution when they arranged for the position of Director of Region 2 to be eliminated. The defendants insist that proof of these allegations “indubitably will require interpretation of the Constitution’s terms.” Response at 9. The Court, however, disagrees that it will have to interpret the Constitution in order for Davis to prove his claims. As Davis points out, the defendants have never denied (and have no basis for denying) that Davis was elected pursuant to a regular and orderly process provided for under the Union Constitution. Admittedly, because the defendants have filed a motion to dismiss, the defendants have not *formally* answered Davis’s allegation regarding his having been elected. But the Union does not seriously assert that

Davis was not elected, and the Union never took any action challenging the validity of the election. Indeed, in the internal Union appeal brought by Davis to challenge the elimination of Region 2, the Union described the relevant facts and noted that “Davis was elected by acclamation.” Union Decision at 1 (Apr. 15, 2003).³

More important, the critical question in this case is not whether Davis was elected, nor is it whether the defendants eliminated Davis’s position. Both of these questions are questions of fact, and are not under serious dispute. Indeed, the critical question is not even whether the defendants’ violated the Union Constitution by eliminating Region 2; while this question may have some evidentiary value, it is not a question that must be answered for Davis to prove all of the elements of his claims. In other words, Davis’s claims for defamation, age discrimination, and retaliation *do not require proof* that the Union violated its own Constitution. Rather, the central question is whether the defendant’s actions—regardless of whether they violated the Union Constitution—were motivated by discriminatory and/or maliciously defamatory intent. The question of whether the defendants eliminated Region 2 because: (1) it was no longer needed, (2) they felt Davis acted unethically during his political maneuvering, (3) they wanted to discriminate against Davis based on age, or (4) for some other reason, does not require a fact-finder or a Court to interpret the Union Constitution.

³ Interestingly, the same decision notes that, although Davis also asserted that the elimination of Region 2 violated age discrimination laws, that was an issue for a court to decide. *Id.* at 4.

On this point, the Court finds instructive the case of *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir.1989), *cert. denied*, 493 U.S. 992 (1989). In *Smolarek*, one of the plaintiffs (Fleming) claimed that, after he suffered an injury at work, his employer (Chrysler) purposely gave him “job assignments inconsistent with his limitations,” harassed him, and finally terminated him. *Id.* 1328. Fleming filed a grievance, asserting that his termination was the product of illegal discrimination and in violation of the CBA. Fleming also filing a complaint in state court, asserting claims for : (1) violation of the Michigan statute that outlawed discrimination against the handicapped (known a “ HCRA”); (2) retaliation for stating an intention to file a worker’s compensation claim; (3) breach of the implied duty of good faith and fair dealing; and (4) intentional interference with employment relations. Although all of these claims were premised on state law, Chrysler removed the case to federal court, citing LMRA preemption. The Sixth Circuit Court of Appeals, however, held that the case had to be remanded to state court. The *Smolarek* court reasoned as follows:

To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming’s handicap. We recognize that Chrysler is likely to assert as its defense to Fleming’s claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need

only decide whether Chrysler took actions adverse to Fleming because of his handicap or rather solely because Chrysler felt bound by the union agreement to take the actions or for some other legitimate reason. It is not necessary to decide at the outset whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation? Under [*Lingle v. Norge Div. of Magic Chef, Inc.* 486 U.S. 399, 108 S. Ct. 1877 (1988)], therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape § 301 preemption, for "resolution of the state-law claim does not require construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted).

Smolarek, 879 F.2d at 1334.

Also, in *Smolarek*, the court examined a discrimination claim by a different plaintiff (*Smolarek*). Who asserted that, after he suffered a seizure at work, his employer of 30 years terminated him illegally. *Id.* at 1328. *Smolarek* did not assert a claim that Chrysler violated the CBA. Rather, *Smolarek* filed a complaint in Michigan state court, alleging handicap discrimination under HCRA and worker's compensation retaliation. Defendant Chrysler removed the case, citing LMRA preemption; Chrysler argued that's *Smolarek* "'substantially dependent' on interpretation of the collective bargaining agreement's

provisions regarding an employee's right to reinstatement following disability leave." *Id* at 1332. Chrysler even characterized a discrimination claim as, in actuality, a *disguised* claim for breach of CBA. *Id*. The Sixth Circuit Court of Appeals rejected Chrysler's arguments, and held remand was appropriate:

The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of §301 preemption.*** Even if may have been able to charge Chrysler under these circumstances with a violation of the collective bargaining agreement, he did not choose to do so and this does not mean that §301, even if applicable but not utilized by plaintiff, preempts the claim.***

Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:

It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim

survives. But the presence of a federal question, even a §301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Id. at 1332-33 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386,398-99 (1997)). See also *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1483 (6th Cir. 1990) (“Whether Pepsi harassed Knafel so outrageously as to cause her emotional distress and physical injury is a question that the district court can decide without interpreting the collective bargaining agreement. The LMRA does not deprive an employee of all common law rights of action”); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 381 (6th Cir 1993) (“the ADEA action is not preempted by section 301 of the Labor Management Relations Act because ‘employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement’s language about an employee’s rights’”).

