Federal Preemption of State Wrongful Discharge Actions

Raymond L. Wheeler†
Kingsley R. Browne††

This article discusses the possibility that state remedies for wrongful discharge actions may interfere with our federal labor law policy. The authors argue that three elements of that policy are affected: the NLRB's primary jurisdiction over unfair labor practices; preference for resolution of labor disputes through arbitration; and, application of a uniform federal law to collective bargaining agreements. The paper suggests a framework for determining which state-law actions should be preempted by federal labor law legislation and which should proceed as state actions.

I

INTRODUCTION

Since at least the latter part of the nineteenth century, the common law rule in the United States has been that employment for an unspecified term was deemed a hiring at will, and it was generally held that the relationship could be terminated at any time by either party.1 During the last twenty-five years, and at a startling rate over the last five or so years, the doctrine of employment-at-will has been seriously eroding, and new limits are being placed on an employer’s discretion to terminate his employees.2 Although in many cases there are no effective limits on a state’s power to modify the nature of the employment relationship and provide remedies for breaches of the obligations it creates, often the state’s action

† Partner, Morrison & Foerster, San Francisco, California; B.A., University of Texas, 1967; J.D., Harvard University, 1970.

implicates the national labor policy. As the protections created by the states increase, the potential for conflict with federal law, and with it the prospect of federal preemption of state law, also increases. The scope of the potential preemption of wrongful discharge actions varies, depending both on the nature of the wrongful discharge theory that is invoked and on whether the discharged employee is covered by a collective bargaining agreement.

Three distinct elements of the federal labor policy may be affected by state wrongful discharge actions. The first is the federal policy reposing primary jurisdiction over unfair labor practice disputes in the National Labor Relations Board ("NLRB" or "Board"). Section 7 of the National Labor Relations Act ("NLRA" or "Act") declares the right of employees to engage in self-organization, collective bargaining, and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."\(^3\) Employer interference with these rights is declared an unfair labor practice by section 8(a) of the Act.\(^4\) Consequently, an employer's interference with employee attempts to form a union or to engage in concerted activity to improve the terms and conditions of employment constitutes an unfair labor practice, and any remedy must ordinarily be sought before the Board. As a result, a state wrongful discharge action based upon an employer's interference with section 7 rights would generally be preempted by federal law.

This article advocates a narrow exception to the preemption of such cases where the state is attempting to advance a policy unrelated to the policies animating section 7. Thus, where a state policy favoring employee protests over working conditions is relied upon, a wrongful discharge action should be preempted, while an action involving a non-protest related policy, such as employee health or safety, should not be.

Although the rule set forth in the above paragraph sufficiently safeguards federal labor policy in cases brought by non-union employees, and also safeguards the federal policy with regard to the section 7 rights of union employees, the second element of federal labor policy—the preference for resolution of disputes through arbitration—alters the analysis when it comes to employees covered by a collective bargaining agreement. Most wrongful discharge actions involve some variant of a claim that the discharge was not for "just cause." Since most collective bargaining agreements contain both a provision requiring discharges to be for cause and a provision for grievance and arbitration of disputes, most such claims could be arbitrated. The Supreme Court has repeatedly stressed the centrality of arbitration to the collective bargaining process

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4. Id. § 158(a).
and the role of the arbitrator as the "proctor" of the agreement.\(^5\) Bypassing the arbitration process in favor of seeking redress in the courts may have a substantial detrimental effect on the use of arbitration. Therefore, in most circumstances such disputes should be resolved through arbitration. However, in rare circumstances, preventing a discharged employee from seeking redress in the courts might significantly impair a state's ability to further its important and legitimate policies. Where such a showing can be made, the state's interest may outweigh the federal interest and a state-law claim should be allowed to proceed.

The third federal policy that is potentially endangered by state wrongful discharge actions is the policy of applying a uniform federal law to the construction of collective bargaining agreements. Section 301 of the Labor Management Relations Act ("LMRA") provides a federal cause of action for breach of a collective bargaining agreement.\(^6\) Although such claims may be brought in state or federal court, they must be resolved on the basis of federal law.\(^7\) Consequently, a state-law claim by an employee covered by a collective bargaining agreement that his discharge violated an implied-in-fact contract or an implied-in-law covenant of good faith and fair dealing must be held preempted. Otherwise, the obligations of parties to collective bargaining agreements would be governed by the vagaries of state contract or tort law, a result that the Supreme Court has consistently rejected.\(^8\)

This article attempts to provide a framework for determining what kinds of state-law actions should be held preempted and what kinds should be permitted to proceed.

\(\text{A. Theories of Wrongful Discharge}\)

Three theories of wrongful discharge have developed. Under the first, and oldest, of these theories, the discharged employee claims that her discharge violated the "public policy" of the state. These cases most frequently involve claims that the employee was discharged in retaliation for filing a workers' compensation claim.\(^9\) Other public policy cases in-

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5. See infra text accompanying notes 138-46.
7. See infra text accompanying notes 147-48.
volve claims by employees that they were discharged for refusing to violate the law,\(^\text{10}\) reporting violations of the law,\(^\text{11}\) engaging in union organizing\(^\text{12}\) or strike misconduct,\(^\text{13}\) serving on jury duty,\(^\text{14}\) or protesting working conditions.\(^\text{15}\) Other claims have been based on allegations of discrimination in violation of public policy.\(^\text{16}\) When employees allegedly discharged for these reasons are covered by a collective bargaining agreement, the question arises whether their lawsuits are preempted by federal law and whether their exclusive remedy lies in the grievance and arbitration procedure under that agreement, since most agreements contain a clause limiting the grounds for discharge to "just cause." Even where no union contract is involved, some of these claims parallel the prohibitions and protections of the NLRA and thus may be subject to the primary jurisdiction of the Board.

A second and distinct theory of wrongful discharge is one based upon an implied-in-fact contract under which the employer is deemed to have promised not to discharge the employee without good cause. This implied contract is said to arise from various factors, such as the duration of employment, commendations and promotions the employee has received, lack of criticism of his work, assurances that if he was loyal his job would be secure, and the employer's personnel policy or practice of not discharging employees without cause.\(^\text{17}\)

A third theory of wrongful discharge is based upon the implied covenant of good faith and fair dealing. Originally developed in the insurance context, the covenant is intended to compensate for the "inherently unequal bargaining positions" of the parties.\(^\text{18}\) The covenant imposes on the stronger party "a heightened duty not to act unreasonably in breach-

\begin{itemize}
  \item \(^\text{14}\) Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).
\end{itemize}
ing the contract, and to consider the interest of the other party as tanta-
amount to its own. The covenant is said to exist in all contracts, but
its true significance lies in the fact that under some circumstances an
action for its breach sounds in tort and will therefore support an award
of compensatory and punitive damages.

A breach of the covenant will sound in tort if certain characteristics
are present. These include unequal bargaining positions, inadequacy of
contract damages because the breaching party lacks incentive not to
breach and the non-breaching party is not made whole, and special vul-
nerness on the part of the weaker party that is known to the stronger.
Some courts have suggested that the covenant is not dependent on the
existence of an express or implied contract but rather inheres in the em-
ployment relationship itself.

B. Theories of Federal Labor Preemption

The doctrine of federal preemption derives from the dictum of arti-
cle VI of the United States Constitution that “this Constitution and the
Laws of the United States . . . shall be the supreme Law of the Land.”
There are different ways that a state law may be preempted, but, funda-
mentally, the question is one of congressional intent. Congress may
either expressly preempt state law, or have manifested by implication
an intent to occupy the entire field of regulation. Regardless of
whether congressional intent is found, however, state law is preempted if
it results in an actual conflict between state and federal law. Thus, if it
is impossible to comply with both federal and state law, or if state law
“stands as an obstacle to the accomplishment and execution of the full
purposes and objectives of Congress,” an actual conflict will be found.

The federal labor preemption doctrine under sections 7 and 8 of the
NLRA consists of two strands. The first involves cases that concern con-
doctrine that is actually or arguably prohibited, or actually or arguably pro-
tected, by the Act. The leading case of San Diego Building Trades
Council v. Garmon elucidated the “primary jurisdiction” rationale, re-

20. See Seaman’s Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158,
22. See, e.g., id.
23. See Brown v. Hotel Employees Local 54, 104 S. Ct. 3179 (1984); Fidelity Fed. Sav. & Loan
quiring that when the same controversy may be presented to a court or the NLRB, it must be presented to the latter.\textsuperscript{31} The Supreme Court held that a state court was barred from awarding damages to an employer for peaceful picketing by a union that had not been selected by the employees as a bargaining agent. The Court held that the determination of whether the union's conduct constituted an unfair labor practice was for neither state nor federal courts to make; instead, the courts "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."\textsuperscript{32} On the other hand, the Court recognized that an unbending rule would be unfaithful to principles of federalism, and it held that the primary jurisdiction of the Board would not preempt state regulation when the challenged activity was a merely peripheral concern of the Act or when the regulated conduct "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."\textsuperscript{33}

In \textit{Sears, Roebuck & Co. v. San Diego District Council of Carpenters},\textsuperscript{34} for example, the Court was faced with a claim that certain picketing in violation of state trespass laws could not be enjoined by state courts. The California Supreme Court had held that the trespass claim was preempted because the picketing was arguably protected by section 7 of the Act since it was intended to secure work for union members; on the other hand, it was arguably prohibited by section 8(b)(7)(c) of the Act as recognitional picketing that had lasted for more than thirty days without the union's petitioning for a representation election. The Supreme Court reversed, although it agreed that the picketing was both arguably prohibited and arguably protected by federal law. It examined the "arguably prohibited" and "arguably protected" elements separately. With respect to the "arguably prohibited" branch, the Court held that the critical inquiry is whether the controversy presented to the state court is identical to or different from the one that could have been, but was not, presented to the Board. Only in the former situation, the Court stated, does the state court risk interference with the Board's jurisdiction.\textsuperscript{35} Under the facts of \textit{Sears}, an unfair labor practice charge filed by Sears would have involved an inquiry into the objective of the union's picketing, whereas the only issue in the state court would have been the location of the picketing. Consequently, the justifications for the "argua-

\begin{itemize}
\item \textsuperscript{31} \textit{Id.} at 245.
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.} at 244.
\item \textsuperscript{34} 436 U.S. 180 (1978).
\item \textsuperscript{35} \textit{Id.} at 197.
\end{itemize}
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bly prohibited” branch of Garmon did not preclude the exercise of state jurisdiction.

