

No. 39564-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COURT OF APPEALS  
DIVISION II

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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.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Plaintiff-Appellant Jerry Kilb (“Kilb”) appeals the Superior Court’s ruling granting the Motion to Dismiss Under CR 12(b)(1) for Lack of Subject Matter Jurisdiction filed by Defendants-Respondents First Student Transportation, LLC, First Student, Inc. and FirstGroup America, Inc. (collectively “First Student” or “Defendants”).

Defendants terminated Kilb based on his refusal to terminate pro-union employees at the direction of Defendants and for otherwise not following the Defendants’ directives to lead the Defendants’ anti-union efforts, which discharge is in direct contravention of clearly established public policies of the State of Washington. Defendants contend that Kilb’s action for wrongful discharge in violation of public policy is preempted by the National Labor Relations Act (the “Act”) under the Garmon doctrine, a doctrine named after the case of San Diego Bldg. Trades Coun. v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959) (“Garmon”). The Superior Court for Clark County granted Defendants’ CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Three separate (and independent) bases preclude a finding of

preemption in this case and the Superior Court erred in granting Defendants' motion and dismissing Kilb's action.

First, since Kilb had been employed by Defendants as a supervisor, he was not entitled to the protections of the Act, nor eligible to pursue administrative remedies before the National Labor Relations Board ("NLRB"). Therefore, the Garmon preemption doctrine does not apply to Kilb's current case. Second, even if Kilb was within the provisions of the Act (which he is not), the Garmon analysis would not support preemption in this case, because the issues raised by the current action are not identical to the issues that would face the NLRB, which is required under Garmon. Third, notwithstanding the first two points, preemption is inappropriate in this case in any event because Kilb's claim falls squarely within at least one (and probably both) of the widely recognized exceptions to the Garmon doctrine.

Overall, especially given Washington courts' disfavor of preempting their own jurisdiction and the fact that the burden of proving preemption was on the Defendants, the Superior Court erred in granting Defendants' motion. The NLRB is not an available forum to Kilb. The Superior Court's ruling should be reversed and the case remanded, so

that Kilb can have his day in Court and, more fundamentally, a venue in which to seek recourse for his claim.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments Of Error.**

1. The trial court erred by entering an order granting Defendants' CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and entering a general judgment of dismissal based thereon for each of the following reasons:

a. Kilb, as a supervisor, is not covered under the Act, because he is not an "employee" as defined by the Act;

b. The Garmon preemption doctrine does not apply to Kilb, because the issues arising out of Kilb's claim for wrongful discharge in violation of Washington public policy are not identical to the issues that would be presented to the NLRB; and

c. Even if Kilb was an "employee" covered by the Act and even if the Garmon preemption doctrine otherwise would apply, preemption is inappropriate in this case because the "peripheral concern" and/or "local concern" exceptions to the Garmon doctrine apply to Kilb's current claim.

**B. Issues Pertaining To Assignments Of Error.**

1. Is a claim for wrongful discharge in violation of public policy of the State of Washington preempted under the Garmon doctrine such as to deprive the Superior Court of subject matter jurisdiction where it is filed by a supervisor whose discharge is not redressable under the Act or through the NLRB? (Assignment of Error 1a).

2. Is a claim for wrongful discharge in violation of public policy of the State of Washington preempted under the Garmon doctrine such as to deprive the Superior Court of subject matter jurisdiction where the issues facing the Superior Court arising out of the wrongful discharge claim are not identical to the issues that would be considered by the NLRB in response to an administrative complaint under the Act? (Assignment of Error 1b).

3. Is a claim for wrongful discharge in violation of public policy of the State of Washington preempted under the Garmon doctrine such as to deprive the Superior Court of subject matter jurisdiction where either:  
(i) the “peripheral concern” exception to the Garmon doctrine applies because redressing injuries to a supervisor is only a peripheral concern of the Act; or (ii) the “local concern” exception to the Garmon doctrine

applies because the employer's discharge of the supervisor directly contravenes local concern rooted in well-established public policy of the State of Washington as set forth in statutes and case law? (Assignment of Error 1c).

### **III. STATEMENT OF THE CASE**

#### **A. Background Facts.**

First Student hired Kilb on or about August 15, 2005 to work as a Contract Manager to supervise First Student's Gresham, Oregon bus routes. Kilb's two interviews for employment and the completion of his hiring paperwork occurred at First Student's regional office in Vancouver, Washington, which is the office out of which Kilb's supervisors worked. CP #3 (Complaint) at ¶ 6.

Starting in or about the fall of 2006, Kilb was repeatedly informed by his supervisors at First Student that the bus drivers within the company were in danger of being unionized and that First Student did not want that to happen. During subsequent conference calls and at meetings, First Student's Region Vice President warned Kilb and other managers 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. During these

initial group meetings, Kilb was told that the First Student Gresham location was not yet a known target of the unions. CP # 3 at ¶ 7.

Eventually, it became known amongst the management of First Student that the bus drivers at the Gresham location, among others, were a specific target of the labor unions, particularly the SEIU and the Teamsters. Thereafter, Kilb was contacted on multiple occasions by First Student's Region Vice President, had regular and repeated contact with First Student's Region Operations Manager, and communications with First Student's Vice President of Human Resources about the union activity in the region, what First Student planned to do to stop it, and what was expected from Kilb to suppress and interfere with the union activity at the Gresham location. CP #3 at ¶ 8.

At a meeting in late 2006, First Student management explained in detail First Student's "official" position on unionization which was allegedly contained in a purported "neutrality agreement" apparently reached between First Student and one or more national labor unions. This "neutrality" position, which was the position managers were to outwardly take in public, apparently allowed First Student to state its position on unionization but disallowed any negative actions or disparagement of the unions. At the same time, it was expressly made clear to Kilb that much more hardline tactics must be used in order to prevent the unions

from infiltrating First Student. Specific examples of previously utilized hardball anti-union tactics were provided to Kilb. CP #3 at ¶ 9.

Also in late 2006, Kilb was told by First Student's Region Vice President that Kilb needed to take affirmative action in order to protect First Student from becoming unionized. First Student told Kilb to visit anti-union websites to find information and suggestions for use in countering the SEIU campaign that had started in the Gresham district. Among other things, First Student told Kilb 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 visit anti-union websites for additional materials, and directed Kilb to discretely leave these materials where the employees in Kilb's district would find them and to distribute them to several particular employees who would assist in distributing them to the drivers. First Student told Kilb that there could be no evidence that the materials came from First Student management or else First Student would deny any involvement and terminate Kilb for getting caught. First Student directed Kilb to remove any pro-union posters or literature found at the First Student locations. CP #3 at ¶ 10.

After the union filed a petition for a vote to be held in the Gresham office on whether or not the bus drivers would unionize, Kilb again contacted the Region

Vice President to update First Student on the anti-union efforts Kilb was undertaking at First Student's direction and to confirm the anti-union activities First Student wanted him to undertake. First Student told Kilb to proceed as previously directed. CP #3 at ¶ 11.

During a meeting attended by Kilb in early January, 2007, shortly before the scheduled January 5, 2007 union vote, First Student's Region Operations Manager identified a particular driver as a purported pro-union leader and insisted that she would need to be fired. The union vote at Kilb's branch was close, but the union fell just short of the votes necessary to unionize the drivers at that location. CP #3 at ¶ 12.

Following the vote, several First Student representatives confronted Kilb in his office and stressed how close the vote was and how much more work needed to be done in order to assure that the next union vote would not succeed. First Student handed Kilb a poster with a list of pro-union drivers from the Gresham location and told Kilb to fire them as soon as possible and, in any event, before the next union vote. First Student then took Kilb to dinner to "celebrate" the defeat of the unionization. CP #3 at ¶ 13.

In late summer 2007, First Student's Region Operations Manager telephoned Kilb and instructed him to fire approximately seven pro-union drivers.

When Kilb expressed concern about the legality of terminating these individuals and the persistent and related problem within First Student of driver shortages, the Operations Manager became angry and defensive and restated that Kilb needed to initiate the termination plan immediately. Several weeks thereafter, the same Operations Manager visited the Gresham office and inquired as to the status of the firings she had directed, and was furious to learn that Kilb had not fired any of the designated individuals. Later that afternoon, she told Kilb that it had been the Region Vice President's directive to gradually write-up the designated drivers for infractions and to use such infractions as the basis for their termination. This same firing strategy was communicated to Kilb by the Operations Manager multiple times over the ensuing weeks with increasing urgency. Kilb was hesitant to follow through with the "union busting" activities he was told to do, so he postponed as long as he could. During this time, the Operations Manager, who was one of Kilb's immediate superiors, became increasingly difficult to work with and unreasonably and unjustifiably critical of Kilb both personally and professionally. CP #3 at ¶ 14.

First Student's Region Vice President and Region Operations Manager terminated Kilb 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.**

Kilb filed his Complaint with the Superior Court on June 27, 2008. CP #3. Defendants filed their CR 12(b)(1) motion to dismiss and memorandum in support on August 7, 2008. CP #5 and #6. Kilb filed his Response on September 3, 2008 (CP #10) and the hearing was held before Judge John F. Nichols on September 5, 2008. CP #11. Despite commenting at the hearing that "as much as I would like to give it to the feds -- . We may be stuck with it." (RP at 13:10-11), Judge Nichols entered on June 18, 2009 an order granting Defendants' motion to dismiss under CR 12(b)(1).<sup>1</sup> CR #13. The Court entered a General Judgment of Dismissal on June 18, 2009. CR #14. Kilb filed his Notice of Appeal to this Court on July 14, 2009. CR #15.

**IV. LEGAL STANDARDS**

**A. Motion To Dismiss For Lack Of Subject Matter Jurisdiction.**

Whether a particular court has subject matter jurisdiction is a question of law reviewed de novo. Wright v. Colville Tribal Enter. Corp., 159 Wn.2d 108,

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<sup>1</sup> The approximately 8 month delay between the hearing and the Court's issuance of its decision is unclear. The letter opinion was issued in response to a joint letter from counsel for both parties inquiring as to the status of the ruling. See CP # 12.

118-19, 147 P.3d 1275 (2006) cert. dismissed, 127 S. Ct. 2161 (2007), Shoop v. Kittitas County, 149 Wn.2d 29, 65 P.3d 1194 (2003) (citing Crosby v. Spokane County, 137 Wn.2d 296, 971 P.2d 32 (1999)).

**B. Preemption Generally.**

Preemption of state law is a purely jurisdictional issue. Beaman v. Yakima Valley Disposal, Inc., 116 Wn.2d 697, 702, 807 P.2d 849 (1991) (“Beaman”) (citing Int’l Longshoremen’s Ass’n v. Davis, 476 U.S. 380, 391 (1986) (“Davis”). Courts “cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously much of this is left to the States.” Beaman, 116 Wn.2d at 702 (quoting Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971)). Washington courts disfavor preempting claims based upon Washington law. See, e.g., Hume v. American Disposal Co., 124 Wn.2d 656, 664, 880 P.2d 988 (1994) (“Hume”). In Hume, the Washington Supreme Court warned:

We begin our analysis of the case at hand with a reiteration of our general prejudice against preemption. Federal preemption can often produce a harsh result, and we are hesitant to find no state jurisdiction absent clear congressional intent.

Hume, 124 Wn.2d at 664 (emphasis added).

### **C. Garmon Preemption.**

Defendants contend that Kilb's action for wrongful discharge in violation of public policy is preempted by the Act under the Garmon doctrine, which applies where "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." Beaman, 116 Wn.2d at 704 (quoting Garmon, 359 U.S. at 244-45). Section 7 of the Act gives "[e]mployees 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." 29 U.S.C. § 157 (Copy in Appendix). Section 8 identifies as "unfair labor practices," among other things, employers' interference with, restraint, or coercion of employees engaging in concerted activity or exercising rights guaranteed in Section 7. 29 U.S.C. § 158 (Copy in Appendix).

The United States Supreme Court has refused to apply the Garmon preemption doctrine in a "literal, mechanical fashion":

inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

Hume, 124 Wn.2d at 663 (quoting Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 302 (1977)). Before a state cause of

action is preempted, the party asserting preemption has the burden to “put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act.” Davis, 476 U.S. at 396-98.

Additionally, the Supreme Court has developed two independent exceptions to the Garmon doctrine: (1) “where the activity regulated was a merely peripheral concern of the [Act],” or (2) “where the regulated conduct touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not [be inferred] that Congress had deprived the States of the power to act.” Hume, 124 Wn.2d at 663-64 (quoting Garmon, 359 U.S. at 243-44 (footnote and citation omitted)).

## V. ARGUMENT

### A. **The Superior Court Erred In Determining That Kilb Was Covered Under The Act, Because Kilb Was A Supervisor And Not An “Employee.”**

In reaching its decision to dismiss Kilb’s claim on the basis that the claim was preempted by the Act, the trial court necessarily determined that Kilb was covered under the Act and could have filed a complaint with the NLRB. This finding was in error, because Kilb was a supervisor and, therefore, did not fall within the Act’s definition of “employees” eligible to file a complaint with the NLRB.

As Washington’s appellate courts have expressly recognized, the determination of whether or not a particular party’s claim is preempted by the Act is dependent, first and foremost, on the parties’ status under the Act’s various definitions. Hotel Employees and Restaurant Employees, Local 8 v. Jensen, 51 Wn. App. 676, 685, 754 P.3d 1277 (Div I 1988) (“Hotel Employees”). In Hotel Employees, Division One held as follows:

We hold that the parties’ status is material to the determination of preemption under the NLRA. Only certain parties are subject to the prohibitions and protections of the NLRA. Preemption under the *Garmon* line of cases concerns conduct arguably protected under section 7 of the NLRA, . . . or arguably protected under section 8 . . . . Section 7 details the rights of employees; section 8 prohibits certain conduct on the part of employers, employees, and labor organizations. Under the language of the act, no other party is subject to its proscriptions. \* \* \*

***We hold that only those parties named in the act, i.e., employers, employees and labor organizations, are subject to the act and the jurisdiction of the NLRB.***

51 Wn. App. at 685-86 (emphasis added).

Section 7 of the Act only applies to “employees,” which are expressly defined to exclude “supervisors.”<sup>2</sup> 29 U.S.C. § 152(3) (“Employee . . . shall **not**

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<sup>2</sup> A “supervisor” means “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is

include . . . any individual employed as a supervisor.”) (emphasis added). As the United States Supreme Court has explained, “[s]upervisors as defined in this section are expressly not considered to be employees,” and “[o]nly employees . . . are given rights under § 7 of the Act . . . .” Davis, 476 U.S. at 383 n. 1. “Under the Act, an employer does not commit an unfair labor practice under § 8(a)(3) if it fires a supervisor for union-related reasons: An employer ‘is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union.’” Id., n. 4. “The discharge of a supervisor violates the Act only where it interferes with the exercise of employees’ Section 7 rights.” Pontiac Osteopathic Hosp., 284 NLRB 442 (1987).

Though a very limited number of cases before the NLRB have tangentially addressed the discharge of supervisors, those cases are clearly distinguishable from the current case, because they primarily involved unfair labor practice claims of covered non-supervisory employees and/or unions, which covered entities initiated the proceedings. For example in the only two cases cited in Defendants’ Memorandum before the Superior Court on this issue, the allegations concerning the discharged supervisors were only a small part of the primary allegations

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not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11) (Copy in Appendix).

forming the basis of the complaints, which directly implicated aggrieved non-supervisory employees. See Greenwich Air Services, 323 NLRB 1162 (1997) (basing finding of violations of Act on, among other things, “interrogating its *employee* about his Union activities, by informing its *employee* that he was under surveillance regarding Union activity; by threatening its *employee* that he may be discharged because of Union activities; by ordering its *employee* to desist from Union activities; by threatening its *employee* with reprisals because of suspected Union activities . . . .” (emphasis added)); Phoenix Newspapers, 294 NLRB 47 (1989) (basing ruling on similar findings regarding multiple instances of direct unfair labor practices against non-supervisory *employees*). In those cases, the NLRB grievances were initiated by employees and the effect on the supervisors was only implicated after-the-fact.<sup>3</sup>

Washington’s courts have not directly addressed this issue, but several other state courts facing this situation have refused to apply the Garmon preemption doctrine where the aggrieved plaintiff was a supervisor. For example, in Smith v. CIGNA Healthplan of Arizona, 203 Ariz. 173, 52 P.3d 205 (2002),

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<sup>3</sup> See also Parker-Robb Chevrolet, Ind. v. NLRB, 262 NLRB 402, 403 (1982) (“In all these situations, however, the protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees’ exercise of their Section 7 rights.”).

the Arizona court reversed the trial court's summary judgment in favor of the defendant employer on the basis of NLRA preemption. The appellate court explained that "a supervisor is not an employee explicitly covered by the Act; therefore, if a plaintiff was employed as a supervisor, 'the conduct at issue was [not] arguably protected or prohibited by the [Act] . . . and there is no preemption.'" Smith, 203 Ariz. at 177, 52 P.3d at 209 (quoting Davis, 476 U.S. at 394)). In that case, the Smith court found that the employer:

failed to carry its burden before the trial court to 'put forth enough evidence to enable [the] court to conclude that [Smith's] activity [was] arguably subject to the Act. Rather, the record clearly reflects that Smith in fact had been a supervisor under the Act while employed by CIGNA. Therefore, her conduct was not protected by the Act, and her state law claim was not preempted.

Smith, 203 Ariz at 178, 52 P.3d at 210 (internal citations omitted).

Defendants in the current case do not cite any statute or regulation (and Kilb is unaware of any authority) providing a basis for a supervisor acting alone to initiate a complaint before the NLRB without the involvement of non-supervisory "employees" with "unfair labor practices" claims of their own. In fact, as the United States Supreme Court has recognized on multiple occasions, a finding of federal preemption under the Act is inappropriate "where the injured party has no means of bringing the dispute before the Board." Davis, 476 U.S. at 393, n. 10; see also Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) ("Sears");

Longshoremens v. Ariadne Shipping Co., 397 U.S. 195, 201-202 (1970) (White, J. concurring).

Here, there can be no dispute that Kilb was employed at all material times as a supervisor.<sup>4</sup> Accordingly, Kilb was not a covered “employee,” and is not entitled to the protections of section 7 of the Act or to assert a claim for unfair labor practice under section 8. 29 U.S.C. §§ 152(3) and (11), 157, 158. Therefore, Kilb is not even arguably covered by the Act and his current claims are not subject to preemption under Garmon. This ends the Court’s preemption inquiry.

Where, as here, the Superior Court rules to the contrary, Kilb is left without a remedy of any kind, because as a supervisor he is ineligible to commence on his own a complaint before the NLRB. Though it could potentially have been argued that Kilb’s discharge may have been considered by the Board in connection with a statutorily-recognized unfair labor practice claim brought against Defendants by an actual employee or an aggrieved eligible union, no such “employee” or “labor organization” has filed a complaint against Defendants that

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<sup>4</sup> Defendants did not challenge Kilb’s status as a supervisor below. However, even if they had, the Superior Court’s determination of whether or not Kilb was a supervisor under the Act raises a question of fact clearly inappropriate for a CR 12(b) motion to dismiss. NLRB v. Griggs Equipment, Inc., 307 F.2d 275, 279 (5th Cir. 1962); NLRB v. Meenan Oil Co., L.P., 139 F.3d 311, 317 (2d Cir. 1998).

could in any way implicate Kilb's allegations, and the time for doing so has likely passed.<sup>5</sup>

In dismissing Kilb's action on the basis of preemption, the Superior Court necessarily erred as a matter of law in determining that Kilb was an "employee" under the Act who would be eligible to file an administrative complaint with the NLRB. The Court should reverse this erroneous decision and remand the case to the trial court.

**B. The Superior Court Erred In Finding Preemption Under Garmon, Because The Issue Raised By Kilb's Wrongful Discharge Claim Is Not Identical To The Issues That Could Be Presented To The NLRB.**

Even if Kilb was entitled as a supervisor to the protections of the Act, or eligible to bring a charge for unfair labor practices before the NLRB (which he is not), the Garmon doctrine does not apply to preempt the current action, because it does not present an identical controversy to what would be considered by the NLRB. The trial court's ruling to the contrary was in error.

The "critical determination for preemption purposes is whether a state or federal claim involves an identical controversy to that which could have been brought before the NLRB." Hotel Employees, 51 Wn. App. at 679 (citing Sears,

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<sup>5</sup> 29 U.S.C. § 160(b) (providing that in most cases, unfair labor practices charge must be filed with NLRB within 6 months of the violation).

436 U.S. at 197); Beaman, 116 Wn.2d at 709 (“Thus, the ‘critical inquiry’ under Garmon is whether controversy presented to the state court is identical with that which could be presented to the NLRB.” (emphasis in original)).

Defendants asserted below that (if he was entitled to the protections of or eligible to bring an action under the Act) Kilb arguably could have asserted under section 8 that Defendants’ actions in discharging Kilb served to “interfere with, restrain, or coerce employees in the exercise of their rights.” 29 U.S.C.

§ 158(a)(1). Even if this was accurate (which it is not), the Washington Court of Appeals has already determined that for preemption purposes such an inquiry is not identical to what would be asserted before the NLRB. Brundridge v. Fluor Federal Services, 109 Wn. App. 347, 360-61, 35 P.3d 389 (Div III 2001)

(“Brundridge”). In Brundridge, the defendant employer argued the plaintiffs’ state law claims for wrongful discharge in violation of Washington public policy were preempted under Garmon. Brundridge, 109 Wn. App. at 359. Division Three of the Washington Court of Appeals rejected this preemption argument based upon the finding that the wrongful discharge claims did not involve the identical inquiry as before the NLRB, which is required for preemption:

Washington has a substantial interest in regulating discriminatory employment practices, and this regulation does not threaten undue interference with federal labor law. . . We have already established that no term of the [collective bargaining

agreement] must be interpreted in the resolution of the pipe fitters' claim. Further, the elements for proving wrongful discharge in violation of public policy include (1) existence of a clear public policy; (2) evidence that discouraging the conduct in which the plaintiffs are engaged would jeopardize the public policy; (3) proof that the public-policy-linked conduct caused the dismissal; and (4) no overriding justification for the dismissal. The clarity element requires evidence that the employer's conduct contravened the "letter or purpose of a constitutional, statutory, or regulatory provision or scheme." In establishing their claim, the pipe fitters will necessarily cite constitutional, statutory, and/or regulatory laws evidencing Washington's interest in protecting the health and safety of its workers and citizens.

***Ultimately, the claim of wrongful discharge in violation of public policy is different from any claim that could have been brought before the NLRB.*** The claim does not implicate collective bargaining or unionization.

Brundridge, 109 Wn. App. at 360 (quoting Ellis v. City of Seattle, 142 Wn.2d 450, 459 (2000) (quoting Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)) (other internal citations omitted, emphasis added)).

The same is true in the current case. In order for Kilb to prevail on his claim of wrongful discharge in violation of public policy, he will prove the following: (1) the existence of a clear public policy in Washington; (2) evidence that discouraging the conduct in which Kilb was engaged would jeopardize the State's public policy; (3) proof that the public-policy-linked conduct caused the dismissal; and (4) that Defendants have no overriding justification for the dismissal. Thompson, 102 Wn.2d at 232. "In determining whether a clear

mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision of scheme. Prior judicial decisions may also establish the relevant policy." Thompson, 102 Wn.2d at 232. In discussing this requirement, the Washington Supreme Court has also noted that "public policy concerns what is right and just and what affects the citizens of the State [of Washington] collectively." Dicomes v. State, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989).

As cited in Kilb's Complaint, and as discussed in more detail below, the State of Washington has its own clearly established public policy against retaliating against supervisory employees for refusing to commit illegal acts, including acts in contravention of employees' rights to organize. See RCW 49.36.010, 49.32.020 (Copies in Appendix); Complaint at ¶ 16; see also Bravo v. The Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995) ("This Court has held both that RCW 49.32.020 confers substantive rights upon employees to be free from interference, restraint, or coercion, and that the statute enunciates an important public policy of the State of Washington."). The existence of this Washington policy, among other things, will be a focus of the trial court's inquiry in this case.

On the other hand, if Kilb was eligible as an “employee” to initiate a charge against Defendants before the NLRB, the Board’s determination would be restricted to construing federal statutes and regulations to determine whether an “unfair labor practice” was committed. See 29 U.S.C. §§ 152, 157, 158. As the Court of Appeals determined in Brundridge, “the claim of wrongful discharge in violation of public policy is different from any claim that could have been brought before the NLRB.” 109 Wn. App. at 360. The two controversies certainly fall well short of being “identical,” which showing Defendants are required make before a Washington court will reach its disfavored conclusion of preemption. Hume, 124 Wn.2d at 664 (describing Washington’s “general prejudice against preemption”). The Defendants did not carry their burden in this case and the trial court erred as a matter of law in granting the motion to dismiss based upon the Garmon Doctrine.

C. **In Any Event, Kilb’s Action Falls Within (At Least) One Of The Two Established Exceptions To The Garmon Doctrine. The Trial Court Erred In Failing To Apply These Exceptions.**

Even if the Court were to determine that Kilb was an “employee” under the Act (which he is not) and that the current dispute involves “identical” claims to what the NLRB would consider (which they are not), the current case cannot be preempted, because Kilb’s cause of action for wrongful discharge in violation of

public policy fits within one (or both) of the recognized exceptions to the Garmon preemption doctrine. Again, even if the claim at issue is potentially subject to federal regulation under Sections 7 and 8 of the Act, “preemption of state jurisdiction is not required when (1) the activity regulated is merely a peripheral concern of the NLRA or (2) the regulated conduct touches interests . . . deeply rooted in local feeling and responsibility . . . .” Delahunty v. Cahoon, 66 Wn. App. 829, 838-39, 832 P.2d 1378 (Div. III 1992) (citing Garmon, 359 U.S. at 243-44; Beaman, 116 Wn.2d at 704-705). Both exceptions apply in this case and the Superior Court erred in failing to apply at least one of them to save Kilb’s claim from dismissal.

(1) The “Peripheral Concern” Exception Applies.

First, as is evident from the discussion in section A above, the Act is (at most) only peripherally concerned with the discharge of supervisors. Supervisors are expressly excluded from the definition of “employee,” which is the only group entitled to protection under the Act. Davis, 476 U.S. at 383, n. 1; 29 U.S.C. §§ 152, 157. This is acknowledged throughout the United States Supreme Court’s discussions of the Garmon doctrine. See, e.g., Davis, 476 U.S. at 383; accord Hinton v. Sigma-Aldrich Corp., 93 S.W.3d 755, 758 (2002) (“It is undisputed that a supervisor is not directly entitled to the protection that the NLRA extends to

employees. Congress excluded supervisors from the definition of ‘employee’ in the NLRA so that an employer could not be deprived of the undivided loyalty of its supervisors.”). If Congress was primarily concerned with protecting the rights of supervisors like Kilb and intended to completely preempt the field with respect to their discharge where it may touch upon labor relation issues, certainly the Act would specifically include supervisors within the class of protected “employees,” and Sections 7 and 8 would specifically include as violations the discharge of supervisors in these circumstances. Since this is not the case and, at most, the NLRB is only peripherally concerned with the discharge of supervisors, claims like Kilb’s current claim are excepted from preemption. The Superior Court erred in not applying the peripheral concern exception to the Garmon doctrine and in dismissing Kilb’s action.

(2) The “Local Concern” Exception Applies.

Notwithstanding the applicability of the first Garmon exception, the second exception is equally (if not more) directly applicable to the current case, because the wrongful discharge of Kilb directly contravenes well-established public policy of the State of Washington regarding the rights of its citizens. The Washington Supreme Court applied this exception illustratively in the case of Hume v. American Disposal Co., in which four employees sought damages from

their former employer for constructive discharge in violation of public policy as enunciated in Washington statutes governing overtime pay. Hume, 124 Wn.2d

665. In rejecting the defendant's preemption argument, the Supreme Court held:

[W]e emphasize that RCW 49.46.100 contains a clear legislative expression condemning retaliation by an employer against an employee who asserts a claim for overtime pay as contrary to the public interest. As we recognized in *Thompson v. St. Regis Paper Co.*, *supra*, the tort of discharge against public policy was designed to balance the interests of both the employer and employee and to *vindicate an important public policy*. The Plaintiffs' *claims are based upon a statute which reflects a legitimate local concern rooted in a strong and clearly articulated public policy*.

We find, therefore, that this cause of action falls under an exception to the *Garmon* preemption rule and that the trial court properly exercised jurisdiction over these claims.

Id. (emphasis added).

Kilb's claim for wrongful discharge in violation of public policy, which is based in large part on Washington statutes and prior case law, presents the exact same situation as faced the Supreme Court in Hume. Here, the statute expressly setting forth the State of Washington's public policy is RCW 49.32.020, which provides:

the *public policy of the state of Washington* is hereby declared as follows:

WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the

individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have ***full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents . . . .***

RCW 49.32.020 (emphasis added).

The Washington appellate courts have recognized that a claim for wrongful discharge may be stated by those terminated for exercising rights protected by RCW 49.32.020. Bravo, 125 Wn.2d at 745; Lund v. Grant County Public Hospital District No. 2, 85 Wn. App. 223, 932 P.2d 183 (Div III 1997). The Bravo case involved claims very similar to Kilb's current claims, and a discussion that directly parallels the Supreme Court's discussion in Hume regarding Washington's local interest in regulating these employment relationships.

In Bravo, a non-unionized collective of workers were fired for going on strike. They alleged violation of RCW 49.32.020 and asserted a claim for the "tort of wrongful discharge in violation of public policy enunciated in that statute." The Washington Supreme Court reversed the trial court's dismissal under CR 12(b)(6) for failure to state a claim, finding:

This court has held both that RCW 49.32.020 confers substantive rights upon employees to be free from interference, restraint, or coercion, and that the statute enunciates an *important public policy of the State of Washington*: “[RCW 49.32.020], in expressly declaring the public policy of this state conferred actionable rights on employees, among which rights were that they be free from coercion, interference and restraint from and by their employer in organizing or joining a labor union and in designating such union as their agent for collective bargaining.” [internal citations omitted] It follows from the Legislatures’ declaration of intent, and this court’s construction of the statute both as granting employees substantive rights and as expressing an important public policy, *that a discharge which violates RCW 49.32.020 also gives rise to a tort of discharge in violation of a clear mandate of public policy. The Court of Appeals’ conclusion to the contrary is reversed.*

Bravo, 125 Wn.2d at 758 (internal citations omitted, emphasis added).

Though Kilb is slightly differently situated than the employees in Bravo, there can be no question whatsoever that Defendants’ discharge of Kilb violates the clearly expressed “important public policy of the State of Washington” to prevent interference, restraint or coercion of employees’ rights to organize or join a labor union recognized in that case and the underlying statutory scheme. Bravo, 125 Wn.2d at 758. Like in Hume and Bravo, this statute and prior case law reflects a “legitimate local concern rooted in a strong and clearly articulated public policy.” Hume, 124 Wn.2d 665. Adjudication of claims contravening this Washington policy should be overseen by the courts of this State, not by a federal administrative body like the NLRB, especially where a supervisor like Kilb would

be left without a remedy if Washington's courts decline to recognize jurisdiction over and hear this case. Kilb is a citizen of Clark County, Washington and had his rights violated in contravention of Washington's public policy. CP #3 at ¶¶ 2, 3, 16. The current tort action falls squarely within the second exception to the Garmon doctrine, and is not preempted by the Act. The Superior Court erred in failing to apply this exception and in dismissing Kilb's action on the basis of preemption.

## VI. CONCLUSION

Based upon the foregoing, the Court should reverse the Superior Court's dismissal of Kilb's action for lack of subject matter jurisdiction and should remand the action to the Superior Court for a trial on the merits.

Respectfully submitted this 7th day of October, 2009.

STEWART SOKOL & GRAY LLC



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No. 39564-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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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.

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APPENDIX TO  
BRIEF OF APPELLANT

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STEWART SOKOL & GRAY LLC

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## U.S. Code collection

TITLE 29 > CHAPTER 7 > SUBCHAPTER II > § 152

### § 152. Definitions

When used in this  
subchapter—

- (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.
- (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
- (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.
- (4) The term "representatives" includes any individual or labor organization.
- (5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
- (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
- (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.
- (8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.
- (9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing,

maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

**(10)** The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

**(11)** The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

**(12)** The term "professional employee" means—

**(a)** any employee engaged in work

**(i)** predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;

**(ii)** involving the consistent exercise of discretion and judgment in its performance;

**(iii)** of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

**(iv)** requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

**(b)** any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

**(13)** In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

**(14)** The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.<sup>[1]</sup>

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## U.S. Code collection

TITLE 29 > CHAPTER 7 > SUBCHAPTER II > § 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.

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## U.S. Code collection

TITLE 29 > CHAPTER 7 > SUBCHAPTER II > § 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<sup>[1]</sup> 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.

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**RCW 49.32.020**  
**Policy enunciated.**

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the state of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the state of Washington is hereby declared as follows:

WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the state of Washington are hereby enacted.

[1933 ex.s. c 7 § 2; RRS § 7612-2.]

**RCW 49.36.010**

**Unions legalized.**

It 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 carry out their legitimate purposes by any lawful means.

[1919 c 185 § 1; RRS § 7611.]

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

No. 39564-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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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.

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CERTIFICATE OF SERVICE  
OF  
BRIEF OF APPELLANT

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STEWART SOKOL & GRAY LLC

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Thomas A. Larkin, WSBA #24515  
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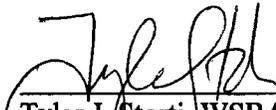
**CERTIFICATE OF FILING AND SERVICE**

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 Stewart Sokol & Gray LLC. I caused to be filed via U.S. First Class mail in the above-entitled Court: BRIEF OF APPELLANT and APPENDIX. I further caused the same to be delivered via U.S. First Class mail and addressed to the following opposing counsel:

Maryann Yelnosky-Smith, WSBA #25773  
Devra S. Hermosilla, WSBA #31169  
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DATED this 7th day of October 2009.

  
\_\_\_\_\_  
Tyler J. Storti, WSBA #40341  
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