The holding of *Smolarek* applies directly to this case. It is true that the defendants will certainly point to (indeed, *have* pointed to) certain provisions in the Union Constitution and argue that those provisions, and not any discriminatory motive, excuse or explain why they took the actions they did. But this defense does not require substantial interpretation of the Constitution itself. Even if there is some interpretation of the Constitution that is required, it will be minimal and tangential to the claims Davis asserts. Simply, Davis's stated causes of action are "state[-law] claim[s], sufficiently set out as separate and apart from a [claim of violation of the Union Constitution], and thus avoid[] preemption." *Id.* at 1331. As such, the defendants' removal of this case to federal court based on LMRA preemption, premised on the need to interpret the Union Constitution's provisions regarding Davis's election, was not properly grounded.

Essentially the same analysis applies to the defendants second point—that, because Davis has alleged he is not a bona fide executive or high policymaker, the Court will have to interpret the Union Constitution. As defendants note, the Ohio Age Discrimination statute states that it is *not* illegal "for any employer ... or labor organization to ...[r]etire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position..." if the employee is entitled to an annual pension of at least \$44,000.00. Ohio Rev. Code §4112.02(O)(3). Davis affirmatively alleges he does not fall within this exception. Complaint at ¶10. The defendants assert that the Union Constitution contains a number of provisions defining the power of the International Executive Board, of which

Davis was a member; accordingly, the defendants insist that “[e]ach of these Constitutional provisions must be interpreted against the statutory definitions of bona fide executive and high policymaker.” Response at 11-12. Once again, however, the defendants’ reliance upon the Constitution *as an affirmative defense* does not turn Davis’s independent claims into labor contract claims. Whether Davis meets the legal requirements for the “bona fide executive” exemption will require a simple factual analysis. The question of what powers the Union Constitution gave to Davis may well have important evidentiary value regarding the applicability of the exemption set out in §4112.02(O)(3). But the extent of the duties and responsibilities accorded to Davis under the Union Constitution is not a question that requires substantial interpretation of that document, nor is it a question that must be answered for Davis to prove all of the elements of his claims.

The defendants’ third point is that the “Ethical Practices Code” (“EPC”) contained in the Union Constitution arguably invested them with a legal privilege to issue their allegedly defamatory remarks, and the Court will have to interpret the EPC to determine the scope of this privilege. This argument is also unavailing. The provision to which the defendants point states:

Each member have full freedom of speech.***Each member shall have the right freely to criticize the policies and personalities of Union officials; however, this right does not include the right to undermine the Union as an institution; to vilify other members of the Union and its

elected officials or to carry on activities with complete disregard of the rights or other members and the interests of the Union.....”

Constitution at 140, EPC §1. As an initial matter, this provision explicitly *limits* the free speech “rights” of Union members, excluding the right to “vilify” other members—which obviously incorporates exclusion of the “right” to defame or slander. Thus, any arguable privilege of the defendants to criticize Davis is exactly contiguous with Davis’s common-law right to be free from defamation. Further, an ethical code promulgated by a union cannot supercede state law. Unlike the situation in *DeCoe*, 32 F.3d at 216, the defendants’ remarks in this case were not made during the course of grievance procedures *required* by a collective bargaining agreement. While the defendant’s statements in *DeCoe* were arguably contractually mandated, and thus arguably privileged, the EPC in this case merely sets out aspirations. Interpretation of the CBA was required in *DeCoe* to determine the scope of the plaintiff’s rights; interpretation of the EPC in this case is *not* required to determine whether the defendants defamed Davis. Again, the question of whether the defendants violated the EPC may have some evidentiary value, but it is not a question that must be answered for Davis to prove all of the elements of his defamation claims.

Finally, the defendants’ fourth point is that Davis seeks, among other things, reinstatement, and the Court will have to interpret the Union Constitution “to determine whether the Constitution amendment that eliminated Davis’[s] former region was properly enacted in the

manner required by the Constitution.” Response at 13. The defendants add that the Court will also have “ to determine whether Davis is eligible to hold office under the terms of the UAW Constitution, given his subsequent retirement from Ford Motor Company.” *Id.* The relief Davis seeks, however, is not an essential element of any of his claims. “If the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement.” DeCoe 32 F.3d at 216. The defendants’ argument that Davis, if he prevails on his substantive claim, is not entitled to reinstatement, is more in the line of assertion of an affirmative defense. Whether Davis is entitled to reinstatement is a question that neither a Court nor a jury will address, if at all, until after Davis has proved “all of the elements of his claim[s].” *Id.* Thus, LMRA preemption is not premised properly on Davis’s prayer for reinstatement.⁴

As the Sixth Circuit has explained an age discrimination action normally”is not preempted by section 301 of the Labor Management Relations Act because ‘employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement’s language about an employee’s rights.’” *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 381(6th Cir. 1993) (quoting *O’Shea v. Detroit News*, 887 F.2d 683, 687 (Cir.1989).

