

LEXSEE 1998 U S DIST LEXIS 15875

**Mildred Fay Greer, Plaintiff, v. Norfolk and Western Railway Company, Defendant.****Case No. 97-74934****UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
MICHIGAN, SOUTHERN DIVISION***1998 U.S. Dist. LEXIS 15875; 159 L.R.R.M. 2568; 77 Fair Empl. Prac. Cas. (BNA) 1125***June 23, 1998, Decided****June 23, 1998, Filed**

**DISPOSITION:** [\*1] Defendant's motion to dismiss or for summary judgment GRANTED in part and DENIED in part.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff employee brought sex discrimination claims against defendant employer alleging the employer violated Title VII of the Civil Rights Act of 1964 and the Michigan Elliott Larsen Civil Rights Act. The employer sought dismissal or a summary judgment based on the employee's failure to file charges with the Equal Employment Opportunity Commission.

**OVERVIEW:** The employee agreed that she was required to file an EEOC claim before bringing her Title VII claim, but claimed that it was not necessary for her to exhaust her administrative remedies prior to asserting her sex discrimination and hostile work environment claims under Michigan's Elliott Larsen Civil Rights Act (Act). The employer claimed that the employee was required to exhaust her administrative remedies to maintain either the state or federal claims and her claims were also preempted by the Railway Labor Act (RLA) and should be arbitrated under the collective bargaining agreement (CBA). The court dismissed the employee's Title VII claims, denied the dismissal of the employee's claims under the Act, and held the decision regarding mandatory arbitration under advisement, holding that it was mandatory for the employee to exhaust her administrative remedies for the Title VII claims, but not for claims under the Act, and the discrimination claims had nothing to do with an interpretation of the CBA, so they were not preempted by the RLA. The court further held that an appellate panel was deciding the mandatory arbitration issue and the court reserved its decision on that issue.

**OUTCOME:** The court ordered that the employee's Title

VII claims were dismissed, denied the employer's motion to dismiss the employee's state civil rights claims, and took the employer's motion regarding mandatory arbitration under advisement.

**LexisNexis(R) Headnotes**

*Civil Procedure > Summary Judgment > Supporting Papers & Affidavits*

*Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action*

[HN1] When a party's motion to dismiss refers to matters outside the pleadings, it is treated as a motion for summary judgment. *Fed. R. Civ. P. 12(b)*.

*Civil Procedure > Summary Judgment > Summary Judgment Standard*

[HN2] Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The central inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

*Civil Procedure > Summary Judgment > Burdens of Production & Proof*

[HN3] After adequate time for discovery and upon motion, *Fed. R. Civ. P. 56(c)* mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial.

*Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1964*

*Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement*

*Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action*

[HN4] When a party asserting claims under Title VII of

the Civil Rights Act of 1964 fails to file charges with the Equal Employment Opportunity Commission, the party has failed to exhaust the party's administrative remedies and the district court lacks subject matter jurisdiction.

***Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement  
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action***

[HN5] Michigan law does not require exhaustion of administrative remedies prior to a claimant bringing an action under Michigan's Elliott Larsen Civil Rights Act based on sex discrimination and the failure to file a complaint with Michigan Civil Rights Commission does not preclude the civil suit. *Mich. Comp. Laws Ann.* § 37.2801.

***Labor & Employment Law > Discrimination > Title VII  
Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement***

[HN6] Sexual harassment and discrimination claims are independent of a collective bargaining agreement and are not preempted.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement***

[HN7] The Railway Labor Act (RLA), codified at 45 U.S.C.S. § 151 et seq., governs the railroad and the airline industries. The RLA was enacted to promote stability in labor relations and to provide a mechanism for resolving labor disputes. To achieve this end, the RLA provides for mandatory arbitration of "major" and "minor" disputes. 45 U.S.C.S. § 151a. "Major" disputes are those regarding rates of pay, rules, or working conditions. "Minor" disputes are those that grow out of the interpretation or application of a collective bargaining agreement (CBA). Thus, the RLA preempts disputes that depend upon an interpretation of a CBA, but does not preempt causes of action to enforce rights that are independent of the CBA.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement***

***Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption***

[HN8] A state law claim is not preempted when it is not dependent upon an interpretation of a collective bargaining agreement (CBA). Purely factual questions regarding an employee's conduct, the employer's conduct, and the employer's motives do not require an interpretation of the CBA and just because precisely the same facts can be addressed in both proceedings does not mean that the state law claim is dependent upon an interpretation of the CBA.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement***

***Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption***

[HN9] The existence of a potential remedy based upon a collective bargaining agreement does not deprive an employee of independent remedies available under state law.

