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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

GISELE JOHNSON, Plaintiff and Appellant, v. KAISER FOUNDATION HOSPITALS, et al. Defendants and Respondents.	B268801 (Los Angeles County Super. Ct. No. BC527939)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa A. Beaudet, Judge. Affirmed.

The Figari Law Firm and Barbara E. Figari for Plaintiff and Appellant.

Nixon Peabody, Michael R. Lindsay, Alicia C. Anderson, and Irene Scholl-Tatevosyan for Defendants and Respondents.

In the underlying action, appellant Gisele Johnson asserted claims against respondents Kaiser Foundation Hospitals (Hospitals) and Kaiser Foundation Health Plan, Inc. (Health Plan) for retaliation and wrongful termination in violation of public policy. The trial court granted summary judgment in respondents' favor on the claims, concluding that it lacked jurisdiction over them under the preemption doctrine enunciated in *San Diego Bldg. Trades Council et al. v. Garmon* (1959) 359 U.S. 236 (*Garmon*). Johnson challenges that ruling, contending that her claims are not subject to *Garmon* preemption, that the prior overruling of a demurrer asserting *Garmon* preemption barred the grant of summary judgment, and that the judgment, as entered, improperly prohibits her from litigating her claims before the National Labor Relations Board (NLRB). We affirm the judgment.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

From August 2012 to October 2013, Johnson worked for respondents as a medical coder. During that period, Johnson was a union-represented employee pursuant to a collective bargaining agreement between her union, SEIU-UHW, and respondents.

In November 2013, Johnson initiated the underlying action against Hospitals, asserting claims for retaliation (Lab. Code, § 1102.5) and wrongful termination in violation of public policy, along with claims under the California Fair

Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). In January 2014, Hospitals removed the action to federal court. In March 2014, by stipulation of the parties, the action was remanded to superior court.

Johnson's second amended complaint (SAC), filed August 13, 2014, contained claims against both respondents for retaliation (Lab. Code, § 1102.5) and wrongful termination in violation of public policy, as well as claims under FEHA and the California Family Rights Act (Gov. Code, § 12945.2). The SAC alleged that after being hired as a medical coder by respondents, Johnson was subjected to racial discrimination and retaliation for union-related activity, culminating in the termination of her employment. The complaint sought compensatory and punitive damages, as well as civil penalties under the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.).

Respondents demurred to the SAC, asserting that under *Garmon*, the trial court lacked jurisdiction over Johnson's claims for retaliation and wrongful termination in violation of public policy. The trial court overruled the demurrer.

In May 2015, respondents sought summary judgment or adjudication regarding the SAC. They requested summary adjudication on the claims for retaliation and wrongful termination in violation of public policy, arguing, inter alia, that the claims were subject to *Garmon* preemption. They contended that summary adjudication regarding the remaining claims was proper on other

grounds, including that Johnson had failed to exhaust her administrative remedies.

In responding to respondents' motion, Johnson declared an intent to dismiss her claims, with the exception of the claims for retaliation and wrongful termination in violation of public policy and the related claim for punitive damages. Her opposition challenged the motion only with respect to the latter claims.

The trial court granted summary judgment, concluding that the claims for retaliation and wrongful termination in violation of public policy were subject to *Garmon* preemption, and that Johnson had abandoned her other claims under FEHA and the California Family Rights Act. On May 10, 2016, the court entered a judgment in favor of respondents and against Johnson.[1]

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[1] Prior to the entry of the judgment, Johnson filed her notice of appeal from the order granting summary judgment, which is a nonappealable preliminary order. (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 531.) Because respondents have not objected to Johnson's premature notice of appeal, we find good cause to treat the notice as having been taken from, and filed immediately after, the judgment. (Cal. Rules of Court, rule 8.104(d)(2); see *Wolf Metals Inc. v. Rand Pacific Sales, Inc.* (2016) 4 Cal.App.5th 698, 702, fn. 1; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1827-1828.)

DISCUSSION

Johnson contends the trial court erred in granting summary judgment, arguing that *Garmon* does not bar the litigation of her claims for retaliation and wrongful termination in violation of public policy, and that there are triable issues regarding the merits of those claims. As explained below, we see no error in the trial court's ruling.

A. *Standard of Review*

"A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. Both are reviewed de novo. [Citations.]" (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.) "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the

cause of action -- for example, that the plaintiff cannot prove element X." (*Id.* at p. 853, fn. omitted.)

Although we independently assess the grant of summary judgment, our inquiry is subject to several constraints. Under the summary judgment statute, we examine the evidence submitted in connection with the summary judgment motion, with the exception of evidence to which objections have been appropriately sustained. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711; Code Civ. Proc., § 437c, subd. (c).) Furthermore, our review is governed by a fundamental principle of appellate procedure, namely, that "'[a] judgment or order of the lower court is presumed correct,'" and thus, "'error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 664, italics omitted, quoting 3 Witkin, Cal. Procedures (1954) Appeal, § 79, pp. 2238-2239.) Under this principle, Johnson bears the burden of establishing error on appeal, even though respondents had the burden of proving their right to summary judgment before the trial court. (*Frank and Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in Johnson's briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126).[2]

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[2] The above-described constraints govern the scope of our inquiry. We note that the trial court denied Johnson's

(Fn. continued on the next page.)

B. *Garmon Preemption*

We begin by examining the preemption doctrine established in *Garmon*. The National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) governs labor-management relations in the private sector. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 632 (*Haney*).) Section 157 of the NLRA -- often called "section 7" -- provides: "'Employees shall have 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 . . . .'" (*Ruscigno v. American National Can Co.* (2000) 84 Cal.App.4th 112, 119, fn. 3 (*Ruscigno*).) Section 158 of the NLRA -- often called "'section 8'" -- further

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objection to certain evidence respondents submitted with their reply to her opposition. Because Johnson does not challenge that ruling on appeal, she has forfeited any contention of error regarding it.

Johnson also has forfeited any contention that summary judgment was improper with respect to her claims, to the extent she fails to challenge the ruling regarding those claims. As she does not discuss her claims under FEHA and the California Family Rights Act, we exclude them from our review. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177; *Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377, 1398; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

provides in subdivision (a)(1) that it is an unfair labor practice for an employer ""to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."" (*Ruscigno*, *supra*, 84 Cal.App.4th at p. 119, fn. 3.)

Under the *Garmon* doctrine, "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. [Citation.] . . ." (*Haney*, *supra*, 121 Cal.App.4th at pp. 632-633.) However, "[t]he 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 [citation] 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.]" (*Id.* at p. 633.) Furthermore, in determining whether conduct is "'arguably prohibited,'" for purposes of the preemption doctrine, "'[t]he 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 [NLRB].'" (*Ibid.*, quoting *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 197.)

Generally, "[t]he NLRB, and not a state court, has exclusive authority to determine whether a claim 'arguably subject to' section 7 or 8 of the NLRA is preempted.

[Citation.] . . . [¶] Despite the NLRB's broad authority, [however,] state courts still have a role in the preemption analysis. 'A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court.' [Citation.] The requirement that conduct "'arguably"' be subject to section 7 or 8 [of the NLRA] for preemption to apply 'is not without substance.' [Citation.] The party claiming preemption 'must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.' [Citation.]"[3] (*Khanh Dang v. Maruichi American Corporation* (2016) 3 Cal.App.5th 604, 608-609.)

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[3] As explained in *Haney*, "[t]he United States Supreme Court has addressed what 'arguable' means in the context of questions of law and questions of fact. As to questions of law, the party asserting preemption must advance a statutory construction of the NLRA 'that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the [NLRB]. [Citation.]' [Citation.] As to questions of fact, the 'party must then put forth enough evidence to enable the court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation.' [Citation.]" (*Haney*, *supra*, 121 Cal.App.4th at pp. 633-634, quoting *Longshoremen v. Davis* (1986) 476 U.S. 380, 395.)

Here, our focus is on Johnson's claims for retaliation and wrongful termination in violation of public policy. As effective during the events alleged in the SAC, former Labor Code section 1102.5 constituted "a whistleblower statute [that] prohibit[ed] an employer from adopting a policy to prevent an employee from divulging to a government or law enforcement agency information the employee reasonably believes discloses a violation of a state or federal law, retaliating against an employee who reveals such information to a governmental agency, or from retaliating against an employee who refuses to engage in conduct that would result in a violation of a statute."[4] The statute offered protection solely to "whistleblowing" employees who disclosed statutory violations to governmental agencies, and did not encompass internal complaints to the employer, even though they involved statutory violations. (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648-649 (*Rope*).)

In *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d

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[4] Subdivision (b) of former Labor Code section 1102.5 barred an employer from retaliating against an employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Stats. 2003, ch. 484, § 2.)

167, 169-170 (*Tameny*), our Supreme Court held that employees may bring an action in tort when their discharge contravenes the dictates of fundamental public policy. Courts have recognized this tort in cases where the employee was terminated for (1) refusing to violate a statute, (2) performing a statutory obligation, (3) exercising a constitutional or statutory right, or (4) reporting a statutory violation for the public's benefit. (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1112.)

Here, the SAC asserts that Johnson's termination was "in retaliation for and motivated by [her] complaints . . . toward activities that she reasonably believed would result in a violation or noncompliance with the state or federal laws, rules or regulations, in violation of Labor Code section 1102.5 . . . and . . . [FEHA]." We note that despite the limitation of the scope of the protection afforded whistleblowing employees under former Labor Code section 1102.5, the policy underlying that statute supports a *Tameny* claim by an employee terminated for making an internal complaint of a potential violation of a statute or regulation. (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1121-1127 (*Collier*).) Generally, FEHA prohibits employment discrimination due to enumerated factors, including a person's race. (Gov. Code, § 12940, subd. (a).) Under FEHA, unlawful employment practices include discrimination-based workplace harassment and denials of available positions. (Gov. Code, § 12940, subd. (j)(1);

Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 373-375; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038.) FEHA also bars employers from discharging or discriminating against employees who complain of unlawful employment practices. (Gov. Code, § 12940, subd. (h).)

In suitable circumstances, retaliation claims under former Labor Code section 1102.5 and *Tameny* claims are potentially subject to summary adjudication on the basis of *Garmon* preemption. (E.g., *Platt v. Jack Cooper Transport, Co., Inc.* (8th Cir. 1992) 959 F.2d 91, 96 [affirming *Garmon*-based summary judgment on retaliation claim under former Labor Code section 1102.5 because the claim relied on violation of right to make safety-related complaints established in union contract]; *Luke v. Collotype Labels USA, Inc.* (2008) 159 Cal.App.4th 1463, 1468-1474 (*Luke*) [affirming *Garmon*-based summary judgment on wrongful termination claim predicated on violation of public policy underlying Labor Code section 232.5, which bars employers from imposing discipline on employees who provided information to others regarding workplace conditions].)

D. *Allegations in the SAC*

In assessing the propriety of summary judgment, we look first to Johnson's allegations in the SAC, which frame the issues pertinent to respondents' motion for summary judgment. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The SAC alleges the following

facts: In August 2012, Johnson was hired as a medical coder by respondents and employed at their west Los Angeles location. Her 60-day probationary evaluation was favorable to her.

In January 2013, Johnson was the only Caucasian employee in her work group. Johnson told Janet Criswell, her supervisor, that she found it difficult to meet her productivity requirements because she was assigned few accounts. Criswell replied, "[Y]ou're just going to have to be a big girl." When she asked for training in order to secure a promotion, her request was denied, and the standards for the promotion were changed without her knowledge. Later, she learned that those standards had been raised and that her current credentials did not satisfy the new standards.

Johnson became aware of an increasing amount of hostility directed toward her, and requested that Criswell and her other supervisor, Evelyn Franco, try to put a stop to false rumors regarding her, including that she was a "'devil worshipper.'" When they did nothing, Johnson asked union steward James Parks, an African-American, why she was subject to the rumors. Parks replied, "[Y]ou do too much work, that is why they are going after you." He also said, "[T]hey believe that you worship the devil," and "[Y]ou are the white girl, you don't fit in."

Johnson's supervisors excluded Johnson from work-related discussions, and talked to her co-workers in her presence "as if [she] did not exist." They encouraged Johnson's co-workers to monitor her work and

"micromanage her." Johnson believed that this conduct was due to her race.

In late April 2013, Johnson met with Crisswell, Franco, and a union steward regarding her workload and workflow. At the meeting, Johnson presented a report regarding her work-related problems. Crisswell and Franco paid little attention to Johnson's presentation.

On April 30, 2013, Johnson met with Franco and Kalesita Manu, the director of Johnson's department, to discuss the hostility directed toward Johnson. Franco stated condescendingly, "[W]ell, Gisele, if you want me to pat you on the back and give you kudos, I can do that." After the meeting, Johnson's complaints regarding a hostile working environment were ignored.

In May 2013, a co-worker screamed at Johnson. Johnson's supervisors did not intervene, and prevented her from responding to the co-worker. Later, Linda Medina, a vice president, told Johnson's work group that they would be considered for better positions after their work was transferred to respondents' Pasadena location. Although Johnson was eligible for a promotion, she was not considered for the available positions.

In late May 2013, Johnson discussed her concerns with Andrea LeNoir, an employee in respondents' compliance office. LeNoir said that she would process Johnson's complaint, but advised Johnson that her supervisors would "'surely trace [the] complaint.'" LeNoir also said that Johnson would have access to her complaint. LeNoir also

told Johnson that the compliance office intended to investigate the complaint.

Shortly after Johnson's meeting with LeNoir, Franco gave Johnson information regarding respondents' code of conduct, berated Johnson during a meeting attended by other employees, and ended the meeting by asking the participants whether she should "'get [Johnson] out.'" Later, union steward Parks told Johnson that vice president Medina had said of her, "'[A]t the rate you are going they should write you up.'" When Johnson informed LeNoir that she was subject to retaliation, LeNoir did not respond. Later, Parks told Johnson that Criswell and Franco had recruited a co-worker to "help[] them write [her] up."

On June 19, 2013, Johnson's supervisors gave her a notice of a "[l]evel 2 [c]orrective [a]ction." Johnson communicated with LeNoir, who told her that another compliance office had assumed responsibility for Johnson's retaliation complaint. That office never contacted Johnson. When Johnson sought a copy of the information that LeNoir had placed in respondents' compliance system on Johnson's behalf, her request was denied.

On July 2, 2013, after taking a disability leave due to stress, Johnson filed a charge with the NLRB. Several days later, she returned to work, albeit at a new location, namely, respondents' Pasadena facility. Upon arriving there, Johnson's new supervisor, Sara Small, told her that she was aware of the complaint Johnson had submitted to the compliance department.

In early September 2013, Johnson became a union steward. Shortly afterward, Johnson appeared for a scheduled review of her personnel file with human resource representative Gordon Harwell, but he did not attend the meeting or respond to Johnson's subsequent e-mails. She also was denied a promotion for which she had applied. On September 23, 2013, when Johnson placed educational flyers on the desks of union members, her supervisors informed her that she had "no business" distributing the flyers.

Johnson believed that the denial of the promotion and response to her conduct regarding the flyers were acts of retaliation for her engagement in protected activity. She consulted with union steward Mark Lehman, who dissuaded her from pursuing an NLRB charge on the ground that it might provoke further retaliation. Lehman also stated that he had been unable to persuade respondents to permit Johnson to see her personnel file.

In early October 2013, Johnson requested an assignment from Small because Johnson's other supervisor, Biliana Milojkic, was unavailable. Small screamed, "'I can't help you.'" Shortly afterward, Johnson repeatedly sought access to a software program necessary for an upcoming webinar and her own work. Johnson was told that she should register and pay for the software herself, and that respondents would reimburse her, but she was not provided with any link to the software.

On October 14, 2013, Small and Milojkic asked Johnson to meet with them regarding "a corrective action."

During the meeting, Small directed Johnson to wear her identification badge at all times. Johnson objected that the first procedural step regarding a corrective action was a discussion, not the issuance of the corrective action, but clipped her badge to her pant waist and wore it there at all times.

As other employees -- including Small and Milojkic -- often failed to wear their badges, Johnson believed that the meeting was a retaliatory act due to her engagement in protected activity. After the meeting, following the advice of a union steward, Johnson used respondents' compliance hotline to make a complaint regarding continuing workplace hostility directed at her.

On October 15, 2013, Small rebuked Johnson for wearing her badge on her pant waist, and told her that under respondents' policies, the badge was to be worn on her torso. Later, a union steward asked Small whether coders were doing billing work, which Johnson had reported as a potential violation of the union contract. Small replied, "'[I]t is not your concern.'" Johnson believed that Small's rebuke and her reply to the union steward were acts of retaliation for Johnson's engagement in protected activity.

On October 21, 2013, Johnson's employment was terminated. When Johnson phoned the compliance hotline, she learned that her case was closed. Union steward Lehman said to her, "'I told you about your NLRB.'" Johnson believed that her employment was terminated for her engagement in protected activity.

E. *Respondents' Showing*

In seeking summary judgment, respondents submitted evidence that notwithstanding the allegations in the SAC, Johnson acknowledged at her deposition that her co-workers made no comments suggesting that they disliked her because of her race, and that she never told any employee -- including compliance officer LeNoir -- that her colleagues treated her unfairly because of her race. Furthermore, respondents offered evidence that although Johnson's complaints to management, union grievances, and NLRB charge alleged discrimination, hostility, and retaliation, she identified no cause for that alleged misconduct other than her attempts to rectify workplace problems with union assistance, as well as other union-related conduct.

According to respondents' evidence, in early 2013, Johnson applied for two different advanced positions, but failed to achieve the minimum test scores necessary for the positions. She first acquired the certification required for the positions in May 2013.

In January 2013, Johnson complained to supervisor Criswell that she was not assigned enough work to meet her productivity requirements. Johnson also asked her supervisors to take steps to stop her co-workers from spreading rumors about her. She believed that her co-workers were directing hostility toward her by "'look[ing] [her] up and down,'" "'whisper[ing] about [her], and ignoring her.'"

In late April 2013, Johnson arranged for a meeting with her supervisors and a union steward, during which she stated that the process for assigning work in her department prevented her from meeting her productivity requirements. According to the SAC, Johnson's supervisors allegedly paid little attention to her, aside from denying the claims she made regarding her workload.

During meetings with department head Manu and union steward Parks, Johnson discussed her concerns regarding work distribution, and stated that she felt that supervisors Franco and Criswell were hostile to her. Johnson maintained that they failed to congratulate her on being hired full-time, failed to ask for her input, greeted everyone but her in the morning, and otherwise ignored her. After the meetings, Johnson did not believe that her situation had changed.

On May 31, 2013, in a meeting with compliance officer LeNoir, Johnson filed a complaint regarding the denial of her application for advanced coder positions and the continuing hostility from her supervisors and co-workers. Johnson believed that respondents were not honoring the collective bargaining agreement with respect to hiring for advanced positions. Johnson told LeNoir that her supervisors had denied her an advanced position due to their hostility to her, and that they failed to resolve her concerns regarding workload distribution because they merely asked her to seek work from her co-workers.

In an e-mail to Manu dated June 5, 2013, Johnson expressed her concerns regarding workload distribution. Manu asked Johnson to allow Criswell and Franco an opportunity to resolve the concerns. The following day, Criswell and Franco held a department meeting with Johnson, a union steward, and two of Johnson's co-workers. At the meeting, the supervisors discussed the importance of adhering to the chain of command regarding complaints related to workload distribution, and handed out copies of respondents' policy entitled, "Code of Conduct: Disruptive Behavior." Johnson told her co-workers that she did not understand their hostility and need to "micromanage" her. The supervisors, joined by the co-workers, expressed their concern that Johnson was not "a team player."

Johnson believed that the June 6 meeting was an act of retaliation for her filing a complaint with LeNoir. Johnson contacted LeNoir, who stated that her complaint had been referred to respondents' human resources department. Johnson also sent Manu an e-mail reiterating her concerns regarding workload distribution and workplace hostility. In response, Franco stated that management would examine her complaints, and requested that she adhere to the chain of command.

On June 19, 2013, Criswell and Franco issued a level 2 "corrective action" to Johnson. The corrective action was based on Johnson's failure to follow the chain of command and refusal to seek work from co-workers.

Johnson believed that the corrective action was an act of retaliation for her filing a complaint with LeNoir and her complaints to Manu. She told LeNoir that the corrective action was unfounded. Additionally, she filed union grievances alleging the existence of unfair discipline, a workload distribution problem, and workplace hostility.

On June 25, 2013, Johnson began a two-week medical leave of absence. On July 2, 2013, while on leave, she filed a charge with the NLRB, which alleged that the corrective action issued to her was intended "'to discourage protected concerted and/or union activities or membership.'" Johnson later amended the charge to add the allegation that she was subjected to workplace hostility in order to discourage those protected activities.

In July 2013, Johnson's coding department was transferred to Pasadena, where her supervisors were Small and Milojkic. In September 2013, Johnson became a union steward. At some point, Johnson reported that coders were doing billing work, which she believed to be a violation of the union contract. In addition, on one occasion, Johnson distributed flyers to co-workers regarding union educational benefits and training programs. Small and Milojkic told Johnson that she should not distribute the flyers; Milojkic also asserted that the union classes were not available to coders. Johnson disagreed with Milojkic, and believed that Milojkic's statement contravened the union contract. According to the SAC, following the incident, Small and Milojkic allegedly ignored Johnson's requests for help,

including her request for assistance in securing access to software needed for her work.

Because Johnson's position as a medical coder required her to work with protected health information, her specific work area within respondents' facility was considered "'secure.'" Respondents' policies obliged all employees to wear identification badges.

On October 9, 2013, Javier Gomez, respondents' property manager, informed Small by e-mail that Johnson had failed to display her badge upon entering the building, and then vocally resisted the landlord's security personnel when they asked to see the badge. On the same date, Johnson told Milojkic that she needed to "'vent'" because the security personnel always requested that she display her badge. Milojkic informed Johnson that she was required to wear the badge.

In an e-mail dated October 14, 2013, Gomez told Small that the situation had escalated, and that if Johnson did not display her badge, the security personnel could refuse her entry to the building. Small and Milojkic met with Johnson and directed her to wear her badge at all times. During the meeting Johnson objected to Milojkic's characterization of it as a "'corrective action,'" as the union contract imposed certain rules of progressive discipline. After consulting a union steward, Johnson made a "hotline complaint" against Small and Milojkic, alleging that the meeting and badge directive were unfair.

Johnson also arranged a meeting with the landlord's national building manager, Tanya Geary. Later, Geary told Johnson that respondents had requested the meeting be rescheduled so that a representative of respondents' management could attend it. In response, Johnson asked Geary why respondents had been notified of the meeting. Johnson's e-mails to Geary stated, "'That is unacceptable! You hear whatever and I am not heard. That is all I have to say.'" The e-mails also stated: "'I have requested a meeting with you and now Mr. Gomez is trying to make it about him deciding who would be at MY meeting. If you are not willing to have the meeting that I requested with you there will not be a meeting. It is my request and I get to decide who attends . . . .'"

On October 16, 2013, Small instructed Johnson by e-mail to discontinue all communication with Gomez, Geary, and the building's security personnel. On October 21, Johnson's employment was terminated. The termination notice described the reasons for that action as Johnson's violations of respondents' badge and security rules, failure to follow the directive to wear her badge, unauthorized communications with Geary, belligerent behavior toward the landlord's security personnel, and improper behavior toward Gomez and Geary. Johnson filed a union grievance and a charge with the NLRB, alleging that her termination was due to her union activities.

F. *Johnson's Showing*

In opposing summary judgment, Johnson did not dispute respondents' showing regarding the underlying events, as set forth above. Rather, she offered evidence of additional facts relating to the events preceding her termination.

According to Johnson's showing, in June 2013, she told compliance officer LeNoir that she believed that she was subject to retaliation for filing her May 31, 2013 complaints. Those complaints were never investigated in accordance with respondents' policies. After Johnson was transferred to Pasadena, she asked Gordon Harwell, a human resources consultant, to remove the June 19, 2013 disciplinary notice from her personnel file, but he did not do so.

Prior to October 2013, Johnson never encountered any disciplinary issues regarding her identification badge, which was necessary solely for the purpose of gaining access to some areas of respondents' Pasadena facility. Johnson's supervisors became attentive to the placement of her badge only after October 14, 1013, when they conducted a disciplinary meeting with her. Generally, in imposing discipline on Johnson, her supervisors did not adhere to the rules for the progressive imposition of discipline. That was true regarding Johnson's termination, as her supervisors imposed the highest level of discipline for her failure to display a badge, even though -- as Harwell testified in his deposition -- employees were rarely subject to even low-level discipline for that conduct.

G. *Trial Court's Ruling*

In granting summary judgment on the SAC, the trial court focused on the claims for retaliation and wrongful termination in violation of public policy, as Johnson had declared her intent to dismiss her other claims and her opposition did not discuss them. The trial court identified four categories of conduct upon which Johnson predicated the retaliation and wrongful termination claims. Those categories were (1) her complaints to respondents' management personnel regarding workload distribution and workplace hostility, (2) her union grievances and related objections to collective bargaining agreement violations, (3) her July 2013 NLRB charge, and (4) her activities as a union steward. The court concluded that the first category of conduct "arguably" constituted conduct subject to *Garmon* preemption, and the remaining categories involved union-related activities falling squarely within the scope of *Garmon* preemption.

H. *Analysis*

We see no error in the trial court's determinations. As explained below, each category of conduct upon which Johnson's claims rely presents no triable issues regarding the existence of *Garmon* preemption.

1. *Complaints to Management Regarding Workload Distribution and Workplace Hostility*

We begin with the first category of conduct, which encompasses Johnson's complaints to respondents regarding her work assignments and hostility from co-workers. Although the SAC suggests that the hostility directed at Johnson was potentially due to racial discrimination, in opposing summary judgment, she admitted that she *never* told any of respondents' employees that her colleagues treated her unfairly because of her race, and she abandoned her FEHA claims. The facts relating to the first category otherwise show only that Johnson, with union assistance, made internal complaints implicating no potential violation of a statute or regulation other than the NLRA.

The record discloses that in early 2013, Johnson complained to her supervisors and respondents' management regarding her workload and workplace hostility. Beginning in April 2013, Johnson sought the assistance of a union steward in raising those concerns with her supervisors and members of management, and then filed an internal complaint regarding the concerns with LeNoir. After Johnson was subject to criticism by her supervisors during a meeting, Johnson complained to LeNoir that the meeting constituted improper discipline. Following that complaint, Johnson's supervisors issued a corrective action notice alleging that she had failed to follow the chain of command and refused to seek work from co-workers.

We agree with the trial court that the first category of conduct arguably fell within the "concerted activities" protected by sections 7 and 8 of the NLRA, and was thus subject to *Garmon* preemption (*Luke*, *supra*, 159 Cal.App.4th at pp. 1469-1470). Generally, the acts of a single employee may constitute "concerted activit[ies]" when there is an appropriate linkage or nexus between those acts and other employees. (*Haney*, *supra*, 121 Cal.App.4th at p. 635.) Thus, an employee acting alone may nonetheless engage in concerted activity by protesting -- informally or through an established grievance procedure -- that a workplace situation violates the collective bargaining agreement. (*NLRB v. City Disposal Systems Inc.* (1984) 465 U.S. 822, 836-837.) Such activity is protected when it "'can be reasonably seen as affecting the terms or conditions of employment.'" (*NLRB v. Mike Yurosek & Son, Inc.* (9th Cir. 1995) 53 F.3d 261, 266.)

Here, Johnson asserts that she was subject to improper discipline after seeking union assistance to rectify certain workplace conditions. As Johnson's complaints implicated her reliance on union assistance and a potential breach of the collective bargaining agreement with respect to the proper application of the discipline process, the first category of conduct arguably fell within the ambit of sections 7 and 8 of the NLRA. (See *Frankl ex rel. NLRB v. HTH Corp. II* (9th Cir. 2012) 693 F.3d 1051, 1062-1063 [concluding that employer improperly disciplined employee due to his involvement in union activity]; *McClain & Co.,*

Inc. (2012) 358 N.L.R.B. 1070, 1070-1073 [concluding that employer violated NLRA by improperly disciplining employees who complained regarding favoritism in work distribution].) Accordingly, the trial court did not err in concluding that the first category of conduct was subject to *Garmon* preemption.[5]

2. *Union Grievances And Complaints Regarding Potential Breaches of the Collective Bargaining Agreement*

Regarding the second category of conduct, the record discloses that in early 2013, Johnson made complaints to respondents' management regarding the shifting standards for promotion, which she believed contravened the collective bargaining agreement. On June 24, 2013, she filed formal union grievances alleging, inter alia, the existence of unfair discipline in contravention of the collective bargaining agreement. Later, she informed the union that coders were doing billing work, which she believed to be a violation of the collective bargaining agreement. On October 14, 2013,

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[5] The court also observed -- correctly, in our view -- that setting aside the application of the NLRA, the first category of conduct did not support the SAC's claims for retaliation and wrongful termination, as it encompassed only internal complaints implicating no potential violation of a statute or regulation. (See *Rope*, *supra*, 220 Cal.App.4th at pp. 648-649; *Collier*, *supra*, 228 Cal.App.3d at pp. 1121-1127.)

shortly before her termination, she made a "hotline" complaint to respondents, alleging that her supervisors had subjected her to unfair discipline in contravention of the collective bargaining agreement. For the reasons discussed above (see pt. H.1. of the Discussion, *ante*), these activities -- that is, the complaints regarding a potential breach of the collective bargaining agreement and the filing of the grievances -- are within the scope of sections 7 and 8 of the NLRA, and thus subject to *Garmon* preemption. (See *Graphic Arts Engraving Co., Inc*. (1972) 197 N.L.R.B. 644, 648-649 [employee who undertook to enforce collective bargaining agreement engaged in protected concerted activity, even though that complaint was erroneous]; *O.B. Williams Co.* (1980) 252 N.L.R.B. 1024, 1028 [employer improperly imposed sanctions on employees for filing union grievances].)

3. *Remaining Categories of Conduct*

The remaining categories of conduct encompass Johnson's NLRB charge and her activities as a union steward. Here, the record establishes that on July 2, 2013, Johnson filed a charge with the NLRB, which alleged that the corrective action issued to her was intended to discourage her union activities. Later, after becoming a union steward, her supervisor told her not to distribute union flyers to employees. These activities are within the scope of sections 7 and 8 the NLRA, which prohibit discrimination against employees who file NLRB charges

(*Nash v. Florida Industrial Com.* (1967) 389 U.S. 235, 238) and protect the distribution of union literature in appropriate locations (*Brockton Hospital and Massachusetts Nurses Association* (2001) 333 N.L.R.B. 1367, 1368-1369 enforced in relevant part in *Brockton Hospital v. N.L.R.B.* (D.C. Cir. 2002) 294 F.3d 100, 108). In sum, the trial court properly concluded that Johnson's claims for retaliation and wrongful termination in violation of public policy were subject to *Garmon* preemption.

4. *Johnson's Contentions*

Johnson contends the trial court erred in granting summary judgment, arguing that the conduct underlying her claims falls within the exceptions to *Garmon* preemption for matters of "'merely peripheral concern'" to the NLRA and "'interests . . . deeply rooted in local feeling and responsibility . . . .'" (*Haney*, *supra*, 121 Cal.App.4th at p. 633.) As explained below, we disagree.

California courts have held that under those exceptions, wrongful discharge claims implicating health and safety laws are not subject to *Garmon* preemption. (*Haney*, *supra*, 121 Cal.App.4th at p. 633, fn. 3 ["[W]orkers' claims for wrongful discharge in retaliation for complaining about unsafe work conditions are not preempted by the NLRA"]; accord, *Luke*, *supra*, 159 Cal.App.4th at p. 1472.) Although no California court has addressed whether the same is true of wrongful discharge claims implicating a state anti-discrimination statute, at least one out-of-state court

has so concluded (*Delahunty v. Cahoon* (Wash. Ct. App. 1992) 832 P.2d 1378, 1383-1384). Furthermore, a wrongful discharge claim may not be subject to *Garmon* preemption when it relies -- at least in part -- on a ground that "in no way implicate[s] collective bargaining or unionization." (*Balog v. LRJV* (1988) 204 Cal.App.3d 1295, 1304.)

In contrast, wrongful termination claims based solely on the employer's alleged retribution for union activities or closely related conduct are ordinarily subject to *Garmon* preemption. In *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal.App.3d 668, 671-672 (*Rodriguez)*, an employee formed a union for his fellow employees, motivated a class action lawsuit that alleged his employer violated a local ordinance and inhibited collective action, and testified before a public agency in opposition to his employer's permit application on the ground that the permit would undermine employee interests. After being fired, the employee filed an NLRB charge and commenced an action against his employer, asserting a *Tameny* claim and a claim under Labor Code sections 1101 and 1102, which prohibit employers from interfering in an employee's political activity. (*Rodriguez, supra,* at pp. 671-672.) Although the employee maintained that the gravamen of his claims was that his discharge was retribution for his political activity, not his union activities, the appellate court affirmed summary judgment on the employees' complaint on the basis of *Garmon* preemption. (*Rodriguez, supra,* at pp. 676-679.) The court stated, "No matter how they may be labeled,

the activities in question all sought to advance the interests of the Union." (*Id.* at p. 679.)

We reach a similar conclusion here. The record shows only that Johnson's complaints to respondents, her union, and the NLRB implicated no potential violation of a statute or regulation other than the NLRA. Under *Rodriguez*, her claims are subject to *Garmon* preemption.

On appeal, Johnson asserts that she made numerous complaints of FEHA violations, including workplace discrimination, "bullying," hostility, and retaliation. However, FEHA prohibits only enumerated types of discrimination and harassment. (See *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, 219.) Johnson's response to respondents' separate statement of undisputed material facts identified as "undisputed" the following factual contentions: "[Johnson] admits that she did not tell LeNoir that she felt discriminated against because of her race"; "[Johnson's] colleagues never made any comments to her which made her believe that they did not like her because she was white"; and "[Johnson] admits that she did not tell any . . . employee that she believed her colleagues were treating her unfairly because of her race." Furthermore, in alleging workplace discrimination, hostility, and retaliation, Johnson's union grievances and NLRB charge assigned no cause to that misconduct other than her union activity. Her statement of additional facts otherwise identified no complaints involving FEHA, and she

abandoned her FEHA claims. The record thus discloses no cognizable complaint of a FEHA violation.[6]

Emrick v. Fujitec America, Inc. (N.D. Cal., Jan. 24, 2005, No. C-04-04514 MJJ) 2005 U.S. Dist. LEXIS 46648, upon which Johnson relies, is distinguishable. There, an employee asserted claims against his employer for retaliation under former Labor Code section 1102.5 and wrongful discharge in violation of public policy, alleging that he was fired when he reported violations of asbestos-related safety violations to his employer. (*Emrick v. Fujitec America, Inc., supra,* at p.*3.) The employer contended the claims were subject to preemption under section 301 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185) because they implicated rights created by the pertinent collective bargaining agreement. (*Emrick v. Fujitec America, Inc., supra,* at pp.*6 -*8.) The district court disagreed, concluding that the claims were independent of the collective bargaining agreement. (*Id.* at p.*9.)

In contrast, the question before us concerns *Garmon* preemption, not preemption under section 301 of the LMRA. As explained in *Rodriguez*, "[p]reemption under the NLRA and the LMRA occurs in different contexts and involves

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[6] We observe that Johnson's reply brief also suggests she asserted violations of the Labor Code, pointing to the SAC's request for civil penalties under PAGA. However, she has forfeited that contention for want of argument identifying the Labor Code violations.

distinct considerations. [Citation.] In section 301 cases the action is preempted if it is based on the meaning of a collective bargaining agreement." (*Rodriguez*, *supra*, 206 Cal.App.3d at p. 679.) Indeed, as discussed further below, in stipulating to the remand of the action to state court, Johnson agreed to amend her complaint to remove allegations implicating section 301 of the LMRA.[7]

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[7] Johnson's reply also directs our attention to *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 918 (*Diego*), in which the plaintiff was discharged from her employment at a preschool. The plaintiff asserted a *Tameny* claim against the preschool, alleging that after a co-worker made an anonymous complaint to a state agency that the preschool was violating state waste disposal regulations, the preschool's director fired the plaintiff in the belief that she had lodged the complaint. (*Id.* at pp. 918-919.) The trial court granted summary adjudication on the *Tameny* claim, concluding that an employer's mistaken belief that an employee had reported noncompliance with state regulations did not support a claim for wrongful discharge in violation of public policy. (*Id.* at pp. 919-920.) Reversing, the appellate court held that for purposes of a *Tameny* claim, the public policy underlying former Labor Code section 1102.5 -- namely, to encourage employees to report violations of statutes and regulations -- was sufficiently broad to protect employees erroneously identified as whistleblowers. (*Diego, supra,* at pp. 922-933.)

As *Diego* did not address *Garmon* preemption, it does not assist Johnson. Because she has identified no relevant

(Fn. continued on the next page.)

Johnson contends the overruling of respondents' *Garmon*-based demurrer to the SAC precluded the grant of summary judgment. She argues that respondents' motion for summary judgment, insofar as it relied on *Garmon* preemption, was effectively akin to a motion for judgment on the pleadings. In this regard, she directs our attention to subdivision (g)(1) of Code of Civil Procedure section 438, which bars a party from seeking judgment on the pleadings on the same ground as an unsuccessful demurrer, absent a change of law.[8] As explained below, Johnson's contention fails.

Generally, a trial court is not precluded from granting a motion for summary judgment raising the same legal issues as a previously overruled demurrer, as they are "two different motions." (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 205.) As

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complaint (by herself or anyone else) implicating a statute or regulation other than the NRLA, her claims are subject to *Garmon* preemption. Nothing in *Diego* suggests otherwise.

[8] Subdivision (g) of Code of Civil Procedure 438 states: "(g) The motion provided for in this section may be made even though . . . the following condition[] exist[s]: [¶] (1) The moving party has already demurred to the complaint . . . on the same grounds as is the basis for the motion . . . and the demurrer has been overruled, provided that there has been a material change in applicable case law or statute since the ruling on the demurrer."

explained in *Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 591, fn. 4 "[t]he purpose of a demurrer is to test the legal sufficiency of a pleading, not to test the evidence or other extrinsic matters [citation]. Summary judgment, on the other hand, provides a method by which, if the pleadings are *not* defective, the court may determine whether the triable issues apparently raised by them are real or merely the product of an adept pleading." (See also *Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 835.)

Here, the ruling on the demurrer did not bar the grant of summary judgment because the facts alleged in the SAC differ from those established in connection with the motion for summary judgment. As noted above, the SAC contains allegations suggesting that Johnson was subject to race-based workplace hostility. The trial court, in overruling the demurrer, stated that there was "[a] possibility that [Johnson] had engaged in non-preempted conduct" and that "the discovery process would reveal whether or not that was the case." In opposing summary judgment, however, Johnson abandoned the race-related allegations in the SAC.[9]

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[9] Johnson's reply brief contends the doctrine of law of the case precluded the trial court from granting summary judgment after overruling respondents' *Garmon*-based demurrer. We disagree. Because that doctrine is inapplicable to successive rulings by the trial court (see 9

(Fn. continued on the next page.)

In a related contention, Johnson suggests that respondents, in stipulating to remand the action to state court, discarded their assertion regarding *Garmon* preemption. We disagree. The stipulation states that respondents originally removed the action on several grounds, including that Johnson's claims were subject to preemption under the NLRA and section 301 of the LMRA. Although the stipulation also notes Johnson's voluntary agreement to amend her complaint to remove all allegations supporting claims under section 301 of the LMRA, the stipulation contains no provision reflecting any disposition of respondents' contention regarding *Garmon* preemption.

Johnson contends the trial court erred in entering judgment against her, rather than staying her action. She argues that the judgment "does not comport with [respondents'] claim that [her] causes of action are preempted, and should be adjudicated by the NLRB . . . ." Her contention fails because a judgment based on lack of jurisdiction does not preclude further proceedings on the merits in an appropriate forum. (See *Nichols v. Canoga Industries* (1978) 83 Cal.App.3d 956, 967.) For that reason, the trial court may properly enter a judgment on an

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Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 460, p. 517), it does not bar a court from granting summary judgment after overruling a demurrer based on the same ground (*Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1062-1063).

employee's complaint on the basis of *Garmon* preemption, as "exclusive jurisdiction over the conduct alleged in the complaint lies with the NLRB." (*Rodriguez*, *supra*, 206 Cal.App.3d at p. 681; see also *Hollingshead v. Matsen* (1995) 34 Cal.App.4th 525, 531-543 [affirming summary judgments in favor of defendants on basis that federal law preempted plaintiffs' state law claims].) Nothing in the trial court's order granting summary judgment or the judgment itself bars Johnson from asserting claims under the NLRA before the NLRB. In sum, summary judgment was properly granted on the SAC.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.