⁴ Moreover, Davis essentially moots the defendants’ argument regarding LMRA preemption and reinstatement by conceding that the remedy of reinstatement is not available to him. As discussed below, Davis make this concession during the course of arguing the viability of LMRDA preemption jurisdiction

“It is irrelevant to the preemption question whether or not the employer can defend by showing it had the right under the collective bargaining agreement to do what it did.”

O’ Shea, 887 F.2d at 687. In this case, the defendants have not shown that any of Davis’s state-law claims require interpretation of the Union Constitution, or invoke rights created by the Constitution, or are in some other way dependent on the Constitution. At best, the defendants show that their affirmative defenses will require reference to the Constitution. This is not enough to obtain federal jurisdiction under LMRA preemption.

B. LMRDA Preemption.

The defendants also argue that, in addition to being preempted by LMRA, Davis’s claims are preempted by LMRDA. Congress passed LMRDA “in large part to address the growing problems of racketeering, crime and corruption in the labor movement.” *Brown v. Hotel & Restaurant Employees & Bartenders Int’l Union Local No. 54*, 468 U.S. 491, 505 (1984). Unlike the case with LMRA, LMRDA preemption is quite narrow. Defendants conceded as they must, that “Congress did not intend to occupy the entire field of regulation, as the text of LMRDA explicitly makes reference to continued viability of state laws” *O’Hara v. Teamsters Union Local No. 856*, 151 F.3d 1161 (9th Cir. 1998) (citing 29 U.S.C. §523). Indeed, “Congress expressly provided *two* broad anti-preemption provisions in the LMRDA in response to objections initially raised by then Sen. John F. Kennedy (D-Mass).” *Fulton Lodge No.2 of Int’l Assn. of Machinists and Aerospace Workers AFL-CIO v. Nix*, 415 F.2d 212, 215 (5th Cir. 1969)(citing 29 U.S.C. §§413 and 523) (footnotes omitted, emphasis added); see *Brown*, 468 U.S. at 505-06 (characterizing §523(a) of LMRDA as “an

express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided”).

Despite the narrowness of LMRDA preemption, it does exist to the extent “expressly provided” by Congress. In particular, 29 U.S.C. §§481-83 provides that the exclusive remedy for challenging the results of a Union election is by pursuing administrative procedures prescribed by the Secretary of Labor. The defendants seek to bring this case within the ambit of LMRDA preemption by focusing, again, primarily on one aspect of the relief sought by Davis: reinstatement. After Davis was elected as Director of Region 2, the delegates to the Union’s Constitutional Convention voted to amend the Constitution and eliminate Region 2, and with it Davis’s position. Defendants argue that Davis, by seeking reinstatement, is essentially challenging the results of the Union Constitutional delegates’ vote, which he may not do by any means other than those set out in 29 U.S.C. §§481-83. Defendants further note that, for Davis to obtain the Court-ordered reinstatement he seeks, a Court would have to choose between conflicting Union election results: “the results of the first election in which Davis was [elected as] Director of Region 2, and the results of [subsequent] elections, in which other persons were elected to serve redrawn jurisdictions which include among them portions of the UAW membership formerly in Region 2.” Motion to dismiss at 12. Again, defendants note that “only the Secretary of Labor may bring an action seeking the installation in union office of a disappointed union member such as Davis, or related relief.” *Id.* Indeed, defendants argue that even Davis’s prayer for an award of back pay shows the propriety of their removal of this case under LMRDA preemption principles,

because a back pay award would necessarily be attributable to Davis's valid election as Director of Region 2.

In response to the defendant's argument, Davis concedes that the remedy of reinstatement is not available to him. Reply at 13. This goes a long way toward mootng the defendants' argument. The question remains, however, whether Davis's prayer for back pay, alone, gives rise to LMRDA preemption. The defendants do cite a single unreported case lending some support to this position. See *Birmingham v. Castro*, 1999 WL 644342 at *2 (9th Cir. 1999) ("although Bunting is not seeking to set aside the December 1989 election, the damages that he seeks for lost income and benefits attributable to the business agent position effectively challenge the validity of the election already conducted, which is an area in which Title IV provides the exclusive remedy").