**COUNSEL:** For MILDRED RAY GREER, plaintiff: Arvin J. Pearlman, Elaine L. Livingway, Pearlman & Pianin, Southfield, MI.

For NORFOLK AND WESTERN RAILWAY COMPANY, defendant: Dennis J. Levasseur, Carson C. Grunewald, Bodman, Longley, Detroit, MI.

**JUDGES:** NANCY G. EDMUNDS, United States District Judge.

**OPINIONBY:** NANCY G. EDMUNDS

**OPINION:**

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT; DISMISSING PLAINTIFF'S TITLE VII CLAIMS; DENYING DEFENDANT'S MOTION TO DISMISS BASED ON PREEMPTION UNDER THE RLA; AND TAKING UNDER ADVISEMENT DEFENDANT'S MOTION REGARDING MANDATORY ARBITRATION**

This matter came before the Court at a hearing on May 6, 1998, on Defendant's motion to dismiss or for summary judgment. Defendant claims that Plaintiff's complaint for sex discrimination under Title VII should be dismissed due to Plaintiff's failure to file charges with the EEOC. Plaintiff concedes this issue and thus the Court dismisses Plaintiff's Title VII claims. Defendant also argues that Plaintiff's claims under the Michigan Elliott Larsen Civil Rights Act should be dismissed [\*2] because they are preempted by the Railway Labor Act. As explained below, the Court finds that preemption does not apply. Finally, Defendant also requests dismissal on the ground that Plaintiff is required to arbitrate her Elliott Larsen claims. The Court takes this final issue under advisement.

**I. Facts**

Beginning in 1969, Plaintiff, Mildred Greer, was employed as a clerk by Defendant, Norfolk & Western Railway Company. Starting in 1986, Greer started to bid on yardmaster positions from the Company's "extra board." The position of yardmaster is considered an upgrade from a clerk's position; the responsibility of a yardmaster includes the supervision of train movement within the railroad yard. Traditionally, the yardmaster po-

sition was held by men. Plaintiff alleges in her complaint that after she began working as a yardmaster, she was subjected to sexual harassment and sex discrimination over the next ten years. She alleges that due to the harassment and discrimination she was forced to take a medical leave of absence beginning in December of 1996. As a result, Greer brought suit against the Railway Company alleging the following:

Count I—Elliott Larsen Civil Rights [\*3] Act, hostile work environment

Count II—Title VII, hostile work environment

Count III—Elliott Larsen Civil Rights Act and Title VII, sex discrimination Defendant now moves for dismissal or summary judgment.

## II. Summary Judgment Standard

Defendant moves for dismissal or for summary judgment. [HN1] Because Defendant's motion to dismiss refers to matters outside the pleadings, it will be treated as a motion for summary judgment. *Fed. R. Civ. Pro. 12(b)*. [HN2] Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. Pro. 56(c)*. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). [HN3] After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. [\*4] v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

## III. Analysis

### A. Title VII Claims

Norfolk & Western moves to dismiss [HN4] the Title VII claims, because Greer failed to file charges with the EEOC and thus failed to exhaust her administrative remedies. Thus, the Court lacks subject matter jurisdiction. *Ang v. Procter & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991); *Jones v. Truck Drivers Local 1299*, 748 F.2d 1083 (6th Cir. 1984). Plaintiff concedes this point. Accordingly, the Court hereby dismisses Count II in its entirety and dismisses the Title VII claim from Count III.