With respect to the “arguably protected” branch, the Court recognized that considerations of supremacy are implicated to a greater extent when activity is protected than when it is prohibited, since a state’s prohibition of conduct affirmatively protected by federal law interferes with federal policy more than does a state’s prohibition of conduct also prohibited by federal law. However, said the Court, the primary-jurisdiction rationale ordinarily justifies preemption only when it is possible to obtain a Board ruling on the challenged conduct. Since Sears could not directly obtain review of the question whether it had itself engaged in an unfair labor practice by interfering with the union’s section 7 rights, the availability of Board review was solely in the hands of the union. Because the union did not file an unfair labor practice charge, Sears had only three options: 1) permit the pickets to remain on its property; 2) forcibly evict them; or 3) resort to the state courts. Only through the exercise of the third option could Sears obtain an “orderly resolution” of the question.

A finding that Board review is unavailable is not sufficient in itself to allow exercise of state jurisdiction, however, since where there is a significant risk of misinterpretation of federal law and prohibition of protected conduct, a jurisdictional hiatus might be superior to frustration of the national labor policy. In Sears, however, the Court believed it unlikely that the conduct would be found to be protected, and therefore the Court held that the action was not preempted.

The primary-jurisdiction rationale has also been applied to exercises

36. Id. at 200.

37. Id. at 201.

38. Id. at 202.

39. Id. at 203.

40. In Brown v. Hotel Employees Local 54, 104 S. Ct. 3179 (1984), the Court in dictum elaborated on this analysis. It stated, in a general exposition of federal labor preemption, as follows:

If the state law regulates conduct that is actually protected by federal law, however, preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then “[t]he relative importance to the State of its own law is not material ... for the Framers of our Constitution provided that the federal law must prevail.”

104 S. Ct. at 3187 (quoting Free v. Bland, 369 U.S. 663, 666 (1962)). The difficulty with this analysis is that the availability of Board review in Sears should then have been irrelevant to the question of preemption if the union’s conduct had been “protected,” rather than merely “arguably protected.” Thus, the preemption analysis may differ depending upon whether the conduct is actually protected or arguably protected. Indeed, if the state court in Sears had considered the question of preemption under the Brown Court’s mode of analysis, it would have been required to decide whether the union’s conduct violated section 7 in order to determine whether preemption followed “not as a matter of protecting primary jurisdiction, but as a matter of substantive right.” Id. Such an analysis would be in some conflict with the Court’s emphasis in Sears on the fact that the controversy presented to the state court was different from the one that the Board would have considered. The only way to reconcile the two principles is to say that in Sears the state court was without power to entertain the
of state jurisdiction in other kinds of cases, the Court often finding that state actions were not preempted. For example, in *Farmer v. Carpenters*,\(^4\) the Court held that a tort action for intentional infliction of emotional distress brought by a union member against his union was not necessarily preempted. The Court stated that if the conduct that is challenged is unrelated to the arguable unfair labor practice, the action is not preempted, nor is an action preempted if it is based upon the particularly abusive manner in which the unfair labor practice is committed. However, if the action is based solely upon the fact of the unfair labor practice, the Board has primary jurisdiction over the dispute and a state action is preempted.

In *Farmer*, the union member claimed that the union had discriminated against him in hiring-hall referrals because of his dissident activities, that it had breached the hiring-hall provisions of the collective bargaining agreement, and that it had engaged in outrageous conduct causing him severe emotional distress. The Court relied on earlier cases holding actions for *libel*\(^2\) and *violence*\(^3\) not preempted and held that the tort action could be adjudicated "without regard to the merits of the underlying labor controversy."\(^4\) The Court engaged in "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with the federal regulation."\(^5\) Despite the fact that the member's allegations might form the basis for unfair labor practice charges, and despite the potential for interference with the federal scheme, the Court deemed the state's interest in protecting its citizens decisive. Moreover, it noted that the inquiry of the Board would be different from the inquiry of the state courts.\(^6\) The former would focus on whether the union discriminated, while the latter would focus on whether the union intentionally engaged in outrageous conduct without regard to the merits of the underlying labor dispute. Realizing the potential for conflict that remained, the Court cautioned:

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.\(^7\)

The other branch of the NLRA preemption doctrine involves "conduct left by Congress to the free play of economic forces." The Supreme

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\(^{44}\) *Farmer*, 430 U.S. at 300.
\(^{45}\) *Id.*
\(^{46}\) *Id.* at 304.
\(^{47}\) *Id.* at 305.
Court has recognized that by enacting the NLRA, Congress was, to a large extent, providing a mechanism that would allow each side in a labor dispute to attempt to achieve its goals through the exercise of its own economic power. For example, in *Machinists v. Wisconsin Employment Relations Commission*, the Court held that a union's refusal to work overtime was the kind of self-help conduct that Congress intended neither the Board nor the states to regulate. The state had no business interceding on the employer's behalf when the employer was unable to overcome the union's tactics through self-help. The Court stated:

But the economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining."49

In addition to barring state actions that upset the congressionally established balance of power between labor and management with respect to the bargaining process, the preemption doctrine has also been held to preclude, at least to some degree, state regulation of the terms of the agreement reached by the parties. Thus, in *Teamsters v. Oliver*, the Court held that a state could not apply its antitrust laws to prohibit the parties to the labor agreement from carrying out its terms, even though the agreement provided for a minimum rental provision for drivers who drove their own trucks and that provision violated state price-fixing prohibitions. The Court framed the question as "whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain."51 The purpose of the federal Act is to promote collective bargaining, not to dictate the substantive terms upon which the parties might agree.52 It is up to the parties to establish "their own charter for the ordering of industrial relations."53 The Court found no room in the federal scheme for a state policy limiting the solutions that the parties reached regarding wages and working conditions, except in two situations: 1) when Congress has expressly authorized state regulation of the specific subject, and 2) when the state law is designed to protect health or safety. The Court stated:

We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically

49. *Id.* at 149 (quoting NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 495 (1960)).
51. *Id.* at 295.
52. *Id.* See also H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970).
53. 358 U.S. at 295.
to adjust relationships in the world of commerce. The collective bargaining agreement was thus deemed to have the force of federal law and, under supremacy clause principles, to preempt state law to the contrary.

In *Malone v. White Motor Corp.*, \(^{55}\) the Court indicated that the rule established in *Oliver*—that the terms of a collective bargaining agreement have the force of federal law—was still good law, despite criticism of that decision by several commentators. \(^{56}\) The question in *Malone* was whether a state statute altering pension rights and obligations found in a collective bargaining agreement was preempted because it conflicted with the terms of the agreement. The Court acknowledged that the inquiry was governed by *Oliver*, but it held that the case fell within one of the *Oliver* exceptions, because it found express congressional approval of state regulation of pensions in the Welfare and Pension Plan Disclosure Act. \(^{57}\)

It is not clear, however, whether and to what extent the *Oliver* rule has survived the Supreme Court’s recent decision in *Metropolitan Life Ins. Co. v. Massachusetts*, \(^{58}\) which held that neither ERISA \(^{59}\) nor the NLRA preempted a state statute requiring certain minimum mental-healthcare benefits. The appellants relied on *Oliver* for their argument that Congress intended by the NLRA to leave the parties free to reach agreement about substantive contract terms and that a law that interferes with the end result of bargaining is even worse than a law that interferes with the bargaining process. \(^{60}\)

In addressing the appellants’ arguments, the Court observed that in considering the passage of the NLRA, Congress had not considered the specific question of whether state laws affecting terms of collective bargaining agreements were to be preempted, so it turned its attention to the

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\(^{54}\) *Id.* at 297. Of course, federal antitrust principles place some limits upon the terms negotiated by the parties. See generally UMW v. Pennington, 381 U.S. 657 (1965); Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965).


\(^{56}\) See, e.g., Cox, Recent Developments in Federal Preemption, 41 OHIO ST. L.J. 277, 296-300 (1980). One commentator has suggested that the *Oliver* rule is inconsistent with the doctrine restricting Congress’ power to delegate its legislative power to other entities. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (invalidating law permitting majority representatives of labor and management to set minimum wages and maximum hours in coal industry); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating a federal law giving the President complete discretion in prohibiting interstate transportation of oil). In essence, the *Oliver* rule grants private parties to a collective bargaining agreement standardless power to preempt conflicting state regulation and thereby invests them with the federal legislative power. See Note, Private Preemption of State Labor Laws: A Constitutional Objection, 58 TEX. L. REV. 1099 (1980).


\(^{58}\) 105 S. Ct. 2380 (1985).


\(^{60}\) *Id.* at 2396.
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The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions. In enacting the NLRA, the Court noted, Congress was addressing an evil "entirely unrelated to local or federal regulation establishing minimum terms of employment." The Court stated:

No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

The Court then went on to point out the similarities of the case under consideration and Malone. Because the case could be seen as falling into the "public health and safety" exception of Oliver, much of the Court's broad language could be viewed as dictum. Moreover, it is far from clear precisely where the language limiting the scope of the holding to cases involving relatively equal bargaining positions, and to cases involving state purposes not incompatible with the "general goals" of the NLRA will lead. However, it is apparent that the Court would view instances of nonpreemption as exceptions to a generally applicable rule.

Although the Court's holding in Metropolitan Life seems correct, the Court's cavalier treatment of Oliver is unsatisfying. Rather than overruling Oliver, the Court largely ignored it, simply labelling certain unidentified portions of it as dicta. Had the Court been more forthright in what it was doing, it would have left fewer unanswered questions.

Finally, federal preemption may also flow from section 301 of the Labor Management Relations Act, which provides a cause of action for breach of a collective bargaining agreement. Although state and federal courts have concurrent jurisdiction over such actions, federal law provides the rules for decision in both forums. Consequently, states are without power to apply their rules of contract law in the interpretation of collective bargaining agreements.

61. Id.
62. Id. (emphasis added).
63. Id. at 2397.
64. Id. (emphasis added).
67. See id.
II

PREEMPTION OF WRONGFUL DISCHARGE ACTIONS

Perhaps not surprisingly the courts have had difficulty harmonizing the principles of federal labor preemption with the emerging theories of state wrongful discharge law. While there appears to be a recent trend by lower courts toward narrowing the scope of federal preemption as it applies to state wrongful discharge actions, the rationale for doing so has been less than clear. Courts have tended to confuse Garmon's preemption doctrine with its exceptions and have failed to draw clear distinctions between employees covered by collective bargaining agreements and those without union representation. Because of the often conflicting state and federal interests, it is essential to focus more precisely on the various forms in which preemption issues may arise. In some circumstances, the state law may be wholly inconsistent with the dictates of federal law and thus a finding of preemption may be made without considering the magnitude of the state interest. In other cases, there may be a tension between the state's activities and certain aspects of federal labor policy, but not such a clear conflict that it may be concluded that Congress necessarily intended to leave the states powerless to act in the area. In such cases, it is necessary to consider the relative magnitude of the state and federal interests that are involved.

A. Preemption and the Employee Not Covered by a Collective Bargaining Agreement

Wrongful discharge actions predicated upon the theories of implied-in-fact contract or implied-in-law covenants of good faith and fair dealing ordinarily do not raise issues of federal preemption where the discharged employee has no claim to the protection of a collective bargaining agreement. Absent a collectively bargained grievance and arbitration procedure, the federal policies favoring the exclusivity of that procedure are obviously not implicated. However, where a discharge is alleged to have breached some "public policy" of the state, preemption questions may be raised regardless of whether the discharged employee was covered by a collective bargaining agreement. That is, the issue in state court may be whether the employer had an

68. See infra text accompanying notes 130-47.
69. Of course, the employee might contend that the employer lacked cause for the discharge, or that the discharge violated a covenant of good faith and fair dealing, because the employer was motivated by the employee's participation in protected concerted activities. See Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), where the court ignored the fact that plaintiff's breach of covenant action was premised in part on the allegation that he had been terminated because of his union organizing activities.
improper reason for the discharge, which may in turn raise the question whether the employee's conduct was protected by the NLRA. Thus, public policy cases sometimes raise issues that must be analyzed under *Garmon* and its progeny.\(^7\)

Under the rule established in *Garmon*, the threshold preemption inquiry in a suit brought by an employee who is not covered by a collective bargaining agreement is generally whether either the employee's conduct is "arguably protected" or the employer's reason for discharge is "arguably prohibited" by the NLRA. If either, the wrongful discharge action is preempted unless it involves conduct falling within one of the two exceptions—the matter must involve conduct that is of only peripheral concern to the NLRA or conduct that is "deeply rooted in local feeling and responsibility." If it is determined that the challenged conduct was neither arguably protected nor arguably prohibited, there is no occasion to determine whether one of the *Garmon* exceptions applies. Many of the courts dealing with the issue of preemption of wrongful discharge actions have been careless in their analysis and have thereby made the issue appear to be more complex than it need be.

Usually where no union is involved, the preemption issue concerns whether the alleged wrongful discharge is arguably prohibited under the Act because it interferes with the employee's section 7 rights. Stated another way, the question of whether the employer's conduct is arguably prohibited merges into a question of whether the employee activity is "concerted" in nature and for the purpose of either collective bargaining or "other mutual aid or protection."\(^7\)

The definition of "concerted activity" has had a somewhat varying history. For some time the Board adhered to the *Alleluia Cushion*\(^7\) rule, under which an employee asserting statutory rights, even in the "absence of any outward manifestation of support for his efforts" by other employees, was deemed to be engaged in protected concerted activity. Under this rule, *Garmon* preemption was implicated whenever an individual

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\(^7\) Public policy cases may also raise preemption issues under the "free play of economic forces" rationale of cases such as Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). See also Belknap, Inc. v. Hale, 463 U.S. 491 (1983), where the Court refused to hold that discharged permanent replacement workers were barred under the preemption doctrine from suing their former employer in state court for misrepresentation and breach of contract.


\(^7\) *Alleluia Cushion* Co., 221 N.L.R.B. 999 (1975). The Board stated:

"Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."

*Id.* 1000. The Board thereafter applied the rationale of *Alleluia Cushion* to a wide spectrum of individual activities. See, e.g., Triangle Tool & Eng'g, Inc., 226 N.L.R.B. 1354 (1976) (employee disciplined for making complaint to Federal Wage and Hour Division regarding a claimed overtime payment); THE DEVELOPING LABOR LAW 141 n.385 (C. Morris 2d ed. 1983) (collecting cases).
employee in a wrongful discharge action claimed to have been discharged because he had resorted to an administrative agency or otherwise complained to his employer about working conditions that were alleged either to be in violation of some public policy or of presumed concern to other employees. In *Krispy Kreme Doughnut Corp. v. NLRB*, the Court of Appeals for the Fourth Circuit refused enforcement of a Board order that held an employee’s filing of a workers’ compensation claim to be concerted activity, and in general the Courts of Appeals were hostile to the *Alleluia Cushion* rule.

In *Meyers Industries, Inc.* the Board overruled *Alleluia Cushion*. The Board stated that the *Alleluia Cushion* rule inverted the proper mode of analysis, since “Instead of looking at the observable evidence of group action to see what men and women in the work place in fact chose as an issue about which to take some action, it was the Board that determined the existence of an issue about which employees ought to have a group concern.” In *Meyers Industries*, the Board announced an objective standard of concerted activity, under which the General Counsel has the burden of showing that the activity was “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” By overruling *Alleluia Cushion*, the Board substantially reduced the number of activities that could be considered “concerted” and thus considerably narrowed the scope of potential federal preemption. For example, relying on the *Meyers Industries* decision, the Board now takes the position that the filing of a workers’ compensation claim does not constitute concerted activity.

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73. 635 F.2d 304 (4th Cir. 1980).
74. The single most common species of public policy case involves a claim by a terminated employee that she was discharged in retaliation for filing a workers’ compensation claim. See supra note 9 and accompanying text.
75. 268 N.L.R.B. 493 (1980).
76. Id. at 495.
77. Id. at 497 (quoting Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980)). The United States Court of Appeals for the District of Columbia Circuit recently remanded *Meyers Industries* to the Board because it concluded that the Board had erroneously believed its decision to be mandated by the Act. Prill v. NLRB, 118 L.R.R.M. (BNA) 2649 (D.C. Cir. 1985). The court expressed no view as to the correct test to be applied, but required “only that the Board exercise the full measure of administrative discretion granted to it by Congress and reconsider this matter free from its erroneous conception of the bounds of the law.” Id. at 2650.
78. See also Ewing v. NLRB, 768 F.2d 51 (2d Cir. 1985). The Second Circuit in Ewing remanded to the Board for further explanation a case in which it had found that filing an OSHA complaint by an individual did not constitute “concerted activity.” Although the court stated that it was expressing no view concerning the corrected interpretation of the phrase “concerted activities” as applied in that case, it did say that the Board’s rationale will “nonetheless be examined in light of the presumption that the old rule [*Alleluia Cushion*] effectuated the policies of the Act.” 768 F.2d at 56. It is up to the Board, declared the court, to give a “reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule.” Id. (quoting Association of Civilian Technicians v. FLRA, 757 F.2d 502, 508 (2d Cir. 1985)).
Despite *Meyers Industries*, there remains the opportunity for considerable overlap between “public policy” wrongful discharge actions and the protections afforded by section 7 of the Act. This is so because of the congruence of the expansive interpretations being given by some courts to the concept of “public policy” and the broad reach of the “protected” arm of section 7 to concerted activities of employees “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” Yet courts have failed to analyze with any precision whether a section 7 issue is involved in the first place or, when assessing the state interest under the *Garmon* exceptions, to scrutinize carefully the nature of the so-called “public policy” that is being enforced.

Obviously, courts should have little trouble finding what might be called “core” unfair labor practices to fall within the primary jurisdiction of the NLRB. Thus, where it is alleged that the discharge was wrongful because it was based upon union organizing activity, the suit should be preempted since the matter is not peripheral to the concerns of the Act and does not involve interests deeply rooted in local feeling. Likewise, there should be preemption where the wrongful discharge suit involves allegations that the employee was terminated because she had been seeking with others to improve wages, hours, or other working conditions.

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The Court of Appeals for the First Circuit has held, however, that a plaintiff discharged for union activities in a business subject to the Railway Labor Act could bring a public policy wrongful discharge action against her employer based upon the theory that a discharge motivated by union animus is a violation of the public policy of the state. *See Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir. 1983).
83. A wrongful discharge action may be preempted even if the section 7 rights involved are those of someone other than the discharged employee. Thus, the court in *Sitek v. Forest City Enter.*
Indeed, most joint, as opposed to individual, conduct among employees would likely involve concerted activities. Assuming that the activities are also “protected”—an inquiry that generally involves the method of carrying out the concerted activity (e.g., violent concerted activities are not protected)—the case would be preempted unless it fell within one of the Garmon exceptions.

To be sure, as the concerted activity becomes increasingly unrelated to traditional terms and conditions of employment and begins to approach “the periphery” of the Act, the question of whether the activity is “for mutual aid or protection” becomes more difficult. Hence, it has been suggested that “It may be that employees have no section 7 right to protest the condition of the employer’s product which it sells, or the manner in which the employer runs its [business].” Alternatively, it has been suggested that even if arguably protected by section 7, such conduct “do[es] not lie at the core of the concerns” of the Act and thus also can be regulated by the states.

It is relatively clear that joint action by employees to protest the conditions under which they work, including the employer’s compliance with various state laws and policies, would be considered protected concerted activity. However, the more troublesome question is whether wrongful discharge actions based upon retaliation for engaging in such conduct should be preempted, or whether one of the Garmon exceptions applies.

587 F. Supp. 1381 (E.D. Mich. 1984), held preempted a wrongful discharge action brought by a former supervisor who claimed that he had been discharged for refusing to take part in “union busting” during an organizing campaign. The court held that the claim that the discharge interfered with the other employees’ efforts to unionize was the same issue that would be before the Board in an unfair labor practice charge.


85. Id.

86. As one commentator has said:

Courts have construed “mutual aid or protection” so broadly that employee action invariably satisfies this requirement. Activity considered to be “for mutual aid” includes “almost any activity that somehow affects the well-being of the employees as a group.”


87. Determining the question of preemption by whether the protected concerted activity lies at the “core” or “periphery” of the Act is not a promising approach. If employees are pursuing a concerted goal that falls within the Act, courts should not attempt to weigh the importance of that section 7 objective. That should be for the employees to decide. The better analysis is to focus on the importance of the state interest being furthered by the wrongful discharge cause of action and whether that interest is of peripheral concern to the Act.

An alternative approach would be to have preemption turn on whether the employer’s motivation for the discharge was the substance of the employee’s complaint (e.g., compliance with the law) or the manner in which it was presented (i.e., concerted activity). But that approach would mean that preemption would not be determined until after trial and would become entangled in the vagaries of “sole” or “mixed motive” analysis. See NLRB v. Transportation Management Corp., 462 U.S.
These issues can be seen clearly when viewed through the prism of a recent decision in California. In *Hentzel v. Singer Co.*, the California Court of Appeal ruled that a plaintiff stated a cause of action when he alleged that he was terminated from his employment as a result of his efforts to obtain "a reasonably smoke-free environment in which to work." The court held that discharge for complaining about smoke in the workplace violated the public policy announced in a section of the Labor Code forbidding discharges for making bona fide complaints concerning workplace safety. In dismissing the possibility of federal preemption, the court stated that Hentzel's protest involved the "public venting of a personal grievance" and therefore was not concerted activity. Although the court made no reference to *Alleluia Cushion*, to which the Board adhered at the time and which also involved an individual's complaint concerning workplace safety, its conclusion was certainly correct under *Meyers Industries*, which holds that individual complaints about working conditions are not to be presumed "concerted."

A far more difficult preemption question would be presented if Hentzel had enlisted the support of one of his colleagues. Concerted activity for the purpose of obtaining a safer workplace would certainly be considered for "mutual aid or protection" under section 7. Consequently, a termination based upon these activities would fall within the primary jurisdiction of the Board, and a state wrongful termination action would be presumptively preempted by *Garmon*. The question then would be whether the issue was a merely peripheral concern of the federal Act or whether it involved a powerful state interest, thereby escaping preemption.

The right of employees to band together to seek improvement in the conditions of employment can hardly be said to be a peripheral concern of the Act. Indeed, one of the policies behind the Act was to improve "the efficiency, safety, or operation of the instrumentalities of commerce." Given the strong federal interest in this area, the state must show that it has a very strong interest in regulating the conduct in question.

The weight to be accorded the state's interest will depend upon the kind of public policy that it seeks to enforce. For example, in hazardous working conditions cases like *Hentzel*, but involving concerted activity, the state's interest might be characterized in different ways. A broad formulation of the state's public policy would be the state's interest in preventing discharge of employees who protest safety conditions in the

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workplace, a definition that seemed to be adopted by the Court of Appeal in *Hentzel*. A narrow description of the state’s policy would be the state’s interest in preventing smoking in the workplace. Considerations of federal supremacy suggest that it is the narrower view of the state’s substantive interest that should be weighed in the balance, since it is less likely that state and federal protections will overlap.

The difficulty with the broad view is that it defines the state’s interest in terms of regulating the employment relationship and purports to restrict an employer’s power to terminate based solely upon the employee’s protesting working conditions. Thus, the action stands on very much the same ground as an action based on a general public policy against discharges in retaliation for an employee’s attempt to seek other, non-safety changes in the terms and conditions of employment, such as wages. Where the employee’s conduct is concerted, the potential for interference with a federal scheme that protects an employee’s right to engage in concerted activity for the purpose of mutual aid or protection is therefore quite real.

On the other hand, if the state’s interest is defined in terms of the state’s substantive policy—for example, a ban on smoking in the workplace—then there is a lesser opportunity for interference with the federal labor policy. Thus, if the state had a statute or administrative regulation banning smoking in the workplace, then the state policy is not one that merely seeks to protect the act of protest by employees. Rather, by providing a remedy to an employee who protests and is discharged, the state is seeking to further an independent substantive policy that is directly connected to the safety and health of the people of the state. Therefore, the state wrongful discharge action is less likely to overlap with protections provided by the federal Act than it is when the broader view of the state’s interest is taken.

Although the precise formulation of the state’s public policy may seem to be a mere semantic difference, it has more substantive content than may appear at first glance. In the case of an employee who is discharged either for reporting or protesting an employer’s violation of the law or for refusing herself to participate in that violation, it is clear that by providing a remedy for that employee, the state is advancing an independent policy unrelated to the conduct of the employee. For example, whether smoking is or is not permitted in the workplace is a matter of indifference to the federal labor laws; on the other hand, whether an employer is permitted to retaliate against an employee for concerted activity strongly implicates the federal policy. The creation of a wrongful discharge action as a remedy for a violation of an independent substantive policy unrelated to protest activity is therefore different for purposes
of preemption analysis from the creation of a right not to be discharged in retaliation for protest.

Moreover, if the state's interest in creating a smoke-free environment is truly a strong one, then it is to be expected that the policy will be reflected in either a statute, administrative regulation, or a previously announced decision of the state courts, for these sources generally contain the policies that the state has recognized as important. In Hentzel, there was no such state policy. If, on the other hand, Hentzel had protested violation of a specific safety regulation—such as a lack of fire escapes—it would be an easy matter to point to an independent, non-protest-related interest being advanced by the state. A significant distinction between the two cases is that in the cigarette-smoking case, the employer has discretion under state law whether to accede to the employee's demands; in the fire-escape case, it does not. Thus, in the former case, the activities have a large aspect of “bargaining” with the employer, while in the latter, the subject is one about which there can be no bargaining, since the employer is under a statutory duty to provide the fire escapes. Therefore, it is only in the former case that the federally created collective-bargaining process is implicated by the state's action.

Under this analysis, it is also clear that a wrongful discharge action for employees terminated in retaliation for filing workers' compensation claims would be valid even if filing a claim were considered to be concerted activity. By providing a remedy, the state is furthering its important substantive interest in the integrity of the state's workers' compensation system, since a practice of employers discharging employees in retaliation would seriously undermine the system.

In sum, where the employee's conduct arguably is protected con-
certed activity, state wrongful discharge actions based on public policy should be preempted to the extent that the state policy is one that seeks to protect employee protest per se. Such actions would seriously disrupt the congressionally established scheme for protecting protests that are concerted. On the other hand, when the state seeks to advance a substantive policy unrelated to protest, whether or not the activity is concerted, in most situations there will be no interference with the federal scheme and the actions should therefore not be preempted.

This suggested analysis is somewhat similar to that applied in Garibaldi v. Lucky Food Stores. In Garibaldi, the Ninth Circuit held that an action by an employee covered by a collective bargaining agreement, who was allegedly discharged for reporting to local health authorities that a load of milk was spoiled and for refusing to deliver it, was not preempted. The court held that the state's interest in providing a cause of action for violation of public policy is not the regulation of the employment relationship, but rather the enforcement of the underlying statute or policy itself. In this case, the state prohibited by statute the sale of adulterated milk. Therefore, the court stated, this case was governed by Farmer v. Carpenters, in which the Supreme Court had held that an action for intentional infliction of emotional distress could proceed, even if an arguable unfair labor practice had been committed, if it was the manner of the conduct, rather than the fact of it, that was challenged.

The court, however, never made the threshold determination of whether the case fell within Garmon in the first place. In the absence of concerted activity, there is nothing that would even arguably bring this case within the primary jurisdiction of the Board. Nevertheless, had Garibaldi's actions been arguably concerted, the result would have been the same, since the state was providing a remedy to further the state's independent substantive policy of keeping adulterated milk out of the hands of the consuming public and was not merely attempting to protect the process of protest itself.

Another panel of the Ninth Circuit distinguished Garibaldi in Olguin v. Inspiration Consolidated Copper Co., in which an employee (also covered by a collective bargaining agreement) brought a wrongful discharge action in Arizona, claiming that he had been discharged for filing a safety complaint with the Federal Mine Safety and Health Administration. The panel noted that "Mine safety is governed by the Federal Mine Safety and Health Act, . . . and concerted activity is protected

92. 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985).
93. Although Garibaldi belonged to a union, for purposes of this discussion it is assumed that he did not.
95. 740 F.2d 1468 (9th Cir. 1984).
by the federal labor laws.”96 Moreover, the plaintiff had filed a discrimination complaint with the Mine Safety and Health Administration, which had concluded that he had not been subjected to discrimination in retaliation for his safety complaint. Plaintiff could not now seek state protection from discharge, because he had acted to further federal, not state, law. The court stated: “Arizona has little interest in enforcing federal law, even if that federal law is incorporated, as Olguin suggests, in the state's general public policy.”97 Consequently, Garibaldi was inapposite, the court stated, because that case involved state law, rather than federal.

The basis for the Olguin court's opinion is not clear. It could be based in part on the premise that Olguin’s activities were concerted and therefore preempted by Garmon, but the court did not discuss that issue. It could also have been based on preemption by the FMSHA, that is, the idea that federal law has occupied the field of mine safety, leaving the states without power to act. It could also have been based on the proposition that under the NLRA, states are barred from permitting wrongful discharge actions based upon any federal law. Finally, it could be based on the proposition that employees covered by collective bargaining agreements may not bring state wrongful discharge actions, but that would be contrary to Garibaldi, which was accepted as good law by the Olguin court.

There are only two ways to get to a conclusion that actions based upon violation of federal law are preempted. The first, which the court seemed to rely on in part, is the idea that a state has little interest in enforcing federal law. Yet, under Garmon, the magnitude of the state’s interest is weighed only when it is first determined that the challenged conduct is arguably protected or prohibited. The Olguin court never made that threshold determination. On the other hand, it could be held, as a matter of general federal supremacy, that states are simply barred from incorporating federal statutes into their public policy. But surely that would be a dramatic extension of preemption law, since ordinarily state action not inconsistent with federal law is not preempted unless Congress has occupied the entire field.98 Each statute must therefore be examined in order to determine whether consistent state action is preempted.

As a matter of federal labor law, the source of the state’s policy seems irrelevant in the absence of a determination that the case involves activities arguably protected or prohibited by the NLRA. Once it is determined that the case does involve such activities, then the source and

96. Id. at 1475.
97. Id.

nature of the policy is highly relevant, because it must be determined whether the conduct involves matters "deeply rooted in local feeling and responsibility." Prior to that point, however, in the absence of some other conflict with federal labor policy, preemption is more likely to be found in the substantive statute, in which case it is not labor preemption that is involved.  

For example, assuming for purposes of discussion that Olguin was not covered by a collective bargaining agreement and that his actions were concerted, his wrongful discharge action should be preempted. Once it is determined that the employer's actions were arguably prohibited as an unfair labor practice, the burden then is on the party resisting preemption to demonstrate that the conduct touched state interests "deeply rooted in local feeling and responsibility." The conduct involved was mine safety, a subject of comprehensive federal regulation that apparently was not regulated by the state. Therefore, despite the fact that in areas where mines are found the issue of mine safety is one about which local feelings run strong, the subject is not one "deeply rooted in local . . . responsibility," either because the federal government has preempted the field, leaving the states without power to act, or because the state has simply elected not to act in that area, thus deciding for itself that it would not assume responsibility in that area.

B. Preemption and the Employee Covered by a Collective Bargaining Agreement

Wrongful discharge actions initially evolved to protect those employees who did not have the protections of a union and a collective bargaining agreement. But with the advent of tort remedies and the prospect of large jury awards, an increasing number of wrongful discharge actions have been filed by union-represented employees. Here the traditional deference to the grievance and arbitration provisions of the collective bargaining agreement clashes head-on with the emerging wrongful discharge theories.

99. An example of such preemption occurs in cases where an employee claims that her discharge violated public policy because the employer intended thereby to deprive her of rights under a pension plan. Because the Employee Retirement Income Security Act (ERISA) specifically covers such discharges, state actions have been held preempted. Johnson v. Transworld Airlines, Inc., 149 Cal. App. 3d 518, 196 Cal. Rptr. 896 (1983).

Another class of cases in which preemption has been found involves wrongful discharge actions brought by officers of national banks, Federal Home Loan Banks, and Federal Reserve Banks. Federal statutes grant these banks power to dismiss "at pleasure" such officers. 12 U.S.C. §§ 24, 143, 341 (1982). State actions alleging wrongful discharge under state law are therefore preempted. Inglis v. Feinerman, 701 F.2d 97 (9th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984); Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287 (N.D. Cal. 1983).

For the most part, courts have found that union employees' state contract and tort causes of action predicated upon implied contractual obligations and covenants are preempted by federal law. But courts have been less willing to find that wrongful discharge causes of action based upon state "public policy" are preempted by national labor policy, even where the employee has the right to grieve his discharge under the collective bargaining agreement. This article suggests that insufficient weight has been given to the principles of preemption and that, except in narrowly defined circumstances, causes of action based upon public policy should be precluded where an employee has access to the grievance and arbitration procedures of a collective bargaining agreement, regardless of whether concerted activity is involved.

1. Breach of Implied-in-Fact Contract

Claims by union employees that their terminations violated an implied contract that they would not be terminated other than for cause have been universally held to be preempted on the theory that the only source of the employee's right could be the collective bargaining agreement. The employee must therefore exhaust the agreement's grievance procedure, and she is bound by the results of that procedure unless she can show that the union breached its duty of fair representation.

Union employees often bring breach of express or implied contract actions in state court without making reference to either the collective bargaining agreement or section 301 of the Taft-Hartley Act. These actions are typically removed on the ground that the "true nature" of the complaint is one arising under federal law. Despite the absence of reference to the agreement or the federal statute in the complaint, it is held that a plaintiff may not defeat federal jurisdiction "simply by omitting from the complaint federal law essential to his claim, or by casting in state law terms a claim that can be made only under federal law." In all but the most unusual circumstances, the only employment

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101. See infra text accompanying notes 103-29.
102. See infra text accompanying notes 130-37.
107. Olguin, 740 F.2d at 1472. See also Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985).
agreement under which the parties are acting is the collective bargaining agreement. Contracts directly between employer and employee interfere with the statutory principle that the union is the exclusive representative of the employees in the bargaining unit. Thus, the Supreme Court has held that individual contracts may not be used "to limit or condition the terms of the collective agreement." The Court held that even if an individual would have been able to secure more favorable terms for himself, the principle of collective bargaining must prevail and a bargaining representative duly elected by a majority of the employees must be exclusive. The Court stated:

[W]e find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages.

The Court noted that individual advantages can often be obtained only at the expense of others, and therefore may decrease the overall welfare of the group. Even when individual employees have acted in pursuit of the eradication of racial discrimination, a central goal of federal labor policy, the Court has held that the principle of exclusive representation must still be honored.

An action for breach of implied contract is, in essence, a claim that the employee enjoys rights under an individual contract and that the individual contract rights are more beneficial to the employee than the terms of the collective bargaining agreement. The courts have thus been correct in rejecting such claims.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing is implied in law rather than in fact. Although it has been argued that a claim for breach of the implied covenant is a tort and therefore cognizable under state law even where the employee is governed by a collective bargaining agreement, that argument does not seem to have been accepted. For example, the First Circuit in Bertrand v. Quincy Market Cold Storage rejected the plaintiff's claim that a breach of the covenant was an independent tort, stating that by definition it is an implied covenant in an employment contract. It therefore concluded that the discharged employee's exclusive remedy was to be found in the mandatory grievance and arbitration procedure of the agreement.

For purposes of federal preemption analysis it ought not to matter

109. Id. at 338.
110. Id. at 338-39.
112. 728 F.2d 568 (1st Cir. 1984).
what theory the state employs to justify the covenant—that is, whether it is deemed implied in the agreement, a common law tort duty arising out of the relationship, or even based upon a statute. The federal question is whether such a state-imposed duty is consistent with the federal labor policy.

The stated justification for implying the covenant is to compensate for the imbalance in bargaining power between the parties. This imbalance is said to create a "fiduciary relationship" between the parties, under which the employer "has a heightened duty . . . to consider the interest of the other party as tantamount to its own."

A state's attempt to alter what it perceives to be imperfections in the balance of power between labor and management by creating new rights and obligations in the parties to a collective bargaining agreement is inconsistent with the federal labor policy, because in enacting the NLRA, Congress chose to correct that balance in a different way—by providing for a system of collective bargaining under which workers could band together in order to increase their aggregate power. The Supreme Court has stated:

While a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management, it sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers.

State attempts to alter the balance struck by Congress are clearly inconsistent with federal policy.

The Supreme Court has recognized that the parties to collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." Each side is free, within limits established by Congress, to seek its own ends. Rather than attempting to equalize the power of the two parties by permitting workers to engage in collective action and arms' length dealing with the employer, Congress could have created a very different system under which the employer would be deemed a fiduciary of the workers. Congress did not do so, and the states are barred by the supremacy clause from doing so themselves.

A case recently decided by the United States Supreme Court sheds a good deal of light on the issue of preemption of wrongful discharge cases, especially those involving a breach of the covenant of good faith and fair

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dealing. In *Allis-Chalmers Corp. v. Lueck*, the Court held that a tort action for bad-faith handling of an insurance claim under a disability plan included in a collective bargaining agreement was preempted by section 301 of the LMRA, since the action was based on obligations created by the agreement.

Under the terms of the relevant collective bargaining agreement, the employer, Allis-Chalmers Corporation, provided its employees with health and disability insurance. Allis-Chalmers acted as a self-insurer, but contracted with Aetna to administer the plan. The plaintiff was injured and requested disability benefits. Payments were begun, but then repeatedly stopped and restarted, although the plaintiff ultimately received all payments due him. Plaintiff bypassed the grievance procedure of the labor agreement and filed suit against Allis-Chalmers and Aetna, alleging that his claim had been handled in bad faith and seeking compensatory and punitive damages.

The trial court held that the action was preempted by federal law and the Wisconsin Court of Appeals affirmed. The Wisconsin Supreme Court reversed, rejecting the argument that the claim was governed by section 301 and that plaintiff's exclusive remedy was under the grievance procedure established in the collective bargaining agreement for handling insurance claim disputes. The court stated, "[T]he tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract." The Wisconsin court stated further:

Lueck's claim is not for a breach of contract; rather, it is a separate and independent claim arising out of the manner in which his disability claim was handled. For purposes of pursuing this claim, Lueck need only first establish that the defendants owed him a duty by virtue of the insurance contract. Even though that duty arose initially because of the insurance provided through the labor agreement, that fact alone does not persuade us that Lueck's claim is in essence a contractual claim.

The issue of breach of contract is wholly separate from the question of bad faith, the court reasoned, because the plaintiff may be able to establish a claim for bad faith without demonstrating a breach of contract.

The United States Supreme Court reversed in a unanimous opinion.

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119. *Id.* at 565, 342 N.W.2d at 702 (quoting Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978)).
120. *Id.* at 565, 342 N.W.2d at 702 (footnote omitted).
121. *Id.* at 566, 342 N.W.2d at 703. The court then went on to reject the defendants' contention that the allegations of the complaint set out a refusal to bargain under section 8(a)(5) and therefore the claim was preempted under Garmon. *Id.* at 568-69, 342 N.W.2d 704.
The Court noted that the question before it was "whether this particular Wisconsin tort, as applied, would frustrate the federal labor-contract scheme established in § 301."122 It also observed that "If the policies that animate § 301 are to be given their proper range, . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations."123

In analyzing the state court's opinion, the Supreme Court first criticized that court's conclusion that a bad-faith claim could be unrelated to a contract claim, since that conclusion could be reached only by assuming that the labor agreement did not contain an implied obligation of good faith, the presence or absence of which is a matter of federal law.124 Moreover, because under state law the obligation of good faith derives from rights and duties under the contract, about which the parties are free to bargain, the "tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law."125

The Court also stated, "[p]erhaps the most harmful aspect of the Wisconsin decision" was that it would diminish the "central role" of arbitration, because the same dispute that could be presented to the arbitrator would instead be presented to a state court. The Court continued:

Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract.126

Finally, the Court emphasized the "narrow focus" of its decision, stating that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301."127 Rather, it stated, an action must be treated as a section 301 claim when its resolution "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract. . . ."128

Thus, it clearly appears that a claim for breach of an implied covenant of good faith and fair dealing arising from an allegedly wrongful discharge of a union employee is also preempted by section 301. The duty arises as a matter of law from the employment relationship created

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123. Id. at 1911.
124. See id. at 1913.
125. Id. at 1914.
126. Id. at 1915-16.
127. Id. at 1916.
128. Id.
by the contract. Although some state courts have held that there is a
duty of good faith in every contract, "what that duty embraces is depen-
dent upon the nature of the bargain struck between [the parties] and the
legitimate expectations of the parties which arise from the contract."\textsuperscript{129}
As a result, resolution of a breach of covenant claim is inextricably inter-
twined with an interpretation of the provisions of the agreement.

3. "Public Policy" Discharges and the Collective
Bargaining Agreement

In the unionized setting, the analysis of preemption of public policy
discharge cases is different from that suggested above for non-union em-
ployees. In the non-union setting, when the employee's conduct is argua-
ably protected, federal interests are sufficiently protected by preemption of
only those actions based on a state policy of protecting employee pro-
tests. However, when the parties are governed by a collective bargaining
agreement, another federal interest is implicated—the strong federal pol-
icy favoring arbitration as the exclusive means of resolving disputes be-
tween employer and employee.

A frequently recurring issue in public policy wrongful termination
actions brought by employees covered by collective bargaining agree-
ments is whether the employee is obligated to exhaust her remedies
under the grievance and arbitration procedure, and, if so, whether the
arbiter's decision is to be given preclusive effect.\textsuperscript{130} Courts have split
on these questions, but most have seemed to treat the question as one of
state, rather than federal, law.\textsuperscript{131}

In most cases, when a covered employee brings a wrongful discharge
action based upon an employer's alleged violation of public policy, one of
the defenses offered by the employer is that the employee is required to

\textsuperscript{129} Commercial Union Assurance Cos. v. Safeway Stores, Inc., 26 Cal. 3d 912, 918, 610 P.2d
1038, 1041, 164 Cal. Rptr. 709, 712 (1980).

\textsuperscript{130} A number of courts have simply declined to extend an action for wrongful discharge to
employees covered by a collective bargaining agreement. See, e.g., Vantine v. Elkhart Brass Mfg.
Co., 762 F.2d 511 (7th Cir. 1985) (applying Indiana law); Smith v. Greyhound Lines, Inc., 614 F.
N.E.2d 1280 (1984) (retaliatory discharge action available to unionized employees), \textit{cert. denied},

\textsuperscript{131} See, e.g., Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (exhaustion not re-
quired); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (exhaustion not
required), \textit{cert. denied}, 54 U.S.L.W. 3253 (U.S. Oct. 15, 1985) (No. 84-1738); Cook v. Caterpillar
Tractor Co., 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980) (exhaustion required); McKinnis v. Western

The Oregon Court of Appeals has taken a middle ground. In Embry v. Pacific Stationery &
Printing Co., 62 Or. App. 113, 659 P.2d 436 (1983), the court held that a plaintiff bringing an action
for wrongful discharge alleging that he was fired for refusing to falsify a claim for damaged freight
was required to exhaust his remedies under the collective bargaining agreement since the wrongful
discharge action was based upon a generalized public policy rather than upon a statute.
proceed under the collective bargaining agreement. Most agreements contain a provision that an employee will not be discharged without just cause. Since retaliation for filing a workers’ compensation claim or refusing to violate the law does not constitute just cause, such terminations would violate the collective bargaining agreement. Typically, the agreements provide a remedy of reinstatement with back pay for unjust discharges.

Illustrative of the conflict inherent in cases dealing with the unionized workforce is the Illinois Supreme Court’s recent decision in *Midgett v. Sackett-Chicago, Inc.* The plaintiffs, who were covered by a collective bargaining agreement containing a “just cause” provision, claimed that they were discharged in retaliation for filing workers’ compensation claims. Such a cause of action had been previously recognized by the court in a case involving employees not covered by a collective bargaining agreement. The defendants argued that the cause of action was created to protect only at-will employees, who would otherwise be without a remedy for wrongful discharge.

The Illinois court rejected the defendants’ argument, stating that “[I]n order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective bargaining agreement.” The court observed that employees could obtain only reinstatement and back pay through arbitration, a remedy the court termed “incomplete.” Moreover, the court believed that its decision would not have “any perceptible effect on the use of arbitration.”

A vigorous dissent pointed out that the tort of retaliatory discharge was created to protect otherwise unprotected employees and that by applying it to unionized employees the majority was overlooking the specific policy considerations that had initially led to the recognition of the cause of action. The dissent also disagreed with the majority’s prediction concerning the impact of its decision on the use of arbitration, stating that allowing employees to circumvent the agreed-upon grievance procedure would seriously undermine the collective bargaining agreement. However, the dissent would not completely immunize a union employer from liability for punitive damages. If the employee had followed the grievance procedures and the arbitrator found retaliatory motivation, then the employee would be permitted to file a civil action.

133. 473 N.E.2d at 1283.
134. *Id.*
135. *Id.*
136. *See id.* at 1285-86.
seeking such damages.\textsuperscript{137}

It is apparent that the majority in \textit{Midgett} was in somewhat of a quandary. It had originally created the cause of action because without it at-will employees would be without a remedy. On the other hand, once the cause of action was created for some, the court felt compelled by considerations of equality to provide it to all. However, the quandary was of the court's own making. Had the court not previously held that tort damages were available in such actions, both union and non-union employees would have had comparable remedies available—reinstatement and back pay.

Determining the effect to be given an arbitration clause requires analysis of both the federal and state interests involved. Two separate methods of analyzing the issue lead in different directions.

\textit{a. The Case in Favor of Deferral to Arbitration}

On the one hand, allowing a discharged employee to circumvent the grievance and arbitration procedure by going into state court to vindicate a state right that is coextensive with a right under the agreement—which is a federal right—poses a significant threat to the relationship of union and management under the agreement. In \textit{The Steelworkers Trilogy},\textsuperscript{138} the Supreme Court "exalted the role of the arbitrator as a force for industrial peace" and "announced a doctrine of judicial self-restraint in cases in which the parties have assigned the task of dispute resolution to an arbitrator privately selected."\textsuperscript{139} The grievance and arbitration procedure, said the Court, is "a part of the continuous collective bargaining process."\textsuperscript{140} When the parties enter into a collective bargaining agreement they thereby "erect a system of industrial self-government"\textsuperscript{141} that is undermined when those covered by the agreement are permitted to resort to other forums for resolution of disputes.

The Court in \textit{United Steelworkers v. American Manufacturing Co.},\textsuperscript{142} held that in a suit under section 301 to compel arbitration of a grievance over a discharge, the court's function "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."\textsuperscript{143} "The courts, therefore, have no business weighing the merits of the grievance, considering whether there

\textsuperscript{137.} See \textit{id.} at 1286.
\textsuperscript{139.} R. GORMAN, LABOR LAW 551 (1976).
\textsuperscript{140.} \textit{United Steelworkers v. Warrior \& Gulf Navigation Co.}, 363 U.S. at 581.
\textsuperscript{141.} \textit{id.} at 580.
\textsuperscript{142.} 363 U.S. 564 (1960).
\textsuperscript{143.} \textit{id.} at 568.
is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.\footnote{144} In reaching its conclusion, the Court relied on section 203(d) of the LMRA, which states, "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . ."\footnote{145} Any doubts "should be resolved in favor of coverage" of the arbitration clause.\footnote{146}

The Supreme Court has recognized the preeminence of federal law in interpreting and enforcing collective bargaining agreements under section 301 of the LMRA. In \textit{Teamsters v. Lucas Flour Co.},\footnote{147} the Court held that although state courts have jurisdiction over section 301 suits, they must reach their decisions by application of federal law. The Court stated:

\begin{quote}
The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.\footnote{148}
\end{quote}

Although the holding of \textit{Lucas Flour} does not apply to the question of preemption of wrongful discharge actions, since they are based on state law rather than upon the collective bargaining agreement, the rationale of the case underscores the federal policy against state intervention into the relationship of parties to labor agreements.

Thus it cannot be doubted that there is a strong federal policy in favor of private, not federal (and certainly not state), resolution of disputes between union employees and employers. Those favoring judicial resolution of employment disputes often fail to recognize the impact that decreasing the importance of arbitration will have. Although the Illinois Supreme Court in \textit{Midgett} appeared to believe that creating a tort cause of action for a unionized employee would have no effect on the use of arbitration, that belief is hardly realistic. The "superiority" of the remedies available in a judicial forum was what led the court to allow the cause of action in the first place, presumably because it believed that some would choose a civil suit over arbitration. Continued erosion of the principle of exclusivity of arbitration can only have the effect of con-

\footnotesize
\begin{flushleft}
144. \textit{Id.} (footnote omitted).
146. 363 U.S. at 583.
147. 369 U.S. 95 (1962).
148. \textit{Id.} at 104.
\end{flushleft}
signing arbitration to the status of a second-rate and disfavored method of dispute resolution.

b. The Case Against Deferral to Arbitration

On the other hand, the Supreme Court has, in a series of cases, rejected the contention that an adverse arbitration decision precludes a court action seeking to vindicate statutory rights. Although in these cases the rights were federally created, it is arguable that the logic of these cases is equally applicable to state statutory rights.

