

No. 39564-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JERRY KILB,

Appellant,

v.

FIRST STUDENT TRANSPORTATION, LLC, a Delaware limited
liability company, FIRST STUDENT, INC., a Florida corporation,
FIRSTGROUP AMERICA, INC., a Florida corporation,

Respondents.

BRIEF OF RESPONDENTS

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STATE OF WASHINGTON
BY [Signature]
DEPUTY
COURT OF APPEALS
DIVISION II

Maryann Yelnosky, WSBA #25773
Devra S. Hermosilla, WSBA #31169
Bullard Smith Jernstedt Wilson
1000 SW Broadway, Suite 1900
Portland, OR 97205
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Respondents

60/02/11 wjd

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I. INTRODUCTION

The Superior Court's order granting First Student's¹ Motion to Dismiss Under CR 12(b)(1) for Lack of Subject Matter Jurisdiction was proper because Kilb's claim for wrongful discharge "for refusing to commit the illegal acts of terminating pro-union employees and for not following ... directives regarding leading ... anti-union efforts" is preempted by the National Labor Relations Act ("NLRA") under *San Diego Bldg. Trades Coun., Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959) ("*Garmon*".) The claim that Kilb attempted to assert in the Superior Court – that he was fired for refusing to engage in unlawful anti-union conduct – precisely states an unfair labor practice charge under § 8(a)(1) and § 8(a)(3) of the NLRA. Consequently, *Garmon* preempts the state law claims and vests jurisdiction over the controversy with the NLRB. Under long-settled law, *Garmon* applies here even though Kilb was not an "employee" under the NLRA because that statute gives Kilb a remedy for the wrong that he alleges in his complaint.

Neither of the two exceptions to the *Garmon* preemption doctrine apply because the claim Kilb seeks to assert is based on the rights of employees to organize – a right that lies at the very core of the NLRA.

¹ Respondents First Student Transportation, LLC, First Student, Inc., and Firstgroup America, Inc. are collectively referred to as "First Student."

The Superior Court's dismissal of Kilb's claim for lack of subject matter jurisdiction was proper and should be upheld.

II. RESPONSES AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Responses To Assignments of Error.

Response to Assignment of Error 1a: The trial court properly ruled that Kilb's claim is preempted by the NLRA under *Garmon*, even though Kilb was a supervisor.

Response to Assignment of Error 1b: Kilb does not avoid *Garmon* preemption by arguing that his state-law claim raises issues that differ from the issues that the NLRB would decide; there is no material difference in the issues.

Response to Assignment of Error 1c: The trial court properly ruled that:

(i) the "peripheral concern" exception to *Garmon* does not apply since redressing unfair labor practice violations is a central concern and purpose of the NLRA; and

(ii) the "local concern" exception to *Garmon* does not apply since there is clear congressional intent that claims alleging unfair labor practices – such as Kilb's claim here – are covered under the NLRA.

B. Issues Pertaining To Assignments Of Error.

1. Does the NLRA preempt a supervisor's state-law claim that he was discharged for refusing to fire pro-union employees and for refusing to engage in unlawful anti-union activity, given that the NLRA prohibits that exact conduct? (Assignment of Error 1a.)

2. Can Kilb avoid *Garmon* preemption by arguing that his state law claim that he was discharged for refusing to commit unfair labor practices presents issues different from those presented by an NLRB complaint that he was discharged for refusing to commit unfair labor practices? (Assignment of Error 1b.)

3(a.) Does the "peripheral concern" exception to the *Garmon* preemption doctrine apply even though discharging a supervisor for refusing to engage in anti-union activity is a central concern to the NLRA? (Assignment of Error 1c.)

3(b.) Does the "local concern" exception to *Garmon* apply even though the NLRA prohibits, and remedies, the very conduct upon which Kilb seeks to base his claim? (Assignment of Error 1c.)

III. STATEMENT OF THE CASE

A. Background Facts.

Kilb filed his Complaint with the Superior Court on June 27, 2008, claiming wrongful discharge in violation of Washington State's

public policy protecting the right of employees to organize and participate in labor unions without interference, restraint, or coercion of their employers under Revised Code of Washington 49.36.010 and 49.32.020.² (CP #3 (Complaint)) In his Complaint, Kilb alleges the following:

- That he was hired by First Student on or around August 15, 2005, as a Contract Manager. (CP #3 at ¶6.)
- That in the fall of 2006, First Student informed Kilb that the bus drivers within the company “were in danger of being unionized and that First Student did not want that to happen.” (CP #3 at ¶7.) First Student instructed Kilb to “be on the look out for labor union activity and to immediately inform First Student superiors if any union activity was seen or heard.” (CP #3 at ¶7.)
- That First Student told Kilb on various occasions “what First Student planned to do to stop [the unionization of First Student’s Gresham, Oregon location], and what was expected from [him] to

² RCW 49.36.010 states that “[i]t shall be lawful for working men and women to organize themselves into, or carry on labor unions for the purpose of lessening the hours of labor or increasing the wages or bettering the conditions of the members of such organizations; or to carry out their legitimate purpose by any lawful means.”