### B. Elliott Larsen Claims

#### 1. Exhaustion of Administrative Remedies

Norfolk & Western argues that like the Title VII claims, Greer's Elliott Larsen claims should be dismissed for failure to exhaust administrative remedies. However, [HN5] Michigan law does not require exhaustion. *Nummer v. Treasury Dept.*, 448 Mich. 534, 547, 533 N.W.2d 250 (1995) (exhaustion not required); *Holmes v. Haughton Elevator Co.*, 404 Mich. 36, 272 N.W.2d 550 (1978) (failure to file complaint with Michigan Civil Rights Commission does not preclude civil suit); *Mich. Comp. Laws Ann. § [\*5] 37.2801* (civil rights claimant may proceed in circuit court). Thus, the Elliott Larsen claims cannot be dismissed on this ground.

#### 2. Preemption

Norfolk & Western next contends that the Elliott Larsen claims in Counts I and III of the Complaint should be dismissed because they are "minor disputes" subject to mandatory arbitration and thus preempted by the Railway Labor Act. To the contrary, the Court finds that Plaintiff's [HN6] harassment and discrimination claims are independent of the collective bargaining agreement and are not preempted.

[HN7] The Railway Labor Act, 45 U.S.C.A. § 151 et seq., governs the railroad and the airline industries. The RLA was enacted to promote stability in labor relations and to provide a mechanism for resolving labor disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 129 L. Ed. 2d 203, 114 S. Ct. 2239 (1994). To achieve this end, the RLA provides for mandatory arbitration of "major" and "minor" disputes. 45 U.S.C.A. § 151a. "Major" disputes are those regarding rates of pay, rules, or working conditions. "Minor" disputes are those that grow out of the interpretation or application of a collective bargaining agreement (CBA). *Norris*, [\*6] 512 U.S. at 253-54. Thus, the RLA preempts disputes that depend upon an interpretation of a CBA but does not preempt causes of action to enforce rights that are independent of the CBA. *Id.* at 256-57.

For example, in *Norris*, an aircraft mechanic refused to certify the safety of an airplane that he considered unsafe and his supervisor suspended him, pending a termination hearing. The mechanic reported the maintenance problem to the FAA, and subsequently the airline terminated him. He brought a wrongful discharge claim, alleging violation of the state whistleblower protection act and public policy. The airline argued that the claims were preempted by the RLA. The Supreme Court adopted the preemption standard set forth in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988), a case dealing with preemption under section 301 of the *Labor Management Relations Act*. 512 U.S. at 263.

In *Lingle*, an employee covered by a CBA was fired

for allegedly filing a false worker's compensation claim. She filed a grievance under the CBA and then filed a state court complaint contending that she was fired for exercising her rights under the [\*7] state worker's compensation law. The state court dismissed her claim on the ground that it was preempted by the LMRA because the same factual analysis would be required in both the grievance proceeding under the CBA and the court proceeding under state law. The Supreme Court reversed, holding that [HN8] the state law claim was not preempted because it was not dependent upon an interpretation of the CBA. The Court found that purely factual questions regarding the employee's conduct, the employer's conduct, and the employer's motives did not require the court to interpret the CBA. Just because precisely the same facts would be addressed in both proceedings did not mean that the state law claim was dependent upon an interpretation of the CBA. 512 U.S. at 261-62.

The Norris Court applied the Lingle preemption standard and held that the plaintiff's claims of wrongful discharge under the state whistleblower protection act and public policy were not preempted because the only source for the claims alleged was state law. That is, the claims did not depend upon an interpretation of the CBA; the claims raised the purely factual question of whether the plaintiff was wrongfully discharged under state [\*8] law. "[HN9] The existence of a potential CBA-based remedy [does] not deprive an employee of independent remedies available under state law." 512 U.S. at 261. The Court also rejected the defendant's contention that the complaint was preempted because defendant's discharge of plaintiff for failure to sign the maintenance record was "arguably justified" under the CBA. The Court rejected the "arguably justified" argument and explained, "The state tort claims . . . require only the purely factual inquiry into any retaliatory motive of the employer." *Id.* at 266.

