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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VERONICA FLORES,

Plaintiff and Appellant,

v.

DIGNITY HEALTH,

Defendant and Respondent.

2d Civil No. B294776
(Super. Ct. No. 56-2018-00507606-CU-WT-VTA)
(Ventura County)

Veronica Flores, a registered nurse, appeals from the judgment entered after the trial court sustained respondent Dignity Health's demurrer without leave to amend.[1] Respondent

[1] Appellant's notice of appeal states that she is appealing from both the judgment and an "Order Denying Motion for New Trial." "[I]t has long been settled that an order *denying* a motion for new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment. [Citation.]" (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.)

was appellant's employer. After respondent discharged appellant, she brought the present action alleging that the discharge was in retaliation for "asserting the right to work in a safe environment with proper ratios between nurses and patients." The trial court concluded that the present action is preempted by the federal National Labor Relations Act (NLRA or Act). (29 U.S.C. § 151 et seq.) We affirm.

Factual and Procedural Background

Starting in October 1994, respondent employed appellant as a nurse at a hospital in Oxnard. Her employment was pursuant to a collective bargaining agreement (CBA).

In April 2015 respondent discharged appellant. "Service Employees International Union Local 21 (SEIU) initiated on [appellant's] behalf a grievance pursuant to the collective bargaining agreement . . . for unjust termination of her employment [in violation of the CBA] . . . ."

Pursuant to the NLRA, in October 2015 appellant filed an unfair labor practice charge with the National Labor Relations Board (NLRB or Board). The charge stated that respondent had "discharged union steward Veronica Flores . . . in retaliation for her union and/or concerted protected activity." The charge does not describe the nature of the protected activity.

The NLRB deferred "further proceedings on the charge . . . to the grievance/arbitration process." The NLRB explained: "The Board's deferral policy provides that the Board will postpone making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provision of the applicable contract." "Since the issues in the charge appear to be covered by provisions of the collective-bargaining agreement, it is likely that the issues may

be resolved through the grievance/arbitration procedure." "[W]hile the charge is deferred, the Regional office [of the NLRB] will monitor the processing of the grievance and, under certain circumstances, will resume processing of the charge." "[A]t any time, a party may present evidence and request dismissal of the charge, continued deferral of the charge, or issuance of a complaint."

The grievance initiated by SEIU, but not the unfair labor practice charge filed by appellant with the NLRB, proceeded to arbitration. In August 2017, the arbitrator concluded that respondent "has proven it had just cause to impose a disciplinary suspension but not that it had just cause to discharge [appellant]." The arbitrator observed that respondent had "justified its decision to discharge [her] based on the grounds that [she] had been at work 'under the influence' on April 1 and again on December 31, 2014." The evidence did not support a finding that she was under the influence on April 1, 2014, although a drug test "showed metabolites of the prescribed Xanax." But "[t]he story is very different on December 31, 2014 where the multiple incidents reported by her co-workers prove[] that she was impaired. . . . Coming to work knowing she was impaired is a clear violation of a known Policy and is a serious enough violation to be just cause for the disciplinary suspension." The arbitrator ordered respondent to "reinstate [appellant] . . . if an evaluation by a mutually agreed upon drug treatment specialist . . . determines that she is able to work unimpaired by her medications."

The arbitrator did not consider the unfair labor practice charge that appellant had filed with the NLRB. The arbitrator stated: "I note that the parties told me there was a deferred

Unfair Labor Practice Charge, but I was provided neither the Charge nor a deferral letter. Although there is evidence that [appellant] was a Union Steward and filed complaints . . . about quite a few RN [registered nurse] assignments over the years, except for one statement from an exasperated supervisor, there is no other evidence in this record of union bias related to the matters here in issue."

Respondent mistakenly asserts that the unfair labor practice charge "was ultimately resolved in arbitration" and that the arbitrator "concluded there was no evidence of retaliation." The arbitrator's decision does not mention appellant's complaints about inadequate nurse-to-patient ratios. Nor does it mention her claim that she was discharged in retaliation for making these complaints.

In May 2018, the United States District Court for the Central District of California dismissed appellant's petition to confirm the arbitration award. The court reasoned that appellant lacked standing to file the petition because she was not a party to the arbitration and the CBA did not permit her to submit a dispute to arbitration.