RCW 49.32.020 provides that it is the public policy of the state of Washington that employees have the right to self-organization to negotiate the terms and conditions of employment, free from interference, restraint, or coercion by employers or their agents.

suppress and interfere with the union activity at the Gresham location.”

(CP #3 at ¶8.)

- That Kilb was directed by First Student to “take affirmative action in order to protect First Student from becoming unionized.” (CP #3 at ¶10.) This included instruction to “remove any pro-union posters or literature,” to “visit anti-union websites” to find information for countering the union campaign, to “obtain anti-union pamphlets and buttons and a ‘strike computer’ showing all of the hidden costs allegedly associated with union dues and union activity,” to and “discretely leave these materials” where employees would find them, and to distribute the materials through certain drivers. (CP #3 at ¶10.)

- That First Student threatened Kilb it would deny any involvement in these actions and would “terminate [him] for getting caught.” (CP #3 at ¶10.)

- That First Student repeatedly ordered Kilb to fire pro-union employees. (CP #3 at ¶¶ 12-14.)

- That Kilb was terminated on October 19, 2007 “for refusing to commit the illegal acts of terminating pro-union employees and for not following the First Student management’s directives regarding leading the anti-union efforts in the Gresham branch.” (CP #3 at ¶15.)

B. Procedural History.

On June 18, 2009, the Court entered a Judgment of Dismissal and Order granting First Student's Motion to Dismiss Plaintiff's Case Under 12(b)(1) for Lack of Subject Matter Jurisdiction because Kilb's state law claim was preempted under the NLRA. (CR #13.)

IV. SUMMARY OF ARGUMENT

Kilb's claim for wrongful discharge in violation of public policy is preempted by the NLRA under the *Garmon* preemption doctrine, even though Kilb was a supervisor. *Garmon* preempts state-law claims based on conduct protected or prohibited by Sections 7 and 8 of the NLRA. Kilb alleges that he was fired for refusing his employer's unlawful directives to fire pro-union employees and engage in anti-union activities aimed at preventing unionization. It is well established law that discharging a supervisor for refusing to engage in unlawful anti-union conduct constitutes an unfair labor practice under § 8(a)(1) and § 8(a)(3) of the NLRA, which prohibits employers from the interference, restraint, or coercion of employees engaging in concerted activity. The result is that even as a supervisor, Kilb has a remedy under the NLRA to redress his wrongful discharge claim.

Kilb cannot avoid *Garmon* preemption by arguing that the issue presented by his wrongful discharge claim is different from the issue

that could have been presented to the NLRB. This is because the central issue the NLRB would address is the same issue Kilb asked the trial court to decide: Whether he was unlawfully discharged for refusing to follow his employer's instructions to terminate pro-union employees and otherwise engage in unlawful, anti-union activity as part of his employer's effort to prevent unionization of the workforce.

Also, where the claim Kilb seeks to assert is based on the rights of employees to organize – a right that lies at the very core of the NLRA – Kilb cannot avoid *Garmon* by arguing that the “peripheral concern” or the “local concern” exceptions to *Garmon* preemption apply.

Consequently, *Garmon* preempts the state law claims and vests jurisdiction over the controversy with the NLRB. The Superior Court's order granting First Student's Motion to Dismiss Under CR 12(b)(1) for Lack of Subject Matter Jurisdiction was proper and should be upheld.

V. ARGUMENT

A. Kilb's Claim is Preempted by the NLRA under the *Garmon* Doctrine Even Though Kilb was a Supervisor (Issue No. 1).

1. Legal standards for review of dismissal under CR 12(b)(1.)

A court's order of dismissal under CR 12(b)(1) for lack of subject-matter jurisdiction over a cause or proceeding is a question of law,

reviewed *de novo*. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003.)

2. *Garmon* preempts state-law claims based on conduct protected or prohibited by Sections 7 and 8 of the NLRA.

A state law claim is preempted by the National Labor Relations Act (“NLRA”), 29 USC §§ 151-169, if it is based on conduct that is “arguably protected or prohibited” by sections 7 or 8 of the NLRA. *San Diego Bldg Trades Council v. Garmon*, 359 US 236, 244-45 (1959); *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 703-704, 807 P.2d 849 (1991); 29 USC §§ 157, 158.

When an activity is arguably subject to § 7 [of the NLRA or constitutes an unfair labor practice under] § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted. ... *Garmon*, at 244-45, 79 S.Ct. at 779.

Beaman, 116 Wn.2d at 703, 705. The *Garmon* preemption doctrine is binding on state and federal courts. *Garmon*, 359 U.S. at 245; *Beaman*, 116 Wn.2d at 704.

Section 7 of the NLRA, 29 USC § 157, gives employees the right “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....” Section 8(a)(1) of the NLRA, 29 USC

§ 158(a) prohibits employer interference with, restraint, or coercion of employees engaging in concerted activity or other rights guaranteed by section 7.

The *Garmon* preemption doctrine is based on the congressional design that the NLRA regulates labor-management relations, vesting jurisdiction to resolve such disputes with the NLRB -- rather than with the state and federal courts. *Garmon*, 359 US at 246; *Hume v. American Disposal Co.*, 124 Wn.2d 656, 662, 880 P.2d 988 (1994); *Beaman*, 116 Wn.2d at 702. This eliminates the danger of court decisions conflicting with national labor policy. *Garmon*, 359 US at 246; *Beaman*, 116 Wn.2d at 704. It is essential to the administration of the NLRA that the NLRB retain jurisdiction over claims in order to prevent conflict, even if such conflict is merely potential rather than actual. *Beaman*, 116 Wn.2d at 704-05 (plaintiff's wrongful discharge must be preempted if it is "even 'potentially subject to' sections 7 or 8 of the NLRA").

Kilb's reliance on *Hume, supra*, for the proposition that Washington courts give only limited recognition to *Garmon* preemption, is without merit. The scope of federal preemption is by definition, a matter of federal, not state, law. When, as here, Congress has enacted legislation that preempts state law, states are not free to narrow or restrict that

preemptive effect. Here, the broad reach of *Garmon* preemption is established by the U.S. Supreme Court, whose decisions on federal preemption control all state and federal courts: “Congress entrusted the administration of labor policy to a centralized administrative agency, with a specially constituted tribunal to insure uniform application of its substantive rules and to avoid conflicts inherent in a multiplicity of tribunals and a diversity of procedures.” *Beaman*, 116 Wn.2d at 703-704, citing *Garmon*, 359 U.S. at 242-243, 79 S.Ct. at 778.

The *Garmon* doctrine operates to preempt claims based upon a state law which attempts to regulate conduct that is arguably either prohibited or protected by the NLRA. See *San Diego Bldg. Trades Coun., Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2 775 (1959.)

In the [NLRA] Congress has provided for centralized administration of its labor policies by creating the [NLRB] and giving it broad authority. The Supreme Court has reinforced this structure by developing the *Garmon* rule that “[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted.” *Garmon*, 359 U.S. at 245, 79 S.Ct. at 780.

Hume, 124 Wn.2d at 662-663 (emphasis added.)

3. The Superior Court properly determined that Kilb's claim was preempted by the NLRA because discharging a supervisor for refusing to commit an unfair labor practice is itself an unfair labor practice.

The Superior Court properly dismissed Kilb's wrongful discharge claim as preempted by the NLRA under *Garmon* because it is an unfair labor practice under the NLRA for an employer to discharge a supervisor for refusing to engage in unlawful anti-union conduct.

Although a supervisor is not an "employee," as defined by the NLRA, a supervisor nevertheless may file an unfair labor practice charge alleging that he was fired for refusing to commit unfair labor practices and can win reinstatement and backpay as a remedy. *Automobile Salesmen's Union, Local 1095 v. NLRB*, 711 F.2d 383, 386-88 (D.C.Cir. 1983); *Howard Johnson v. N.L.R.B.*, 702 F.2d 1 (1st Cir. 1983).³ "[T]he

³ See also, *Local No. 207, Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 707, 83 S.Ct. 1429, 1432, 10 L.Ed.2d 646 (1963) (Preemption of a state law claim by a discharged supervisor was justified where there was a sufficient probability that the Board could find a violation of the Act and where it "would surely be within the Board's power ... to order the union to reimburse the supervisor for lost wages."); *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir.1980) (supervisor's discharge for refusing to engage in unlawful anti-union conduct was unfair labor practice subject to jurisdiction of NLRB; reinstatement of supervisor enforced); *Russell Stover Candies, Inc. v. N.L.R.B.*, 551 F.2d 204 (8th Cir.1977) (supervisor's discharge for refusing to engage in unlawful surveillance of pro-union employees was unfair labor practice subject to jurisdiction of NLRB; reinstatement of supervisor enforced); *NLRB v. Talladega Cotton Factory*, 213 F.2d 209 (5th Cir.1954) (supervisor's discharge for failing to thwart unionization was unfair labor practice subject to jurisdiction of NLRB; reinstatement of supervisor

[Footnote continued on next page]

discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987), quoting *Parker-Robb Chevrolet, Inc.*, 262 NLRB 404 (1982) (emphasis added).

Kilb's argument that, "as a supervisor he is ineligible to commence his own complaint before the NLRB" (Pl Br 18), is wrong. The NLRB's procedural rules state that an unfair labor practice charge can be filed "by any person." NLRB Rules and Regulations, § 102.1. Not only did Kilb have the ability to commence an unfair labor practice proceeding before the NLRB by filing a charge, but he also had the capacity to prevail and to gain reinstatement and backpay with proof that the reason for his discharge was his alleged refusal to commit unfair labor practices. "The NLRB has the discretion to remedy the effect of the unfair labor practice by restoring the status quo and directing the reinstatement of supervisors with back pay." *Hinton v. Sigma-Aldrich Corp.*, 93 S.W. 3rd

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enforced); *Texas Dental Ass'n*, 186 LRRM 1340, 354 NLRB No. 57 (2009) (Supervisor's discharge for refusing to provide employer with names of pro-union employees for fear those employees would be discharged was a violation of the NLRA, subject to jurisdiction of the NLRB).

755, 758-759 (Mo. 2002), citing *Talladega*, 21 F.2d at 217, and *Automobile Salesmen's Union v. N.L.R.B.*, 711 F.2d 383, 386 (D.C. Cir. 1983). See, e.g., *Belcher Towing Co. v. N.L.R.B.*, 614 F.2d 88 (5th Cir.1980) (court reinforced NLRB's order to reinstate supervisor who was discharged for refusing to engage in unfair labor practices); *Russell Stover Candies, Inc. v. N.L.R.B.*, 551 F.2d 204 (8th Cir.1977) (Court enforced NLRB's order to reinstate supervisor who had been wrongfully discharged in violation of the NLRA for refusing to engage in unlawful surveillance of pro-union employees); *Lorge School*, 183 L.R.R.M. 1393 (2008) (NLRB ordered reinstatement of supervisor who was wrongfully discharged for refusing to cause resignation or constructive discharge of pro-union employees).

In *Gerry's Cash Markets, Inc. v. N.L.R.B.*, 602 F.2d 1021 (1st Cir. 1979), the First Circuit upheld the NLRB's finding that the employer violated Section 8(a)(1) of the NLRA by demoting a supervisor for refusing to enforce an overly broad no-solicitation rule. The court explained:

The underlying theory is not, of course, that the Act protects the supervisor, which it does not, nor even that disciplining a supervisor for union activities instills fear in rank-and-file employees that their own protected union activities may subject them to a similar fate. Rather, the theory is that if employers are allowed to force supervisors to engage in unfair labor practices, this necessarily results

in direct interference with the affected rank-and-file employees in the exercise of their § 7 rights.

Gerry's Cash Markets, 602 F.2d at 1023 (internal citations omitted.)

Kilb's brief ignores this settled principle of labor law.

Instead, Kilb tries to build his case on a separate irrelevant line of NLRB cases: cases holding that a supervisor has no protection under the NLRA for attempting to obtain union representation for himself. Since a supervisor has no right to union representation, his efforts to obtain such representation are not protected.⁴

⁴ For instance, in *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904 (1986), the supervisors were discharged for their direct participation in attempting to form a union. Such discharges do not constitute unfair labor practices under the NLRA and, therefore, the claims were not preempted as the NLRB did not have jurisdiction. Unlike Kilb – whose discharge alleges conduct constituting an unfair labor practice – because these supervisors' discharges were not in violation of the NLRA, they had no standing to bring their claims before the NLRB.

Kilb also offers *Smith v. CIGNA Healthplan of Arizona*, 203 Ariz. 173, 52 P.3d 205 (2002) as a case where another state court “facing this situation [has] refused to apply the *Garmon* preemption doctrine where the aggrieved plaintiff was a supervisor. (Pl Br, pp. 16-17.) It is true that the Arizona Appellate Court did not apply the *Garmon* preemption to a supervisor's state wrongful discharge claim in *Smith*. However, the reasoning behind this result was that the employer did not establish that any of the recognized exceptions existed which would have allowed the supervisor's claim to be covered under the NLRA. *Id.* at 178. The *Smith* Court set out these exceptions to include the very claim presented at bar: “A supervisor may be covered under the Act ... if the employer disciplines a supervisor for refusing to commit an unfair labor practice....” *Id.* at 178 n.1. The *Smith* case, therefore, supports First Student's position that under the facts alleged by Kilb, his wrongful discharge claim is preempted under the NLRA.

These cases are irrelevant here, however, because Kilb alleges that he was discharged, not for seeking representation for himself, but instead for “refusing to commit the illegal acts of terminating pro-union employees and for not following the First Student management’s directives regarding leading the anti-union efforts in the Gresham branch.” (CP #3 at ¶15.) As the cases cited herein show, firing a supervisor for refusing to engage in unlawful labor practices is itself an unfair labor practice under the NLRA because such a discharge interferes with employees’ statutorily protected rights. *Howard Johnson, supra*, 702 F.2d at 4.

Kilb relies on *Hotel Employees and Restaurant Employees, Local 8 v. Jensen*, 51 Wn. App. 676, 754 P.3d 1277 (Div I 1988) for his proposition that *Garmon* preemption does not apply to Kilb’s case because he is not a supervisor and therefore, not a protected person under the NLRA. However, the *Jensen* court recognized that, “[i]n furtherance of the overriding interest in developing a uniform, nationwide interpretation of the NLRA by a centralized expert agency, *i.e.*, the NLRB, ... courts have strained to find Board jurisdiction in cases involving unfair labor practices where it was far from clear that all of the parties were subject to the Act.” *Id.* at 686-687. The Court’s first two illustrations of just such preempted claims are cases brought by supervisors for wrongful discharge,

“even though supervisors generally are expressly excluded from the definition of ‘employee’ under the Act.” *Jensen*, 51 Wn. App. at 687, citing *Local 926, Int’l Union of Operating Eng’rs, AFL-CIO v. Jones*, 460 U.S. 669, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983) and *Local 207, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646 (1963). Thus, *Jensen* acknowledges that *Garmon* preempts claims that are indistinguishable from Kilb’s.

Similarly, in *Delling v. N.L.R.B.*, 869 F.2d 1397, 1399 (10th Cir. 1989), a supervisor was discharged for refusing to falsify termination slips with pretextual reasons for the firing of pro-union employees. The supervisor’s discharge was held to be a violation of the NLRA because it had the likely effect of thwarting employees’ efforts to bring successful unfair labor practice charges. The Court upheld the NLRB’s order to reinstate the supervisor.

In *Sitek v. Forest City Enterprises, Inc.*, 587 F.Supp. 1381 (E.D. Mich. 1984), cited by the trial court, a supervisor alleged that his employer wrongfully discharged him for refusing to engage in union suppression activities, in violation of a state statute making it unlawful for employers to interfere with or coerce employees in the exercise of their rights regarding union organization. The supervisor alleged that he was

given a list of employees engaged in union activity and was told it was in his best interest to discourage any efforts to unionize. When the supervisor refused to take any part in the union suppression, his hours were reduced and he was eventually laid off. *Id.* at 1383. The supervisor argued, as does Kilb here, that preemption did not apply because: (1) he was a supervisor; (2) the issues were not the same in state court as they would be before the NLRB; and (3) claims fell within the exceptions to *Garmon*. Rejecting all three arguments, the Court ruled that discharging a supervisor for refusing to commit unfair labor practices or for failing to prevent unionization is prohibited by Section 8 of the NLRA, *id.* at 1384, that the wrongful discharge claim raised “the very issue which would be before the NLRB on an unfair labor practice discharge,” *id.* at 1384, and that therefore *Garmon* preempted the state-law claim.

In *Hinton, supra*, a supervisor claimed that he was wrongfully discharged for refusing to prepare false evaluations and disciplinary reports against employees who were involved in organizing a union. *Hinton*, 93 S.W. at 756. The employer moved to dismiss on the ground that the claim was preempted. The supervisor argued that he did not have standing to bring his claim before the NLRB because he was a supervisor. The court stated that the supervisor’s argument “ignores the large body of case-law uniformly holding that the NLRA preempts a

supervisor's wrongful discharge claim when the supervisor has been discharged for refusing to engage in unfair labor practices against employees and requiring supervisors to bring their claims for relief for such discharge to the NLRB." *Id.* at 758. The dismissal of the supervisor's action was affirmed.

In *Chavez v. Copper State Rubber of Arizona, Inc.*, 182 Ariz. 423, 897 P.2d 725 (1995), the court ruled: "the gravamen of each legal theory relied upon by Chavez is that appellees discharged him because he refused to treat non-union employees more favorably than union employees. As we concluded above, such conduct by appellees arguably constitutes an unfair labor practice that falls within the Act's prohibitions. ... Similar claims, whether delineated breach of contract, wrongful discharge, or wrongful interference with contract, have been consistently held preempted." *Id.* at 732.

In *Calabrese v. Tendercare of Michigan, Inc.*, 262 Mich.App. 256, 685 N.W.2d 313 (2004), a supervisor claimed that she was wrongfully discharged for refusing to fire pro-union employees in a way that avoided suspicion. The court rejected the supervisor's assertion that her claim was not preempted by the NLRA because supervisors are not covered employees and held that the claim was preempted by the

NLRA under *Garmon* because it is a violation of the NLRA to fire a supervisor for refusing to commit unfair labor practices. *Id.* at 264-265.

These cases reflect the settled law that *Garmon* preempts state law claims by supervisors alleging that they were discharged for refusing to engage in unlawful anti-union activity.⁵

Here, as in the cases listed above, Kilb's wrongful discharge tort claim is based on his allegations that he was terminated for "refusing to commit the illegal acts of terminating pro-union employees and for not following the First Student management's directives regarding leading the anti-union efforts in the Gresham branch." (CP #3 at ¶15.)

⁵ See also, *Russell Stover Candies, Inc., supra*, 551 F.2d 204 (8th Cir. 1977) (holding that an employer who discharges a supervisory employee for failing to illegally surveil union members violates the NLRA); *Lontz v. Tharp*, 647 S.E.2d 718 (W. Va. 2007) (supervisors' wrongful discharge claims involving allegations they were fired for refusing to have a union organizer arrested, were preempted by the NLRA); *Calabrese v. Tendercare of Michigan, Inc., supra*, 262 Mich.App. 256, 685 N.W.2d 313 (2004) (employee's status as supervisor at time of termination did not preclude NLRA from being applicable; wrongful discharge claim was preempted by NLRA); *Kelecheva v. Multivision Cable T.V. Corp.*, 18 Cal.App.4th 521, 22 Cal.Rptr.2d 453 (1993) (supervisor's claim for wrongful discharge in violation of public policy for refusal to spy on and write up union organizing employees was preempted by the NLRA); *Venable v. GKN Automotive*, 107 N.C.App. 579, 421 S.E.2d 378 (1992) (supervisor's claim for wrongful discharge for refusing to violate the rights of union supporters by falsifying their evaluations or by firing them were preempted by the NLRA; after union organizing effort failed, plaintiff refused to follow his employer's alleged orders to submit negative reviews for those employees who had supported the union effort; Court said that notwithstanding that supervisors are not covered by the NLRA, an employer's discharge of a supervisor for refusal to participate in an unfair labor practice is itself an unfair labor practice and the claim is therefore preempted by the NLRA according to the *Garmon* preemption doctrine.)

Such allegations are directly encompassed within Section 8 of the NLRA. Therefore, even though Kilb was a supervisor, the allegations of his complaint state an unfair labor practice in violation of the NLRA, and are subject to the exclusive jurisdiction of the NLRB. The Superior Court's dismissal of Kilb's action as preempted under *Garmon* was proper and should be affirmed.

B. Kilb cannot avoid *Garmon* preemption by arguing that the issue presented by his wrongful discharge claim is different from the issue that could have been presented to the NLRB. (Issue No. 2.)

Kilb's argument that his wrongful discharge claim presents issues different from the issues that would be addressed by the NLRB, is without merit. The language and purpose of the Washington statutes under which Kilb asserts his public policy discharge claim are, for all intents and purposes, identical to the language and purpose of Sections 7 and 8 of the NLRA. Both RCW 49.36.010 and Section 7 of the NLRA give employees the right to organize themselves into, carry on, and participate in labor unions to improve hours, wages, and conditions of the members of the unions. RCW 49.36.010; 29 USC § 157. Both RCW 49.36.010 and Section 8(a) of the NLRA state that it will be unlawful for an employer to interfere, restrain, or coerce employees from exercising

their right to engage in unionization and concerted activities. RCW 49.32.020; 29 USC § 158(a).

Garmon requires preemption in this case because the issues raised by the action are the same as the issues that would face the NLRB. The central issue the NLRB would address is the same issue Kilb asked the trial court to decide: Whether Kilb was unlawfully discharged for refusing to follow his employer's instructions to terminate pro-union employees and otherwise engage in unlawful, anti-union activity as part of his employer's effort to prevent unionization of the workforce.

To determine whether the controversy is the same, the Court looks to the nature of the conduct involved rather than to the legal theories advanced by the parties. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292, 91 S.Ct. 1909, 1920-21, 29 L.Ed.2d 473 (1971). The bottom line is that the central issue before the state court is whether Kilb was fired for refusing to fire pro-union employees and engage in anti-union conduct; and the central issue before the NLRB would be whether Kilb was fired for refusing to fire pro-union employees and engage in anti-union conduct. This is an identical issue and, therefore, *Garmon* preempts this action.

For this reason, Kilb's reliance on the case of *Brundridge v. Fluor Federal Svcs., Inc.*, 109 Wn. App. 347, 35 P.3d 389 (2001), to

support his position that the central controversy in this state case would not be the same as if brought before the NLRB, is in error. The court in *Brundridge* did not address the issue of wrongful discharge for refusing to engage in unfair labor practices. Rather, the Court addressed the issue of employee and public safety connected with construction on a nuclear waste facility. There, non-supervisory employees filed a wrongful termination claim against the employer for allegedly terminating them for refusing to install unsafe valves at the Hanford nuclear waste facility, and for terminating non-supervisory employees who supported those employees who refused to install the valves. The Court held that the employees' state-law claim for wrongful discharge in violation of public policy was not preempted under *Garmon* because: (1) The "claimed violations of Washington's health and safety laws are not even arguably unfair labor practices" and (2) The claim touched matters of clear local interest – specifically, Washington's interest in protecting its citizens from exposure to dangerous nuclear materials. *Id.* at 360-361. The Court held that the state law claim was not preempted, "because the claim does not implicate collective bargaining or unionization"; it "is different from any claim that could have been brought before the NLRB" *Id.* at 361.

In contrast to *Brundridge*, the central issue to be addressed in Kilb's state claim is the same issue that would have been addressed by

the NLRB. The Court in *Sitek, supra*, determined that claims precisely like that asserted here were preempted because they presented “the very issue which would be before the NLRB on an unfair labor practice discharge[.]” *Sitek*, 587 F.Supp. at 1384.

In *Chavez, supra*, 182 Ariz. at 430, the Court analyzed whether the *Garmon* doctrine preempted a supervisor’s state wrongful discharge claim where the supervisor alleged he was fired for refusing to treat non-union workers more favorably than union-workers. The court affirmed the dismissal of the state claim, holding that the controversy was the same at the state level as it would have been before the NLRB, and that neither the peripheral concern nor the local concern exceptions applied:

Regardless of the label attached to his claims, Chavez cannot establish wrongful discharge or improper interference with his employment contract without showing the same crucial element as would be essential to establishing an unfair labor practice: he must show that [the employer] discharged him, or ... obtained his discharge, because he refused to discriminate against union members. That element is of more than peripheral concern to federal labor law; it reflects and requires consideration of a central focus of the Act. We therefore conclude the trial judge did not err in granting judgment in appellees’ favor on the tortious discharge and wrongful interference claims.

Id. at 430.

That Kilb would have different remedies through the NLRB than in state Court does not avoid preemption. “[T]he fact that a given remedy cannot be granted by the NLRB does not mean [a plaintiff’s] claim is not preempted. ‘[R]emedies form an ingredient of any integrated scheme of regulation[;] to allow the State to grant a remedy here [damages] which has been withheld from the [NLRB] only accentuates the danger of conflict.’” *Beaman*, 116 Wn.2d at 710-711, quoting *Garmon*, 359 U.S. at 247, 79 S.Ct. at 773.

Under the allegations of Kilb’s complaint, the Superior Court properly granted First Student’s motion to dismiss for lack of subject matter jurisdiction where the central issue before either the state court or the NLRB is whether Kilb was fired for refusing to fire pro-union employees and engage in unlawful anti-union conduct. *Garmon* applies and the state claim is preempted by the NLRA.

C. The Superior Court Properly Found Preemption Under *Garmon* Because Neither the Peripheral Concern nor the Local Concern Exceptions Apply to Kilb’s Case. (Issue No. 3.)

There are two exceptions to the *Garmon* doctrine, neither of which apply here. The NLRA does not preempt a claim if: (1) the regulated activity under the state law is merely a peripheral concern to the NLRA; or (2) the regulated activity touches an interest so deeply rooted in

local feeling and responsibility that, absent compelling congressional direction, there is no inference that the State has been deprived of the power to act. *Garmon*, 359 U.S. at 243-244; *Hume*, 124 Wn.2d at 663-664. In such cases, the court must balance the state's interest in regulating the conduct against the interference with the NLRB's ability to adjudicate controversies committed to it by the NLRA and the risk that the state will sanction conduct that the NLRA protects.

Kilb's claim falls outside each of these exceptions to the *Garmon* doctrine because the central purpose of the NLRA is to govern labor relations and unfair labor practice allegations such as the allegations at the heart of this case. The state has no interest at stake other than prohibiting employers from disciplining supervisors who refuse to engage in unlawful anti-union activities. This is the exact same interest served by the NLRA.

1. The *peripheral concern* exception to *Garmon* does not apply.

The peripheral concern exception applies only where the activity regulated by state law is of merely a peripheral concern to the NLRA. *Garmon*, 359 U.S. at 243-244; *Hume*, 124 Wn.2d at 663-664. Kilb asserts that *Delahunty v. Cahoon*, 66 Wn. App. 829, 832 P.2d 1378 (1992), shows that his claim is only of peripheral concern to the NLRA

and thus excepted from *Garmon*. This argument overlooks that the central issue in *Delahunty* was retaliation for conduct in opposition to sexual harassment. There, the non-supervisory employees claimed they were retaliated against for opposing sexual harassment. The employer asserted that the NLRB had jurisdiction over the employees' retaliation claims under *Garmon* because the claims resulted from their walkout in opposition to sexual harassment. *Id.* at 838. The Washington Court of Appeals held that the state court did not need to yield to the jurisdiction of the NLRB under *Garmon* because it was not a case where the questioned conduct was protected by Section 7 or 8 of the NLRA. *Id.* at 838-839. Rather, the state statutes there regulated "practices of discrimination which violate its citizens' civil rights, with legislation substantially parallel to Title 7 of the United States Civil Rights Act of 1964." *Id.* at 838. Thus, the employees' state law claims of unlawful retaliation were not preempted by the NLRA because the state's anti-discrimination laws did not conflict with the national policy governing unfair labor practices. *Id.* at 838-839. The peripheral concern exception applied because any concern the NLRA would have over the discrimination claims would be, at most, of only peripheral concern to the NLRA.

In short, *Garmon* did not preempt the sex discrimination/retaliation claim in *Delahunty* because the NLRA does not regulate –

peripherally or otherwise – sex discrimination or retaliation. In contrast with *Delahunty*, the claim in this case seeks to regulate the exact same conduct that the NLRA regulates, for the exact same reasons. This exception has no application to this case.

2. The local concern exception to *Garmon* does not apply.

The local concern exception applies only where the regulated activity touches an interest so deeply rooted in local feeling and responsibility that, absent compelling congressional direction, there is no inference that the State has been deprived of the power to act. *Garmon*, 359 U.S. at 243-244; *Hume*, 124 Wn.2d at 663-664. The local concern exception is not even considered where there is clear congressional direction that allegations of conduct constituting unfair labor practices belongs within the jurisdiction of the NLRB rather than the state courts.

Kilb's reliance on *Hume* and *Brundridge* is misplaced.⁶ In *Hume*, the court addressed the issue of retaliation for claiming unpaid

⁶ Kilb's reliance on *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995) – the case relied upon by Kilb for the assertion that the Washington Supreme Court has held the state statute protecting unionization to be of local concern despite the clear Congressional intent in the establishment of the NLRB – is also misplaced. There, the Washington Supreme Court confirmed that the tort of wrongful discharge in violation of public policy could be based on an alleged violation of RCW 49.32.020, the state statute prohibiting employers from interfering with, restraining, or other concerted activities. In *Bravo*, for reasons unknown, the employer did not move to dismiss the employees' actions
[Footnote continued on next page]

overtime. *Hume*, 124 Wn.2d at 660. The employees in *Hume* alleged harassment and constructive discharge in violation of public policy in retaliation for demanding overtime pay. *Id.* The Washington Supreme Court held that these claims were not preempted by federal labor law because the state statute at issue did not involve unfair labor practices. The employees' retaliation claims were regulated by a statute that touched a deeply rooted local concern – the prevention of retaliation against an employee who asserts his right to claim overtime – thus falling under the local concern exception to *Garmon*. *Id.* at 664-665.

In *Brundridge*, the Court held that the claims regarding safety in the construction of nuclear waste facilities, which were “not even arguably unfair labor practices” touched matters of clear local interest – specifically, Washington’s interest in protecting the health and safety of its workers and citizens. *Brundridge*, 109 Wn. App. at 360-361.

[Continued from previous page]

for lack of subject matter jurisdiction. For this reason, as well as that the employees in *Bravo* were allegedly fired for engaging in their own concerted activity, and were not supervisors refusing to engage in an unfair labor practice, the case offers no useful analysis under the *Garmon* doctrine or its local concern exception. The legal analysis in which the Supreme Court engaged in *Bravo* rather focused on whether the employees’ conduct met the definition of concerted activity as intended by the legislature in enacting RCW 49.32.020, since those employees did not yet belong to any union.

Neither *Hume* nor *Brundridge* involved a claim, like that asserted by Kilb, where the underlying wrongful conduct is an unfair labor practice for which the NLRA provides a remedy. Nor does Kilb's claim implicate important local interests, such as sex discrimination or wage claim retaliation.

Consequently, neither of the *Garmon* exceptions apply here. This case is governed instead by the settled case law set forth in Sections A and B above.

VI. CONCLUSION

The Superior Court properly granted First Student's CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and entering a general judgment of dismissal based thereon. The dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of
November, 2009.

BULLARD SMITH JERNSTEDT WILSON

By 

Maryann Yelnosky, WSBA #25773

Devra S. Hermosilla, WSBA #31169

Attorneys for Respondents

No. 39564-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JERRY KILB,

Appellant,

v.

FIRST STUDENT TRANSPORTATION, LLC, a Delaware limited
liability company, FIRST STUDENT, INC., a Florida corporation,
FIRSTGROUP AMERICA, INC., a Florida corporation,

Respondents.

**APPENDIX TO
BRIEF OF RESPONDENTS**

Maryann Yelnosky, WSBA #25773
Devra S. Hermosilla, WSBA #31169
Bullard Smith Jernstedt Wilson
1000 SW Broadway, Suite 1900
Portland, OR 97205
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Respondents

29 U.S.C.A. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 158

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to

tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or

transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the

public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall

be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable [FNI] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms “any employer”, “any person engaged in commerce or an industry affecting commerce”, and “any person” when used in relation to the terms “any other producer, processor, or manufacturer”, “any other employer”, or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction

industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

No. 39564-9-II

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**CERTIFICATE OF SERVICE
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Maryann Yelnosky, WSBA #25773
Devra S. Hermosilla, WSBA #31169
Bullard Smith Jernstedt Wilson
1000 SW Broadway, Suite 1900
Portland, OR 97205
503-248-1134/Telephone
503-224-8851/Facsimile

Attorneys for Respondents

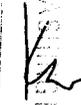
CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington as follows:

I am an attorney of the firm of Bullard Smith Jernstedt Wilson. I caused to be filed via U.S. First Class mail in the above-entitled Court: BRIEF OF RESPONDENTS and APPENDIX. I further caused the same to be delivered via U.S. First Class mail and addressed to the following opposing counsel:

John Spencer Stewart
Tyler A. Larkin
Tyler J. Storti
Stewart Sokol & Gray LLC
2300 SW 1st Ave., Suite 200
Portland, OR 97201
Attorneys for Appellant

DATED this 20th day of November, 2009.

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BY 
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Maryann Yelnosky, WSBA #25773
Devra S. Hermosilla, WSBA #31169
Attorneys for Respondents