The first of these cases was Alexander v. Gardner-Denver Co., in which the Court held that an adverse arbitration decision did not bar an employee from pursuing a Title VII action arising out of the same conduct. The Court rested its conclusion on "the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation." The arbitrator's special competence is "the law of the shop, not the law of the land," and when a collective bargaining agreement conflicts with a statute, the arbitrator is required to follow the agreement. Moreover, the scope of an arbitration hearing and the rights and procedures are usually significantly more restricted than is the case in civil trials. Consequently, a deferral rule would restrict the substantive protection of Title VII. Applying the same reasoning, the Court has held that granting preclusive effect to arbitration awards is also inappropriate in suits under the Fair Labor Standards Act and the Civil Rights Act of 1871.

There is nothing in the above cases to suggest that the same rules should not apply when a plaintiff seeks to vindicate state statutory rights, so long, of course, as the substantive right being enforced does not itself conflict with federal policy. Arbitrators are no more competent, and have no more power, to apply and enforce state law than federal law. The source of the right is in the laws of the state, not in the agreement of the parties. If employees are unable to vindicate those rights in a state court, the state's ability to protect its citizens could be impaired. Because relief under a collective bargaining agreement is generally limited to rein-

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151. Id. at 56-57.
152. Id. at 57.
155. Several commentators have suggested as much. See, e.g., Note, State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption, 71 CALIF. L. REV. 942 (1983); Comment, supra note 100.
statement and back pay—while relief under state tort law could include the whole panoply of state tort remedies, including punitive damages—it could be argued that complete deferral to arbitration would disadvantage unionized employees. In turn, diminution of the state rights of unionized employees could discourage employees from organizing, thus impairing the federal policy favoring collective bargaining. The federal interest may be sufficiently protected by limiting the kinds of public policies that can be relied on in a state action in a manner consistent with the views previously expressed in this article with respect to non-unionized employees, that is, prohibiting only actions based upon a state policy protecting employee protest.¹⁵⁶

As a matter of state law, courts may require that an employee first exhaust the grievance procedure, but the states could then allow the employee to pursue an action in state court, giving the arbitration award whatever weight it deemed appropriate.¹⁵⁷ Similarly, there is no federal labor law impediment to a state law giving preclusive effect to an arbitration decision, since such a law would not conflict with any federal law or impede any federal policy. States may be reluctant to do so, however, as was the Supreme Court in Alexander, Barrentine, and McDonald.

c. Accommodation of State and Federal Interests

Thus, we are confronted with two seemingly conflicting lines of authority—one based upon the federal interest in promoting arbitration of industrial disputes, the other based upon the state interest in vindicating an employee’s statutory rights. In grappling with the difficult preemption issues presented in this context, it is essential to accommodate, to the extent possible, the interests of both sovereigns. In order to do so, it is even more important in this context than it was in the non-union context to identify with specificity the nature and magnitude of the state interest.

Permitting a state to entertain any public policy action so long as the state policy was not one designed to protect protest leaves a universe of potential actions that is limited only by the ingenuity of plaintiffs’ law-

¹⁵⁶. See supra text accompanying notes 89-102.
¹⁵⁷. The states might adopt a policy similar to the one the Board has adopted with respect to charges of unfair labor practices that also constitute violations of the labor agreement. In NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967), the Supreme Court held that although the Board does not have general power to interpret collective bargaining agreements, it has jurisdiction over charges of unfair labor practices even though the alleged conduct also violates the agreement. Despite the existence of this power, the Board has, as a matter of discretion, declined to exercise it in certain cases. The Board will defer to an arbitrator’s decision if it determines that: 1) the proceedings were fair and regular; 2) all parties agreed to be bound; and 3) the arbitral decision is “not clearly repugnant to the purposes and policies of the Act.” Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). In Collyer Insulated Wire, Gulf & Western Sys. Co., 192 N.L.R.B. 837 (1971), the Board announced that in certain kinds of cases it will defer its review until after the arbitration procedure has been exhausted.
yers and the willingness of courts to accept their arguments. While such broad-ranging public policy actions may not significantly impinge on federal interests when brought by at-will employees—even those engaging in concerted activities—when applied to unionized employees a significant disruption of the collective bargaining process is inevitable.

Given the potential for disruption of the federal labor policy and the presumption of preemption that flows from it, the state's interest in advancing its public policy must be weighed in order to determine whether it is sufficiently compelling to justify circumvention of the federally favored arbitration process. In determining the magnitude of the state interest involved, a two-pronged analysis should be employed—first, the specific nature of the state policy must be identified; second, the fit between the means chosen and the ends desired must be assessed. On the other side of the balance, the extent to which the state's activities impinge on federal interests must be determined.

In assessing the propriety of engaging in interest balancing, it bears repeating at this point that the balancing of state and federal interests is appropriate only where there is not an actual direct conflict between state and federal law. When there is a direct conflict, the state interest is not weighed in the balance and the federal law controls. The Supreme Court has stated that where "the issue is one of an asserted substantive conflict with a federal enactment, then the relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that federal law must prevail." However, given that "[t]he purpose of Congress is the ultimate touchstone," it is appropriate for a court to consider the magnitude of the state's interest in assessing congressional intent. For example in Brown v. Hotel Employees Local 54, the Court, in concluding that a New Jersey law regulating the qualifications of casino industry union officials was not preempted by section 7 of the NLRA, relied in part on the state's "compelling" interest in combatting local crime. Because of that interest, the Court could not conclude that the state law was preempted "[i]n the absence of a more specific congressional intent to the contrary." Similarly, in Metropolitan Life Insurance Co. v. Massachusetts, the Court observed, "An appreciation of the State's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated." In essence, this is a common-sense proposition: the

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161. See id. at 3190.
162. Id.
more important the state's interest, the more likely that if Congress had desired to oust the state from regulation in the area it would have done so expressly.  

i. The State Interest

Critical to justification of state intervention is a specifically articulated policy. Unfortunately, the "public policy" theory of wrongful discharge, as applied by some courts, has no effective limits. For example, in Novosel v. Nationwide Insurance Co., the plaintiff claimed that he was discharged for refusal to participate in the defendant's efforts to lobby the Pennsylvania House of Representatives with respect to a pending insurance bill. This discharge, the plaintiff claimed, violated the public policy favoring free expression found in the first amendment to the United States Constitution and the state constitutional counterpart.

The Third Circuit agreed with the plaintiff and held that "the protection of an employee's freedom of political expression would appear no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim." Although the court acknowledged that the plaintiff was not a public employee, it reasoned that cases dealing with expressive rights of public employees "suggest that an important public policy is in fact implicated whenever the power to hire and fire is utilized to dictate the terms of employee political activities." The court was mistaken. The first amendment expresses a policy against governmental interference with free expression; it is silent with respect to private interference. Only through the most unbounded reasoning by loose analogy can it be concluded otherwise. By such reasoning, all constitutional restraints on governmental employers, with their attendant inefficiencies, could be attached to private employers, and it requires no great imagination to predict that virtually every discharge could be viewed as violating some amorphous "public policy," thereby allowing all discharged employees to circumvent the grievance procedures of the collective bargaining agreement.

Although Novosel did not involve a worker covered by a collective bargaining agreement, it is interesting to speculate how the preemption issue would have been resolved if it had, or if the refusal to engage in lobbying activity had been concerted. By equating the public policy in-

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164. Id. at 2394 n.27.
165. See, e.g., Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (recognizing a cause of action for discharges arising out of "socially undesirable motives").
166. 721 F.2d 894 (3d Cir. 1983).
167. Id. at 899.
168. Id. at 900. But see Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 478 N.E.2d 1354 (1985) (rejecting claim that wrongful discharge action could be brought against a private employer based upon the "policy" of first amendment).
volved in the case to "freedom of political expression," the Court of Appeals was rating extremely high the state's interest in advancing that policy, rendering rather obvious the answer it would have provided to the question of whether the matter touched interests "deeply rooted in local feeling and responsibility."

The concept of "public policy" is simply too nebulous to justify deferral to state processes when a significant federal interest stands in opposition. The Novosel case demonstrates that the concept has no bounds. Consequently, in order to justify a finding of a significant state interest, a directly controlling statute or constitutional provision should be identified. In Novosel, there was no such provision. The Third Circuit did not hold that the first amendment or the state constitution barred the employer's action; instead, it relied on the policy of those provisions, failing to recognize that the Constitution's prohibitions and its policies are coextensive.

It could be argued that no statute should be required and that an expression of policy by a state court is entitled to the same deference as an expression by the state legislature as long as the state court is empowered under the state system to act in a policy-making role. That is, it is no concern of the federal government which branch of the state government the policy came from, so long as it is in fact the policy of the state. However, it must be recognized that when a court creates a remedy for retaliatory discharge it does something different from what the legislature does when it prohibits such discharges. In the latter case, the legislature generally provides a mechanism by which the state may itself enforce the prohibition irrespective of whether the aggrieved employee chooses to file a wrongful discharge action. For example, in California, an employer's discharge of an employee in retaliation for the employee's filing a workers' compensation claim constitutes a misdemeanor.169 Thus, the legislature has defined retaliatory discharge as an offense against the state. However, when a court creates a retaliatory discharge action, it is defining the wrong solely as a private one, so that the state's interest is not nearly as compelling.