In June 2018 appellant filed in Ventura County Superior Court a first amended complaint (complaint) in the present matter. The complaint consists of two causes of action. The first alleges that, in violation of section 1278.5 of the Health and Safety Code,[2] respondent retaliated against appellant for

[2] All further statutory references are to the Health & Safety Code.

"whistleblowing."[3] Appellant "repeatedly complained of insufficient staffing for the number of patients." "As a result of [her] safety complaints, [respondent] retaliated against her." She "was forced to endure continued harassment." The retaliation eventually resulted in the termination of her employment in April 2015. "[Appellant] had never been subjected to discipline in any form by [respondent] until after she made complaints

[3] Section 1278.5, subdivision (b)(1)(A) provides, "No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has . . . [p]resented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity." This statute is known as "the health care facility whistleblower statute." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 667.) Section 1278.5, subdivision (a) states, "The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations." The statute "'prohibits retaliation against any employee who complains to an employer or a government agency about unsafe patient care or conditions.' [Citation.] To establish a prima facie case of retaliation under § 1278.5, a plaintiff must show that: (1) he engaged in protected activity under the statute; (2) he was thereafter subjected to an adverse employment action; and (3) a causal link between the two." (*Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129, 1144.)

regarding proper nurse to patient ratios and the patient safety concerns arising from improper ratios."[4]

The second cause of action was for "wrongful termination in violation of public policy." Both causes of action sought "[c]ompensatory damages for lost wages and benefits," "[e]motional distress damages," and punitive damages. The first cause of action also sought "[p]enalties in the sum of $20,000 per willful violation."

After granting "the requests of both parties for judicial notice of certain" documents, the trial court sustained respondent's demurrer without leave to amend. The court ruled that appellant's state "claims . . . are preempted by sections 7 and 8 of the NLRA." Judgment was entered in respondent's favor.

Appellant filed a motion for a new trial on the ground that "there is insufficient evidence to support the order granting the demurrer to the complaint without leave to amend . . . and that the finding of NLRA preemption is against the law." The court denied the motion.

Demurrer; Standard of Review

"The task of this court is to determine whether the complaint states a cause of action." (*Inter-Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Railway Co.* (1999) 73 Cal.App.4th 918, 924 (*Inter-Modal*).) A demurrer "'test[s] the sufficiency of the [pleading] as a matter of law, and it raises only a question of law. [Citations.] On a question of law, we apply a de novo standard of review on appeal.' [Citation.] [¶] The

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[4] In her opening brief, appellant states that "the controversy in this action is . . . whether Respondent terminated Appellant's employment because she complained of unlawful staffing risking patient safety in violation of H&S Code § 1278.5."

reviewing court gives the pleading a reasonable interpretation and treats the demurrer as admitting all material facts properly pleaded. [Citation.]" (*First Aid Services of San Diego, Inc. v. California Employment Development Dept.* (2005) 133 Cal.App.4th 1470, 1476 (*First Aid Services*).) "'"We also consider matters which may be judicially noticed.' [Citation.] . . ." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "The reviewing court does not . . . assume the truth of contentions, deductions or conclusions of law. [Citation.]" (*First Aid Services*, *supra*, at p. 1476.)

"'The judgment [sustaining a demurrer] must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citation.]" (*First Aid Services*, *supra*, 133 Cal.App.4th at pp. 1476-1477.)

Preemption under Sections 7 and 8 of the NLRA

"Section 7 of the NLRA guarantees employees 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . .' (29 U.S.C. § 157.) Section 8 of the NLRA makes it an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in' section 7. (29 U.S.C. § 158(a)(1).)" (*Luke v.*

Collotype Labels USA, Inc. (2008) 159 Cal.App.4th 1463, 1469-1470 (*Luke*), italics added.)