In a case similar to the one at hand, the Eighth Circuit applied Norris to a plaintiff's claim of handicap discrimination under state law. The court, in *Taggart v. Trans World Airlines*, 40 F.3d 269 (8th Cir. 1994), held that the claim was not preempted by the RLA because it was independent of the CBA. The only source of the right asserted was the state anti-discrimination statute. The fact that the plaintiff had a potential remedy under the CBA did not deprive her of her state law claim. The issue of whether the defendant fired plaintiff because of her handicap was a purely factual issue which did not require interpretation [\*9] of the CBA. *Id.* at 274. Accord *Felt v. Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416 (9th Cir. 1995) (RLA did not preempt Title VII religious discrimination claim); *Spears v. Northwest Airlines, Inc.*, 798 F. Supp. 436 (E.D. Mich. 1992) (RLA did not preempt race discrimination claim under Elliott Larsen); *McGinnis v.*

*Norfolk & Western Railway Co.*, 1995 WL 356356, No. 93-71763 (E.D. Mich. 1994)(same).

In this case, Greer claims that she was subject to sexual harassment and sex discrimination in violation of state law. Norfolk and Western argues that Greer's discrimination claims implicate the CBA without explaining precisely how the discrimination claims implicate the CBA. Defendant argues:

Plaintiff is asserting sex discrimination based on different treatment of her and comparably situated males as to medical excuses and absences and physical examination requirements as well as different work treatment when training for yardmaster. In her deposition taken on March 5, 1998, Plaintiff blamed all of her problems on sex harassment and discrimination. These included her dismissal as a clerk for excessive absences; her failure to be paid while training as [\*10] a yardmaster; her double shifts as clerk and extra yardmaster which were needed to protect her clerk seniority; and the more recent criticism of her work as yardmaster and her health problems and physical exam requirements.

Defendant's Reply pp. 3-4 (citations to affidavits omitted).

Defendant relies on cases where the court found that the plaintiff's claim required interpretation of the CBA based on the specific facts of the case. For example, in *Monroe v. Missouri Pacific Railroad Co.*, 115 F.3d 514 (7th Cir.), cert. denied, 139 L. Ed. 2d 316, 118 S. Ct. 413 (1997), an employee brought suit for wrongful discharge, claiming that his employer terminated him in order to prevent him from exercising his right to collect damages for his work-related injuries, in violation of the Federal Employers Liability Act (FELA) and public policy. The court held that the claims were preempted because they required interpretation of the CBA.

First of all, Monroe's complaint alleges that the Railroad failed to avail itself of its right to compel him to undergo a physical examination if it contested his medical condition. The CBA provides the Railroad with its right to compel such [\*11] an examination. Second, a court must apply and interpret the standards regarding an employee's physical condition — which are implied terms of the CBA — when analyzing Monroe's claim of pretextual discharge. . . . Third, Monroe questions the propriety of his disciplinary

hearing as well as the sufficiency of the evidence proffered at that hearing by objecting to the testimony of a doctor who never examined him. This hearing was conducted pursuant to the CBA and the RLA, thereby necessitating the court's interpretation of that agreement and those laws.

*115 F.2d 513 at 518.* Other cases dealing with allegations relating to disability and the physical requirements of the job or dealing with allegations relating to hearings under the CBA have also held that preemption does not apply under such circumstances. See, e.g., *Hogan v. Northwest Airlines, Inc.*, 880 F. Supp. 685 (D. Minn. 1995) (disability discrimination claim required interpretation of CBA rules relating to duties of janitor); *Henegar v. Banta*, 27 F.3d 223 (6th Cir. 1994) (defamation claim required interpretation of CBA because defamatory statements were made during grievance proceeding and thus statements may have [\*12] been privileged), cert. denied, 513 U.S. 1057, 130 L. Ed. 2d 599, 115 S. Ct. 664 (1995) n1; *Croston v. Burlington Northern R. Co.*, 999 F.2d 381 (9th Cir. 1993) (RLA preempts disability claim where court must interpret CBA provisions regarding physical requirements of job).

n1 Note also that *Henegar v. Banta*, 27 F.3d 223 (6th Cir. 1994) is probably not good law as it was decided only one day after the Supreme Court's decision in *Hawaiian Airlines v. Norris*, it does not cite *Norris*, and its reasoning conflicts with *Norris*. *Tyree v. The Burlington Northern & Santa Fe Railway Co.*, 973 F. Supp. 786, 793 n.6 (W.D. Tenn. 1997).

Contrary to Defendant's assertion, Greer's discrimination claims are independent of the CBA. The only source of Greer's right not to be discriminated against is the Elliott Larsen Civil Rights Act. The purely factual questions regarding Greer's conduct, her employer's conduct, and her employer's motives do not require this Court to interpret the CBA. Further, this [\*13] case does not involve allegations regarding Greer's physical abilities or physical requirements of the job, nor does it involve allegations regarding hearings under the CBA. Therefore, Greer's Elliott Larsen claims are not dependent upon an interpretation of the CBA and are not preempted under the RLA.

Defendant also relies on *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485 (5th Cir.), cert. denied, 519 U.S. 864, 136 L. Ed. 2d 112, 117 S. Ct. 171 (1996). However, it is this Court's opinion that *Reece* was wrongly decided. In

*Reece*, an employee brought a race discrimination claim against his employer. The court held that the discrimination claim was preempted with little analysis. The court merely stated that the claim turned on issues of promotion, seniority, and assignment to training programs, issues addressed by the CBA. The court also reasoned that interpretation of the CBA was necessary to the employer's defense that it had legitimate non-discriminatory reasons for discharge. This holding was incorrect because, under *Norris* and *Lingle*, the court should have determined that the race discrimination claim arose solely from state law. Also, the defendant's claim that [\*14] its actions were justified under the CBA did not require preemption. In *Norris*, the court rejected the "arguably justified" argument and explained that such state claims required "only the purely factual inquiry into any retaliatory motive of the employer." 512 U.S. at 266.

### 3. Arbitration

Norfolk and Western also argues that Plaintiff's Elliott Larsen claims should be dismissed for lack of jurisdiction because the parties contractually agreed to arbitration. The issue of whether an employee can be required, by her employment contract, to arbitrate her state law discrimination claim, is currently before a special panel of the *Michigan Court of Appeals. Special Orders*, 226 Mich. App. 821 (1997) (panel convened pursuant to Mich. Ct. R. 7.215(H).) The panel is to resolve the conflict between *Rushton v. Meijer, Inc.*, 225 Mich. App. 156, 570 N.W.2d 271 (1997) (agreement in employment contract to arbitrate civil rights claims violates public policy) and *Rembert v. Ryan's Family Steakhouse, Inc.*, 226 Mich. App. 821, 575 N.W.2d 287 (released Dec. 1997, vacated by Special Order Dec. 1997) (finding dissent in *Rushton* better reasoned and indicating desire to hold that agreements to arbitrate [\*15] civil rights are enforceable). Accordingly, the Court takes this issue under advisement.

### IV. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby GRANTS in part and DENIES in part Defendant's motion to dismiss or for summary judgment as follows:

Defendant's motion to dismiss Plaintiff's Title VII claims is GRANTED.

Defendant's motion to dismiss Plaintiff's Elliott Larsen claims based on preemption by the Railway Labor Act is DENIED, as preemption does not apply.

Defendant's motion to dismiss on the ground that Plaintiff is required to arbitrate her Elliott Larsen claims is hereby TAKEN UNDER ADVISEMENT.

1998 U.S. Dist. LEXIS 15875, \*15; 159 L.R.R.M. 2568;  
77 Fair Empl. Prac. Cas. (BNA) 1125

Nancy G. Edmunds

U. S. District Judge

Dated: JUN 23 1998

**ORDER SETTING DATE FOR STATUS  
CONFERENCE**

IT IS HEREBY ORDERED that the parties appear  
in Room 211, U.S. Courthouse, Detroit, Michigan for a  
status conference on Thursday, July 2, 1998 at 3:00 p.m.

Any request for adjournment **must be in writing, and  
filed at least one week before the conference.**

NANCY G. EDMUNDS

United States District Judge

Dated: June 23, 1998

**PLEASE NOTE: NO CELLULAR PHONES ARE  
[\*16] ALLOWED IN THE COURTHOUSE**