

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RICHARD V. ANDERSON,)
et al.,)
)
Plaintiffs,)
)
v.) C.A. No. 03-123-SLR
)
AIRCO, INC., et al.,)
)
Defendants.)

MEMORANDUM ORDER

At Wilmington this 28th day of July, 2003, having reviewed plaintiffs' motion to remand and defendants' responses thereto;

IT IS ORDERED that said motion (D.I. 12) is granted, for the reasons that follow:

1. The 36 named defendants removed the above-captioned case to this court from the Superior Court of the State of Delaware pursuant to 28 U.S.C. §§ 1441 and 1446, on the asserted grounds that the removed action "necessarily arises under federal law and could originally have been filed in this Court pursuant to the Court's federal question jurisdiction." (D.I. 1, ¶ 1)

2. Plaintiffs at bar assert eight causes of action against various groupings of defendants arising out of alleged workplace exposure to vinyl chloride monomer ("VCM") alleged to

have occurred between 1983 to 1996: negligent failure to adequately warn of the known hazards of VCM (Count I); strict products liability for failure to adequately warn (Count II); negligent and intentional failure to provide a safe workplace (Count III); reckless failure to provide accurate and sufficient information regarding VCM (Count IV); fraudulent concealment and misrepresentation of the dangers of VCM (Count V); conspiracy to commit fraud, misrepresentation and fraudulent concealment of the dangers of VCM (Count VI); aiding and abetting the fraudulent concealment of the health hazards of VCM (Count VII); and loss of consortium (Count VIII).

3. According to defendants, "[t]he essence of each of plaintiffs' claims, no matter how framed, is the alleged failure to adequately warn of the health risks of workplace exposure to VCM. . . . Workplace warnings relating to VCM are conclusively and **exclusively** governed by federal statute and comprehensive federal regulation promulgated by the Secretary of Labor under his delegated powers."¹ (D.I. 1, ¶¶ 3, 4) Defendants argue that "[f]ederal law and federal regulation so completely occupy the field of occupational safety and health, as it pertains to

¹More specifically, defendants refer to the Hazard Communication Standard ("HazCom Standard"), 29 C.F.R. § 1910.1200, and the VCM warning and labeling standard, 29 C.F.R. § 1910.1017, both promulgated under the authority given by the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 655 et seq.

plaintiffs' purported exposure to VCM, that plaintiffs' complaint, premised as it is on purported exposure to VCM, must be recharacterized as stating a federal cause of action." (D.I. 1, ¶ 5)

4. "[T]he question whether a certain state action is preempted by federal law is one of congressional intent." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985). Although "[t]he purpose of Congress is the ultimate touchstone," id., when considering preemption "we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

5. By enacting OSHA, Congress

endeavored "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To that end, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce, 29 U.S.C. § 651(b)(3), and thereby brought the Federal Government into a field that traditionally had been occupied by the States. Federal regulation of the workplace was not intended to be all encompassing, however. First, Congress expressly saved two areas from federal preemption. Section 4(b)(4) of the OSH Act states that the Act does not "supercede or in any manner affect any workmen's compensation law or . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or

liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). Section 18(a) provides that the Act does not "prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. § 667(a).

Gade v. National Solid Wastes Management Assoc., 505 U.S. 88, 96-97 (1992).

6. Consistent with the above analytical framework, the court finds that the state tort laws at issue have not been preempted by the HazCom Standard or the VCM warning and labeling standard. Indeed, defendants cite to no case, and the court has found none, where any court has found that the regulations in controversy preempt state tort law, necessarily depriving workers of a right to recovery for injuries sustained at the workplace due to exposure to hazardous substances. See, e.g., Crane v. Conoco, Inc., 41 F.3d 547, 553 (9th Cir. 1994) ("OSHA violations do not themselves constitute a private cause of action for breach. 29 U.S.C. § 653(b)(4)"); Mason v. Ashland Exploration, Inc., 965 F.2d 1421, 1425 (7th Cir. 1992); Pedraza v. Shell Oil Co., 942 F.2d 48, 52 (1st Cir. 1991) ("We are aware of no case which holds that OSHA preempts state tort law. Rather, most courts have been concerned with how OSHA affects tort actions, not with whether it preempts state tort law. Thus, every court faced with the issue has held that OSHA creates no private right

of action."); Fullen v. Philips Electronics North America Corp., No. CIV.A. 1:02CV64, 2002 WL 32105204, at *3 (N.D. W. Va. December 18, 2002); Wickham v. American Tokyo Kasei, Inc., 927 F. Supp. 293, 295 (N.D. Ill. 1996).

7. In the absence of either unambiguous congressional intent or relevant case precedent to the contrary, plaintiffs' motion to remand is appropriately granted.

Sue L. Robinson
United States District Judge