"Whether the NLRA preempts a cause of action is an issue of law we review de novo. [Citation.]" (*Wal-Mart Stores, Inc. v. United Food & Commercial Workers International Union* (2016) 4 Cal.App.5th 194, 201.) "The strand of federal preemption under the NLRA relevant to this case was announced by the United States Supreme Court in *San Diego Unions v. Garmon* (1959) 359 U.S. 236 . . . (*Garmon*). Under the *Garmon* test, state law claims are preempted if they concern conduct that is 'arguably' protected by section 7 or 'arguably' prohibited by section 8 of the NLRA. (*Garmon, supra,* at p. 245.)[5] . . . [¶] The scope of preemption based on conduct that is arguably protected by the NLRA does not extend to state law claims where the activity regulated (1) is a 'merely peripheral concern' of the NLRA (*Garmon, supra,* 359 U.S. at p. 243) or (2) 'touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act.' [Citations.]" (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 632-633 (*Haney*); see also *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25* (1977) 430 U.S. 290, 302 (*Farmer*) ["inflexible application of the [*Garmon* preemption] doctrine is to be avoided, especially where the State has a

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[5] "When an activity is arguably subject to [section] 7 or [section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (*Garmon, supra*, 359 U.S. at p. 245.)

substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme"].) "[T]he local interest exception is founded upon a recognition that certain conduct can be the basis for state court action even though the same conduct might constitute an unfair labor practice under the [Act]. [Citation.]" (*Hillhaven Oakland Nursing etc. Center v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 859, (*Hillhaven Oakland Nursing*), fn. omitted.)

Appellant's State Court Action is
Preempted by Sections 7 and 8 of the NLRA

Appellant Engaged in Arguably Protected Conduct that Is Not A Merely Peripheral Concern of the NLRA

"The [NLRB] has jurisdiction to investigate unfair labor practices, which include discharges based on protected activity such as voicing safety complaints . . . ." (*Zurn Industries*, *Inc. v. N.L.R.B.* (9th Cir. 1982) 680 F.2d 683, 694.) Appellant's complaint in the state court action alleges that, "in[] terminating [her] employment, [respondent] retaliated against [her] for asserting the right to work in a safe environment with proper ratios between nurses and patients." But appellant's complaints to her employer concerned the safety of the patients, not the nurses. "The Board has held repeatedly that employee concerns for the 'quality of care' and the 'welfare' of their patients are not interests 'encompassed by the "mutual aid or protection" clause'" of section 7 of the NLRA. (*Orchard Park Health Care Center*, *Inc.* (2004) 341 N.L.R.B. 642, 643-644.) Therefore, to the extent that appellant's complaints concerned the safety of patients, they do not qualify as protected activity under the NLRA. (*Ibid*.; see *Good Samaritan Hospital* (1982) 265 N.L.R.B. 618, 626

[employees' criticisms of "the quality of care . . . and the welfare of the children . . . were not directed to improve their lot as employees . . . . As such, [the] criticisms [were] related to disputes outside the objectives of the mutual aid or protection provisions [of section 7] of the National Labor Relations Act"].)

Nevertheless, appellant's protests against inadequate nurse-to-patient ratios arguably constitute protected activity because they related not only to patient safety, but also to the working conditions of the nurses. "'[T]he policy of the Act [is] to protect the right of workers to act together to better their working conditions.'" (*Eastex, Inc. v. N.L.R.B.* (1978) 437 U.S. 556, 567.) "Employee protests to improve working conditions have long been held protected activity . . . ." (*PHT, Inc. v. N.L.R.B.* (D.C. Cir. 1990) 920 F.2d 71, 73.) In *Misericordia Hospital Medical Center v. N.L.R.B.* (2d Cir. 1980) 623 F.2d 808, 812-813 (*Misericordia Hospital*), the court concluded that a nurse's participation in the preparation of a report criticizing nursing staff shortages was protected activity "that related not only to patient welfare but to the working conditions of the employees; indeed, in the health care field such issues often appear to be inextricably intertwined." Thus, the nurse's discharge for her participation in preparing the report was an unfair labor practice. (See also *Community Hospital of Roanoke Valley, Inc. v. N.L.R.B.* (4th Cir. 1976) 538 F.2d 607, 609-610 [hospital committed unfair labor practice by disciplining nurse because she complained on television about "hospital working conditions regarding staffing"; her complaint was protected activity under section 7 of the NLRA]; *Washington State Nurses Ass'n v. N.L.R.B.* (9th Cir. 2008) 526 F.3d 577, 582 ["'[w]hether a button [worn by a nurse] protests "forced overtime" or demands

"safe staffing," both messages obviously relate to the impact of inadequate staffing levels on the hours [nurses] are required to work and the conditions they labor under.' [Citation.] Consistent with this view, both the courts and the Board have long recognized that nurses' working conditions are directly related to patient care and safety"].)

Appellant's claim that respondent discharged her in retaliation for complaining about insufficient staffing is not a "'merely peripheral concern' of the NLRA." (*Haney*, *supra*, 121 Cal.App.4th at p. 633.) "[W]orking conditions are of central, not peripheral, concern to the NLRA's purposes. . . . [T]he NLRA specifically sought to protect the right of employees to organize to improve their working conditions." (*Henry v. Laborers' Local 1191* (2014) 495 Mich. 260, 290 [848 N.W.2d 130, 146].)

Appellant Engaged in Arguably Concerted Activities

"To be within the ambit of [section 7 of] the NLRA, the [employee's] action must be 'concerted' . . . ." (*Mayes v. Kaiser Foundation Hospitals* (E.D.Cal. 2013) 917 F.Supp.2d 1074, 1082 (*Mayes*).) Appellant claims that the NLRA does not preempt state law because she acted alone. "An individual employee's complaint is 'concerted' if it is related to group action for the mutual aid or protection of other employees. [Citation.] Either the individual employee 'is in fact acting on behalf of, or as a representative of, other employees,' [citation], or his claim 'must be made with the object of inducing or preparing for group action,' [citation]. It is not necessary that the individual employee be appointed or nominated by other employees to represent their interests. [¶] Protests of . . . working conditions and the presentation of job-related grievances are for the mutual aid and protection of employees. [Citations.] Additionally, an

employee's presentation of job-related grievances aimed at achieving employer compliance with governmental regulations affecting working conditions is for the mutual aid and protection of employees. [Citations.]" (*N.L.R.B. v. Lloyd A. Fry Roofing Co., Inc. of Delaware* (6th Cir. 1981) 651 F.2d 442, 445; see also *Ewing v. N.L.R.B.* (2d Cir. 1988) 861 F.2d 353, 361 ["a lone act is concerted . . . if an individual acts, formally or informally, on behalf of a group"]; *N.L.R.B. v. Main Street Terrace Care Center* (6th Cir. 2000) 218 F.3d 531, 539 ["The relevant inquiry in determining whether an employee's action was concerted . . . 'is whether the employee acted with the purpose of furthering group goals'"].)

Appellant's complaints about insufficient staffing arguably constitute "concerted activities" within the meaning of section 7 of the NLRA. It is reasonable to infer that she made the complaints for the purpose of furthering a group goal – the improvement of working conditions by increasing the allegedly inadequate ratio of nurses to patients. It is also reasonable to infer that she acted on behalf of herself and other nurses at the hospital. (See *Haney*, *supra*, 121 Cal.App.4th at p. 635 [concerted activity issue "raises the question whether . . . Haney arguably acted on behalf of a group"].) Appellant would not be the only beneficiary of an increase in nursing staff. The other nurses would also benefit because their workloads would be reduced. (See *Misericordia Hospital*, *supra*, 623 F.2d at p. 813 [report on nursing staff shortage "raised issues that related . . . to the working conditions of the employees"].)

The allegedly insufficient staffing level not only imposed an unreasonable burden on nurses; it also violated state regulations. Appellant asserted that she "was repeatedly required to work

with insufficient staff, which insufficiency violated the legally mandated ratio of nurses to patients, which short staffing was a patient safety violation." "Patient ratios required by California law are a 1 to 1 ratio between nurse and patient in '5150' patient suicide-concerns situations and frequently the ratio [at the hospital] has instead been 2 or 3 patients per nurse."[6] In *Mayes*, *supra*, 917 F.Supp.2d at p. 1085, the court concluded that a nurse's request for "an audit . . . which might have [shown] a lower licensed nurse-to-patient ratio than permitted by law . . . was a concerted activity about working conditions." The court continued, "Despite plaintiff's characterization of [his] claim as relating to patient safety, his complaint is properly viewed as concerted activity for mutual aid and protection such that his termination was an unfair labor practice." (*Ibid*.)