The Court concludes, however, that the nature of the relief requested by Davis, alone, does not create federal preemption jurisdiction. The LMRDA is careful to state that, "except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer...of a labor... organization...under the laws of any State" 29 U.S.C. §523(a). "Generally speaking, [Ohio] law imposes a responsibility on employers, *including unions*, to refrain from discharging an employee on the basis of ...age over 40." *Smith v. International Brotherhood of Electrical Workers*, 109 Cal.App.4th 1637, 1653, 1 Cal.Rptr.3d 374, 385 (Cal. Ct. App.2003) (emphasis added). As the *Smith* Court noted,

[b]ecause the LMRDA does not "explicitly provide to the contrary," these responsibilities

[not to discriminate or retaliate] are neither “reduced” nor “limited “ by the provisions of the Act. As a logical corollary, neither are the state’s means of enforcing these responsibilities reduced or limited by the Act. Therefore, the LMRDA does not preempt an action against union for unlawful discharge based on age....

Id. Moreover, there is no direct conflict between federal law and the state laws allegedly violated by the defendants in the present case. “Nothing in the LMRDA even remotely condones the practice of ... age discrimination on the part of elected union officials.” *Id.* To adopt the defendants’ argument, merely because Davis prayed for back pay as one measure of the damages he suffered due to the defendants’ allegedly illegal actions, he may not pursue his state law claims against them. This argument reads too much into Davis’s prayer for relief.

Ultimately, if Davis proves that the defendants subjected him to illegal discrimination, retaliation, and/or defamation, he is entitled to compensatory damages. A state court can surely instruct a jury regarding the proper measure of those damages.⁵ A state court can surely instruct a jury regarding the proper measure of those damages, according to State law. An award of damages that includes back pay would not necessarily imply, as defendants assert, that one or more of the Unions election results were invalid. An award of damages that includes back pay would not necessarily

⁵ The Court expresses no opinion as to whether Davis might be entitled to punitive damages.

imply, as defendants assert, that one ore of the Union's election results were invalid. Such an award could also (and would probably more accurately) imply that, *regardless* of the validity of the election, the defendants worked to obtain those results by pursuing discriminatory, retaliatory, and/or defamatory actions. Davis's state-law claims do not attack the ultimate validity of any Union election results; rather, his claims challenge the means by which the defendants secured those results. The *LMRDA* simply does not preempt state-law claims accusing a Union defendant of illegal acts and seeking appropriate relief. *See Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 783 F.2d 1356, 1361 (9th Cir.1986) (examining *LMRDA* and holding that to protect a defendant from a claim of wrongful discharge "by preempting a state cause of action based on it does nothing to serve union democracy of the rights of union members; it serves only to encourage and conceal such [illegal] acts and coercion by union leaders").

II.

In sum, the Court concludes that neither *LMRDA* nor *LMRA* preempt Davis's state law claims. Accordingly, the defendants' removal of the case to this Court was not well-taken, and Davis's motion to remand must be granted. Finally, the Court concludes that, in the circumstances presented, an award to Davis of attorneys' fees and costs under 28 U.S.C. §1447 is not appropriate.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

33a

No. 04-3131
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WARREN DAVIS,
Plaintiff-Appellee
v.

FILED
FEB. 28th, 2005
LEONARD GREEN, CLERK

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, (UAW), ET AL.

Defendants-Appellants.

BEFORE: KEITH, MOORE, and GILMAN, Circuit
Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk

28 U.S.C. § 1367 provides as follows, in pertinent part:

Section 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1447 provides as follows, in pertinent part:

Section 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not review able on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be review able by appeal or otherwise.

29 U.S.C. § 482 provides as follows, in pertinent part:

Section 482. Enforcement

(a) Filing of complaint; presumption of validity of challenged election

A member of a labor organization -

- (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
- (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the

constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets

The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) Declaration of void election; order for new election; certification of election to court; decree; certification of result of vote for removal of officers

If, upon a preponderance of the evidence after a trial upon the merits, the court finds -

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization.

* * *

29 U.S.C. § 483 provides as follows:

Section 483. Application of other laws; existing rights and remedies; exclusiveness of remedy for challenging election

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

Section 4112.02 of the Ohio Revised Code provides, in pertinent part:

§ 4112.02. Unlawful discriminatory practices.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation

plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the “Age Discrimination in Employment Act Amendment of 1978,” 92 Stat. 189, 29 U.S.C.A. 631, as amended by the “Age Discrimination in Employment Act Amendments of 1986,” 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

Section 4112.14 of the Ohio Revised Code provides as follows:

§ 4112.14. Age discrimination by employers.

(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy which shall include reimbursement to the

applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action. The remedies available under this section are coexistent with remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code; except that any person instituting a civil action under this section is, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

(C) The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause.