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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RICHARD ROMERO, Plaintiff and Appellant, v. DIRECTV, INC, Defendant and Respondent.	B235288 (Los Angeles County Super. Ct. No. BC457904)

APPEAL from a judgment of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Law Offices of Arthur Kim, Arthur Kim and Claudia G. Prieto for Plaintiff and Appellant.

Wolflick & Simpson, David B. Simpson and Christina R. Mitchell for Defendant and Respondent.

Richard Romero (Romero) appeals from the judgment of dismissal following the sustaining of the demurrer of respondent DirecTV, Inc. The trial court ruled that Romero's wrongful termination complaint was federally preempted under the National Labor Relations Act (NLRA or Act) (29 U.S.C. 151 et seq.) because the alleged conduct was "arguably" subject to the protections of the NLRA. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The complaint alleged the following: Romero was hired by DirectTV in August 2008 and worked as a "production technician." He was promoted to "supervisor" in April 2010. "As a supervisor [Romero] informed upper management about the concerns of the production technicians." Production technicians were paid per project and not per hour, so any work they performed that did not concern their project was unpaid. Romero believed this was illegal and complained to DirecTV on a weekly basis.

In August 2010, Romero's manager suspended him for sleeping on the job, which Romero denied. A few days later, Romero went into the office and was told that he was being let go for sleeping on the job, which he again denied. He was then told, "well you like to make comments in meetings." Romero "was terminated because he complained to [DirecTV] about [its] illegal activities, including the wage and hour violations. . . ."

Romero alleged seven causes of action against DirecTV for (1) violation of Labor Code sections 98.6 and 232.5; (2) violation of Labor Code 1102.5; (3) wrongful discharge in violation of public policy; (4) negligent hiring, retention and supervision; (5) negligence; (6) intentional infliction of emotional distress; and (7) negligent infliction of emotional distress.

DirecTV demurred on two grounds: (1) Each of the claims was federally preempted by the NRLA, and (2) each of the claims failed to state facts sufficient to constitute a cause of action. Romero opposed the demurrer, which the trial court sustained without leave to amend. The case was dismissed and this appeal followed.

DISCUSSION

I. Standard of Review.

We review de novo a trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (S*top Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren*, *supra*, at p. 300.) We may disregard allegations which are contrary to law or to judicially noticed facts. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 559–560.) "On appeal, we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) The plaintiff bears the burden of proving there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan*, *supra*, at p. 318; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

II. NRLA Preemption.[1]

The NRLA was enacted in 1935 to govern labor-management relations in the private sector. Section 7 of the NRLA 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(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of" their section 7 rights. (29 U.S.C. § 158(a)(1).) The NRLA created the National Labor Relations Board (NLRB or Board), vesting it with full powers to enforce sections 7 and 8 of the NLRA. (29 U.S.C. § 160(a).)

The NRLA does not contain an express preemption provision. (*Luke v. Collotype Labels USA, Inc.* (2008) 159 Cal.App.4th 1463, 1469.) In *San Diego Unions v. Garmon* 1959) 359 U.S. 236 (*Garmon*), the Supreme Court concluded that "[w]hen an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal

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[1] The parties dispute whether the trial court sustained the demurrer solely on the basis of NRLA preemption. While the minute order identifies preemption as the basis for the court's ruling, the court stated at the hearing on the demurrer: "I must say if I were to get beyond the NRLA preemption issue, I think I would still be sustaining the demurrer." The basis for the trial court's ruling is irrelevant because, as noted, we do not review the trial court's rationale, only its ruling. A judgment based on a dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967.) Both below and on appeal, DirecTV provided specific arguments regarding how each claim in the complaint failed to state a cause of action. On appeal, Romero neither mentions nor addresses these arguments, much less explains why his claims withstand such scrutiny. It is a fundamental rule of appellate review that an appealed judgment is presumed to be correct and "error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Even when our review is de novo, it is limited to issues which have been adequately raised and briefed. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Because Romero does not address DirecTV's alternate ground for demurrer, he has forfeited his right to do so and we may affirm the judgment of dismissal on this basis alone. We nevertheless exercise our discretion to address the merits of the preemption issue.

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,* at p. 245.) The *Garmon* Court explained: "At times it has not been clear whether the particular activity regulated by the States was governed by [section] 7 or [section] 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board." (*Id*. at pp. 244–245.) Thus, under *Garmon*, whether the alleged conduct violates the NRLA must be decided in the first instance by the NLRB and not the courts. A court's only role is to determine whether the alleged conduct "arguably" falls within the scope of the NRLA. If it does, then it is preempted.

We conclude that the complaint's allegations fall within the primary and exclusive jurisdiction of the NRLB because they *arguably* allege an unfair labor practice under section 8(a)(1). (29 U.S.C. § 158(a)(1).) "A violation of [section] 8(a)(1) is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was 'protected' by the act; and (4) the discharge or other adverse personnel action was motivated by the protected activity." (*N.L.R.B. v. Oakes Mach. Corp*. (2d Cir. 1990) 897 F.2d 84, 88.)

Here, the complaint alleges that Romero complained to management on behalf of "*the concerns of the production technicians*" regarding their unpaid work. It can reasonably be inferred that management was aware Romero was complaining on behalf of other employees and not himself because he was a supervisor and not one of the production technicians who was allegedly underpaid. It can also be reasonably inferred that Romero was bringing the concerns of the production technicians to management to protect their interests. Finally, the allegation that Romero was fired "because he complained" to management on behalf of other employees sufficiently pleads that his firing was "motivated by" his protected activity.

DirecTV concedes this is not the "garden variety NRLA retaliatory discharge case" because it involves complaints by an individual employee rather than a group, by a supervisor and not rank-and-file employees, and by a person who was not alleged to have been affirmatively designated as a spokesperson for the concerns of others. But we agree that these factors are not barriers to preemption.

First, courts have found that an individual employee who complains to management on behalf of others may be engaged in "'concerted activit[y].'" (See *NLRB v. City Disposal Systems, Inc*. (1984) 465 U.S. 822, 830–831 [while the term "concerted activity" is not defined in the NRLA and clearly "embraces the activities of employees who have joined together in order to achieve common goals," it also encompasses circumstances where the "particular actions of an individual employee" are such that it can "be said that the individual is engaged in concerted activity"]; *N.L.R.B. v. Talsol Corp*. (6th Cir. 1998) 155 F.3d 785, 796 ["For an individual's complaints to constitute concerted action, . . . the complaints 'must not have been made solely on behalf of an individual employee, but [they] must be made on behalf of other employees or at least with the object of inducing or preparing for group action'"]; *Compuware Corp. v. N.L.R.B.* (6th Cir. 1998) 134 F.3d 1285, 1288 ["Activity is concerted 'if it is related to group action for the mutual aid or protection of other employees' [Citation.] Therefore, the relevant question is whether the employee acted with the purpose of furthering group goals"]; *Meyers Industries, Inc.* (1986) 281 NLRB 882, 887, affd. *Prill v. NRLB* (D.C. Cir. 1987) 835 F.2d 1481, 1482 ["our definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management"].)

Second, while supervisors are not considered "employees" under the NRLA (29 U.S.C. § 152(3)), federal and state courts have found that firing a supervisor can constitute a section 8(a)(1) violation when such firing has the effect of interfering, not with the supervisor's rights, but with the section 7 rights of nonsupervisors, for example their rights to seek collective redress for their mutual aid or protection. (See *Iron*

Workers v. Perko (1963) 373 U.S. 701, 707 (finding preemption and stating "even if it be assumed that Perko was not an employee but was solely a supervisor, there is a sufficient probability that the matter would still have been cognizable by the Board so as to compel the relinquishment of state jurisdiction"]; *NLRB v. Better Monkey Grip Co.* (5th Cir. 1957) 243 F.2d 836, 837 [affirming NLRB finding that discharge of a supervisor "interfered with, restrained and coerced nonsupervisory employees in violation of [section] 8(a)(1)"].) In California, the courts in *Kelecheva v. Multivision Cable* T.V. Corp. (1993) 18 Cal.App.4th 521, 529, *Bassett v. Attebery* (1986) 180 Cal.App.3d 288, 294–295, and *Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal.App.3d 707, 714–715 all found that wrongful termination claims brought by supervisors were preempted by the NRLA under the *Garmon* doctrine.

Third, specific authorization as a spokesperson is not needed to show concerted activity. (*Compuware Corp. v. N.L.R.B., supra,* 134 F.3d at p. 1288; *N.L.R.B. v. Lloyd A. Fry Roofing Co., Inc. of Del.* (6th Cir. 1981) 651 F.2d 442, 445 ["It is not necessary that the individual employee be appointed or nominated by other employees to represent their interests"]; *N.L.R.B. v. Talsol Corp., supra,* 155 F.3d at p. 796 ["Workers, however, are not required to have formally chosen the complaining employee as their spokesperson, as long as the employee is at least impliedly representing the views of other employees"].)

To the extent Romero argues that NRLA preemption requires that he be involved in union activity or efforts to unionize, we reject this argument. (See *Salt River Val. W. User's Assn v. National Lab. Rel. Bd.* (9th Cir. 1953) 206 F.2d 325, 328 ["'concerted activities for the purpose of mutual aid or protection' are not limited to union activities"]; *Hugh H. Wilson Corporation v. NLRB* (3d Cir. 1969) 414 F.2d 1345, 1347, fn. omitted ["The mantle of protection of concerted activities, the various circuit courts have held, extends to both union and non-union employees"]; *Luke v. Collotype Labels USA, Inc., supra,* 159 Cal.App.4th at p. 1469 [finding NRLA preemption of wrongful termination claim where no union activity alleged in complaint].)

We also reject Romero's argument that wage and hour violations are "local concerns" not subject to federal NRLA preemption. While DirecTV acknowledges there

is a recognized exception for activities of merely "*peripheral concern*" to federal labor law, it argues persuasively that wages are not the type of category traditionally falling within the local interest exception. "[D]issatisfaction due to low wages is the grist on which concerted activity feeds." (*Jeannette Corp. v. N.L.R.B.* (3d Cir. 1976) 532 F.2d 916, 919.) "Traditionally conduct falling within the 'local interest' exception to preemption has included violence . . . ; threats of violence . . . ; libel . . . ; infliction of emotional distress . . . ; trespass . . . ; obstructions of access to property . . . ; and state breach of contract actions by laid-off replacement employees." (*Hillhaven Oakland Nursing Etc. Center v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 854–855.)

Finally, we reject Romero's argument that NRLA preemption should not apply because having to appear before the NRLB would cause him "prejudice" and "huge hardship." Not only does Romero fail to cite any authority supporting a "hardship" exception to NRLA preemption, he fails to make any showing of hardship or prejudice. He merely complains that NRLB procedures differ from state court procedures, but that is true for everyone. As DirecTV points out, "if that fact alone were sufficient to legally avoid NLRA preemption, then no one's claim would ever be preempted."

III. Leave to Amend.

Romero contends the trial court abused its discretion in denying him leave to amend the complaint to make it clear that his activities do not fall within the NRLB's jurisdiction.

Romero is correct that generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility the pleading defect can be cured by amendment (*Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 107), that leave to amend is usually liberally permitted (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227), and that a request for leave to amend and the showing necessary to cure the defects may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*)). To satisfy the burden on appeal of showing a

reasonable possibility that an amendment will cure the defects, an appellant must not only set forth the legal basis for amendment, but "'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.'" (*Rakestraw, supra*, at p. 43, quoting *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The plaintiff must set forth factual allegations that sufficiently state all required elements of the challenged causes of action, and the allegations "must be factual and specific, not vague or conclusionary." (*Rakestraw, supra*, at p. 44.) "Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Ibid*.)

Neither below nor in his opening appellate brief did Romero set forth the specific factual allegations he would include in an amended complaint. For the first time in his appellate reply brief, he states that he could amend his complaint by replacing the sentence "As a supervisor Plaintiff informed upper management about the concerns of the production technicians" with "As a supervisor Plaintiff informed upper management about wage and hour violations affecting production technicians." There are two problems with this proposed amendment.

First, "[a]s a general rule, points not addressed until a reply brief will not be considered unless good reason is shown for failing to address them earlier." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. 10.) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it . . . . Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. [Citations.]'" (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) No good reason is shown here.

Second, Romero cites no authority for the proposition that he should be allowed to amend his complaint by eliminating language that subjects his claims to NRLA preemption. Nor can he do so. "'"A plaintiff may not avoid a demurrer by pleading facts

or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.]" [Citations.]'" (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412.) "Similarly, '[u]nder the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment.' [Citations.]" (*Ibid*.) "'If a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsistent allegations.'" (*Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151.)

While Romero argues in his reply brief that he already provided the trial court with a "clear blueprint" for amending his complaint, in this regard he merely points to the *arguments* he made in his opposition to the demurrer. For example, he points to the conclusory argument that he was never engaged in concerted activities. He also points to the arguments that he was not part of a union, did not have discussions with employees regarding working conditions, and was not elected a spokesperson. Even assuming he could truthfully amend his complaint by adding such allegations, we have already concluded that these factors are not a bar to NRLA preemption.

We are satisfied that the trial court did not abuse its discretion in denying Romero leave to amend his complaint.

DISPOSITION

The judgment is affirmed. DirecTV is entitled to recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