Furthermore, appellant was not just respondent's employee; she was also a union steward. In her unfair labor practice charge filed with the NLRB, appellant admitted that she had engaged in concerted activities as a union steward. The charge stated: "[Respondent] discharged union steward Veronica Flores . . . in retaliation for her union and/or *concerted* protected activity." (Italics added.) In her opening brief, appellant claims that she "asserts in the NLRB complaint that the motivation for her retaliatory termination was her *concerted* activity as a union steward in representing and advising other employees." (Italics added.) "Union steward" is defined as "[a] union official who

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[6] Section 1276.4 requires the State Department of Public Health to "adopt regulations that establish minimum, specific, and numerical licensed nurse-to-patient ratios by licensed nurse classification and by hospital unit for all health facilities licensed pursuant to subdivision (a), (b), or (f) of Section 1250."

represents union employees and who oversees the performance of union contracts." (Black's Law Dict. (9th ed. 2009) p. 1549, col. 2.) Since appellant was a union steward, it is reasonable to infer that, when she complained about inadequate staffing levels, she was acting on behalf of the nurses that she represented. (See *Mayes*, *supra*, 917 F.Supp.2d at p. 1083 ["Plaintiff's actions as a union representative were concerted within the meaning of the NLRA"]; *Londono v. ABM Janitorial Services* (D.N.J. Dec. 12, 2014) No. CIV.A. 13-3539 ES, 2014 U.S. Dist. LEXIS 172475 at *16-17 ["As a shop steward, Londono undoubtedly could have shown that she engaged in protected concerted activity under the NLRA when she complained of an alleged violation of law affecting all employees and was then terminated in retaliation, in violation of sections 7 and 8 of the NLRA"]; *Id.*, 2014 U.S. Dist. LEXIS 172475 at *17 ["the law does not stand for the proposition that a[] shop steward can complain to management in an individual capacity in order to avoid NLRA preemption"].)

The Local Interest Exception to *Garmon* Preemption Is Inapplicable

The remaining issue is whether "the activity regulated . . . 'touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act.' [Citations.]" (*Haney*, *supra*, 121 Cal.App.4th at p. 633.) As an example of activity that touches on deeply rooted local interests, the *Haney* court noted in dicta that "workers' claims for wrongful discharge in retaliation for complaining about unsafe work conditions are not preempted by the NLRA." (*Ibid.*, fn. 3.) In support of its statement, the

court cited *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857 (*Paige*), and *Inter-Modal*, *supra*, 73 Cal.App.4th at p. 924.

In *Paige* the plaintiffs brought an action against their employer for wrongful discharge in violation of public policy. The plaintiffs claimed that they had been discharged for complaining about unsafe working conditions in violation of the California Occupational Safety and Health Act (Cal/OSHA). The court rejected the employer's argument that *Garmon* preempted the wrongful discharge claim. It reasoned: "Congress's main goal in enacting the NLRA was to establish an equitable bargaining process . . . . State laws which set minimum safety standards do not interfere with the bargaining process itself." (*Paige*, *supra*, 826 F.2d at pp. 863-864.) "Cal/OSHA and actions for wrongful discharge in violation of Cal/OSHA do not interfere with the bargaining process. As it is uniquely within the states' police powers to legislate for the health and safety of their citizens, and such regulation does not interfere with the NLRA's goals, federal law does not preempt such statutes." (*Id.* at p. 865.)

In *Inter-Modal* an employees' association filed a complaint alleging that the defendant employers had terminated employees for complaining about unsafe working conditions in violation of Cal/OSHA. The trial court granted the defendants' motions for judgment on the pleadings because the plaintiff's "wrongful termination claims were 'committed by federal law to the exclusive jurisdiction of the National Labor Relations Board.'" (*Inter-Modal*, *supra*, 73 Cal.App.4th at p. 923.) Relying on *Paige,* the Court of Appeal concluded that the trial court had "erred in finding federal preemption of [the plaintiff's] health and safety claims because the court ignored the exception for local concerns." (*Id.* at p. 925.) The Court of Appeal rejected the defendants'

claim that "federal preemption occurred because [plaintiff] *could have* presented its claims to the NLRB." (*Id*. at p. 927.)

Paige and *Inter-Modal* are distinguishable. The present state court action does not involve complaints about unsafe working conditions in violation of Cal/OSHA. (See *Luke*, *supra*, 159 Cal.App.4th at p. 1473 ["where the public policy at issue involves employee complaints under, or refusal to violate, state occupational safety and health laws, causes of action for wrongful termination in violation of this public policy are not preempted"].) Although the allegedly inadequate nurse-to-patient ratio adversely affected the nurses' working conditions by increasing their workload, it did not adversely affect their health or safety. The state regulations establishing minimum nurse-to-patient ratios were designed to protect the health and safety of patients, not nurses.

Paige and Inter-Modal are also distinguishable because the plaintiffs in these cases could have, but did not, file an unfair labor practice charge with the NLRB. Here, in contrast, appellant's union invoked the jurisdiction of the NLRB by filing an unfair labor practice charge before she filed her state court action.

"To determine whether regulated conduct touches interests deeply rooted in local feeling and responsibility such that state law is not preempted, a court must first consider whether there is 'a significant state interest in protecting the [employee] from the challenged conduct.' [Citation.] Second, it must consider the level of 'risk of interference with the regulatory jurisdiction of the Labor Board.' [Citation.] Once those two considerations have been measured, the court must balance them against each other before ultimately concluding whether the state law is preempted.

[Citation.]" (*Pia v. URS Energy & Construction, Inc.* (S.D. Iowa 2017) 227 F.Supp.3d 999, 1003 (*Pia*); see *Kaufman v. Allied Pilots Ass'n* (5th Cir. 2001) 274 F.3d 197, 201 ["The [United States Supreme] Court has explicitly rejected a formalistic implementation of *Garmon,* and invited a balancing of state interests and federal regulatory interests in analyzing the preemption question"]; *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 214, fn. 9 ["So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests"]; *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones* (1983) 460 U.S. 669, 676 ["The question of whether [state] regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens"].)

California has a significant interest in protecting hospital employees from being discharged in retaliation for complaining about a low nurse-to-patient ratio that allegedly violates state regulations and threatens patient safety. "Next, this Court must determine the level of the 'risk of interference with the regulatory jurisdiction' of the National Labor Relations Board . . . if the state-law claim were to proceed. [Citation.] Because the level of risk is highly case-dependent, this determination 'requires a more fact-sensitive approach.' [Citation.]" (*Pia, supra*, 227 F.Supp.3d at p. 1004.) "The critical inquiry . . . is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not,

presented to the Labor Board. For it is only in the former situation [i.e., identical controversies] that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1978) 436 U.S. 180, 197 (*Sears*).)

The controversies here are identical. The union's unfair labor practice charge did not indicate the nature of the protected activity for which she had been discharged. But based on appellant's complaint in the state court action, the protected activity consisted of her protests against allegedly unsafe nurse-to-patient ratios. The complaint stated, "In terminating [appellant's] employment, [respondent] retaliated against [her] for asserting the right to work in a safe environment with proper ratios between nurses and patients . . . ." Thus, the issues in the state court action cannot be decided without resolving the merits of the unfair labor practice charge filed with the NLRB.

In her opening brief, appellant acknowledges that both the unfair labor practice charge and the state court action "are based on the termination" of her employment. But she claims that "the controversies are not identical." Appellant notes, "[T]he controversy in [the state court] action is . . . whether Respondent terminated Appellant's employment because she complained of unlawful short-staffing unduly risking patient safety." Appellant does not explain why the unfair labor practice charge is based on a different controversy. In her reply brief appellant contends that the controversies are not identical because, unlike the state court action, "[i]n the NLRB action, the retaliation for complaints of insufficient staffing must be motivated by the intention to

restrain and coerce Appellant from exercising rights to concerted activity . . . ." Appellant does not explain why the unfair labor practice charge requires such a motivation.

In *Sears* the United States Supreme Court said, "The critical inquiry . . . is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, *but was not*, presented to the Labor Board." (*Sears*, *supra*, 436 U.S. at p. 197, italics added.) It is important that here the controversies are not only identical; the state court controversy *was* presented to the NLRB before appellant filed her complaint in the state court action. The NLRB decided to invoke its "deferral policy," which "provides that the Board will *postpone* making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provision of the applicable contract." (Italics added.) The NLRB retained jurisdiction over the matter. "[D]eferral is not akin to abdication [by the NLRB]. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." (*United Technologies Corp.* (1984) 268 N.L.R.B. 557, 560.) "[W]here, after deferral, the respondent has refused to proceed to arbitration, the Board has rescinded the deferral and decided the case on the merits." (*Ibid.*)

The arbitrator did not consider the unfair labor practice charge because appellant did not properly bring the charge before the arbitrator. The arbitrator stated: "I note that the parties told me there was a deferred Unfair Labor Practice Charge, but I was provided neither the Charge nor a deferral letter." Instead of

arbitrating the charge, appellant recast it as a state law claim and filed the present court action.

At oral argument in this court, appellant's counsel said that the charge is still pending before the NLRB. In these circumstances, "'[t]he risk of interference with the Board's jurisdiction is . . . obvious and substantial.'" (*Platt v. Jack Cooper Transport, Co., Inc.* (8th Cir. 1992) 959 F.2d 91, 95 (*Platt*) ["'The risk of interference with the Board's jurisdiction is . . . obvious and substantial' when an unsuccessful charge to the Board is recast as a state law claim"].) The NLRB did not authorize appellant to skip the arbitration process and instead file a state court action based on the unfair labor practice charge.

"To permit the state law claim . . . to proceed in this situation is to permit the risk of inconsistent results between [the trial court] and the NLRB." (*MVM Inc. v. Rodriguez* (D.P.R. 2008) 568 F.Supp.2d 158, 174; see also *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal.App.3d 668, 679 ["Because appellant's state claim might result in regulation of conduct arguably within the jurisdiction of the NLRB there is 'a realistic threat' that a state judicial proceeding would impinge on 'the federal regulatory scheme"].) Moreover, "the infringement on federal labor policy would be substantial because the state claim presented is inextricably intertwined with federal labor law." (*MVM Inc.*, *supra*, at p. 174.) Balancing the state interest against the risk of interference with the regulatory jurisdiction of the NLRB, "we conclude that [appellant's] state law claims are preempted by the NLRA as construed in *Garmon* and its

progeny."[7] (*Platt*, *supra*, 959 F.2d at p. 95; see also *Farmer*, *supra*, 430 U.S. at p. 305 ["concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme"].)

The preemption of appellant's whistleblower claim is supported by the recent Ninth Circuit memorandum opinion in *Casumpang v. Hawaiian Commercial & Sugar Co.* (9th Cir. 2018) 712 Fed.Appx. 709 (*Casumpang*).[8] There, the Court of Appeals concluded, "The district court did not err in holding Casumpang's Hawaii Whistleblower Protection Act claims against [his former employer] are preempted by the National Labor Relations Act . . . under . . . [*Garmon*] . . . and its progeny." (*Id*. at p. 710.) The appellate court explained: "The local interest exception to *Garmon* preemption does not apply. Casumpang's state law claim was substantially the same as his unfair labor practice charge against [his former employer] alleging his employer retaliated against him for filing grievances and reporting safety concerns. Because '[t]he risk of interference with the Board's jurisdiction is . . . obvious and substantial' when the same issues brought to the National Labor Relations Board are raised in a state court complaint, Casumpang cannot 'relitigate the question' under state law. [Citations.]" (*Id*. at pp. 710-711.)

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[7] Because the state action is preempted by the NLRA, we need not consider respondent's contention that appellant's state claims are time-barred.

[8] The opinion states that it "is not appropriate for publication and is not precedent." (*Casumpang*, *supra*, 712 Fed.Appx. at p. 709.) Pursuant to Ninth Circuit Rule 36-3(b) and rule 32.1(a) of the Federal Rules of Appellate Procedure, the opinion may be cited for its persuasive value.

We recognize that, unlike Casumpang, in her state court action appellant is not relitigating issues raised in her unfair labor practice charge. These issues were never litigated because the NLRB "postpone[d] making a final determination" pending the outcome of the arbitration proceedings, and the arbitrator did not determine the merits of the unfair labor practice charge. But the existence of the unresolved charge raises a serious risk of conflicting decisions. "Cases following *Garmon* have clarified that the preemption issue as to both arguably prohibited and arguably protected conduct 'turns primarily on whether preemption is necessary to avoid conflicting adjudications which would interfere with the regulatory activity of the administrative board. [Citations.]' [Citation.]" (*Hillhaven Oakland Nursing*, *supra*, 41 Cal.App.4th at p. 855.)

Disposition

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

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