The same reasoning that would permit actions for retaliatory discharge that are supported by a specific statute would also apply to the "whistle-blower" statutes that have recently been adopted by a number of states.170 These statutes typically provide that an employer shall not discharge or otherwise discriminate against an employee for having re-

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170. See, e.g., CAL. LAB. CODE § 1102.5 (West Supp. 1985); CONN. GEN. STAT. ANN. § 31-
51m (West Supp. 1985); ME. REV. STAT. ANN. tit. 26, §§ 831-39 (Supp. 1985); MICH. COMP. LAWS
ANN. §§ 15.361-.369 (West 1981). By a recent count, some form of whistle-blower protection exists
in 19 states, and several other states are considering such laws. DAILY LABOR REPORT (BNA) 2
(Mar. 7, 1985).
ported a violation of law. They are thus analytically similar to statutes prohibiting discharge for having filed a workers' compensation claim. As long as the whistle-blower protection is explicitly set forth in a statute and it is confined to reporting violations of law, the state's interest is sufficiently defined to support a retaliatory discharge action even by union employees.\textsuperscript{171}

After the state policy is identified, the state's method of furthering the policy must be examined. The tighter the fit between the ends and the means, the greater the likelihood that the state action will be deemed not preempted. In most cases, though, the fit will be loose at best. In only a few cases is the wrongful discharge action a necessary, or even substantial, means of advancing the state's policy. Arguably, one such case is in the workers' compensation area. If an employer may discharge an employee with impunity for filing a workers' compensation claim, it does not take much imagination to predict what would happen to the number of claims filed, which undoubtedly accounts for the readiness of courts to allow such civil actions to proceed. Not only is the wrongful discharge action the primary method of protecting the integrity of the system, the retaliatory discharge itself is probably the principal method of impeding the state policy.

On the other hand, it is not altogether clear that allowing the retaliatory discharge claim to be heard by an arbitrator rather than a judge would have a great impact on the realization of state policy goals. In the absence of any reason to believe that arbitrators would be unresponsive to retaliation claims, the primary justification for not deferring to the grievance process is that the greater scope of remedies available in a tort action is necessary for the protection of the state's workers' compensation system. The Illinois Supreme Court in \textit{Midgett} clearly believed that it was necessary to permit a union employee to seek punitive damages for retaliatory discharge, but the correctness of its conclusion is highly questionable.

In light of the purpose of punitive damages, it is somewhat peculiar to conclude that the lack of availability of such damages renders the remedies which are available "inadequate" or "incomplete." From the plaintiff's perspective, a complete remedy is one that makes him whole for any harm suffered at the hands of the defendant. Therefore, in determining the need for punitive damages, one must focus on the situation of the defendant and determine whether the spectre of punitive damages is necessary to deter the disfavored conduct.

In assessing the need for punitive damages, the court in \textit{Midgett}

\textsuperscript{171} Since, however, under the Board's \textit{Interboro} doctrine, see infra text accompanying notes 182-83, the scope of employee activities covered by a collective bargaining agreement is quite broad, in many cases attempts to apply a whistle-blower statute will be barred by \textit{Garmon} preemption.
characterized the back pay remedy as a "small additional obligation" that "would do little to discourage the practice of retaliatory discharge, which mocks the public policy of the State . . . ."\textsuperscript{172} The court's reasoning is flawed in several respects. It is true that in a given case the back pay award may be small, such as where the discharged employee immediately finds another job at a comparable or higher rate of pay. On the other hand, the back pay award may be quite substantial in a case where the plaintiff has been unable to find work. Since the employer generally will not know in advance the extent of any back pay liability, it must consider the possibility of a sizable back pay award in making its termination decision. Moreover, the \textit{Midgett} court's reasoning leads ineluctably to a conclusion it would surely reject: if it is concluded that the back pay award will usually be a trivial sum, as the \textit{Midgett} court appeared to conclude, then the need for a cause of action for retaliatory discharge is called into serious doubt. That is, if the harm suffered by a discharged claimant is very small, then it is unlikely that an employer's threat to discharge will significantly deter the filing of compensation claims. If that is so, then retaliatory discharges pose little threat to the integrity of the workers' compensation system, and the state's interest is not likely to outweigh the federal interest in the preemption analysis. The answer is, of course, that the court's tacit premise—that back pay liability will usually be slight—is simply incorrect.

The \textit{Midgett} court was not alone in erroneously discounting the deterrent effect of the back pay remedy in order to justify creation of a right to punitive damages. For example, the California Court of Appeal, in extending the cause of action for tortious breach of contract to employment-related contracts, asserted that "ordinary contract damages offe\textsuperscript{r} no incentive for defendant not to breach,"\textsuperscript{173} because even if the plaintiff obtains a favorable judgment "defendant would only have to pay what it owed anyway."\textsuperscript{174} However, in the wrongful discharge context, the employer would have to pay the wages of two people to do one job, since ordinarily the discharged employee would be replaced (and if he were not replaced, the employer could defend the discharge as a reduction in force). It seems likely that the risk of paying double wages for what might be an extended period of time would deter nearly as many employers from retaliatory discharge as the risk of punitive damages. Certainly Title VII and the NLRA have had dramatic effects on employer behavior despite the fact that they do not provide for punitive damages. Thus it appears that the need for punitive damages has been exaggerated.

Despite this exaggeration, however, a state should probably be free


\textsuperscript{174} Id.
to provide a civil remedy for retaliatory discharges of unionized employees, just as it is free to enact anti-discrimination legislation, since the state policy is narrow in scope and specifically defined, and there is a reasonable, though hardly compelling, relationship between the ends and means. The likelihood that the availability of punitive damages will have a far greater effect on encouraging litigation than it will have on discouraging retaliatory discharges is a factor that the states may be free to ignore. Therefore, the reasoning behind non-preemption of state anti-discrimination legislation, namely that leeway exists for state law to operate where Congress has manifested an intent not to occupy the field, may be equally applicable to state retaliatory discharge legislation.\footnote{175}{It has long been recognized that some leeway exists for state law to operate where Congress has manifested an intent not to occupy the field. Thus, state causes of action based upon anti-discrimination laws are not preempted. Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714 (1963). The existence of a comprehensive enforcement scheme, however, may mean that the procedures under that scheme preempt state common law wrongful discharge actions. See supra note 90.}

On the other hand, even if they have the power to act, the states are free to refrain from exercising that power with respect to unionized employees and to require such employees to pursue their contractual remedies. Such forebearance by the states would further the course of stable labor relations by retaining the predictability that comes from having labor disputes consistently resolved in the parties' chosen forum.

In most cases other than workers' compensation cases, wrongful discharge actions are an insignificant addition to the arsenal that the state may bring to bear in achieving its substantive policy. The \textit{Garibaldi} case—involving discharge for protesting the delivery of, and refusing to deliver, spoiled milk—is again instructive. The \textit{Garibaldi} court apparently had no difficulty in concluding that allowing a wrongful discharge action advanced the state's public policy. Although concededly the state's interest in preventing the delivery of spoiled milk is a significant one, in cases involving collective bargaining agreements the inquiry should not stop there. The state's interest in advancing its substantive policy is not necessarily the same as its interest in providing a wrongful discharge action in cases involving that policy. Just as in \textit{Midgett}, there was no applicable state statute providing a wrongful discharge action; instead, the court's decision was based on a generalized policy favoring pure milk. Thus, the first factor in determining the magnitude of the state's interest—an articulated policy against certain kinds of discharge—is not present.

With respect to the means chosen, it is highly unlikely that the state's policy favoring pure milk is significantly advanced by permitting a wrongful discharge action under the facts of \textit{Garibaldi};\footnote{176}{But cf. Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1383-84 (9th Cir. 1982), where the
is equally unlikely that its policy would be significantly impaired by prohibiting such actions. Alternative methods of enforcement, such as state inspections of the milk or complaints by consumers, are likely to be much more effective and important ways of protecting the state’s interests.177

In a Hentzel-like health and safety case the result would be the same. As discussed above, California had no clearly articulated policy against smoking in the workplace. Since a state policy that seeks only to protect protest is not deemed a legitimate exercise of state power in the context of the exercise of section 7 rights—where the only question is whether the matter is one touching matters involving local feeling and responsibility—there is no occasion to proceed to the next step of determining whether the means that the state employed to protect that interest were appropriate. Similarly, in an Olguin-like case involving federal regulation, since it has already been determined that mine safety is not an area of state responsibility and therefore no state interest is implicated, the inquiry ends at that step.

ii. Balancing the Federal Interest

The general federal interest favoring arbitration of industrial disputes has been discussed previously. In narrow classes of cases, such as statutory retaliatory discharge or employment discrimination actions, the federal interest, though implicated, is not controlling, because the state interest is relatively much larger. However, as the scope of the definition of the state interest expands, the scope of mandatory arbitration decreases. At some point, the federal interest is threatened to such an extent that state action is no longer permissible.

As with any kind of balancing test, there is a substantial element of subjectivity involved in determining the outcome of specific cases. To a large extent, the threshold requirement of specific statutory authorization reduces that subjectivity. Yet, not every statutory scheme can escape preemption.

An example of a specific state statute that might be preempted would be one providing that all discharges of employees, whether or not covered by a collective bargaining agreement, must be supported by just cause and creating a tort cause of action for its breach. The requirement of a specific statutory policy would be satisfied. Moreover, the means

Ninth Circuit held that “the interests of antitrust enforcement” gave a company’s marketing director standing to sue for treble damages under the federal antitrust laws when he was discharged for objecting to the company’s alleged conspiracy to fix prices.

177. It must be remembered that Garibaldi was not without a remedy. He filed a grievance that went to arbitration, and the arbitrator found that he was discharged for cause. Had the arbitrator found that Garibaldi had been discharged for refusing to violate the law, a finding of cause would not have been made.
chosen would substantially further the state's policy of protecting job security. However, two overriding federal concerns mandate that such a statute be preempted. First, the statute's impact on the use of arbitration would be devastating. Few discharged employees would select arbitration if the remedies available through litigation were substantially more attractive. Second, as applied to unionized employees, the policy that the statute attempts to further parallels to some extent the federal policy. That is, one of the primary motivations for the NLRA was to provide a method for employees to obtain job security. Thus, unlike the case of the workers' compensation discharge where state and federal policies are independent, the state job-security policy is inextricably intertwined with federal labor policy.

A just-cause requirement may be the kind of case that would fall within an exception to Metropolitan Life Insurance Co. v. Massachusetts.\textsuperscript{178} Two circumstances were identified in that case that would result in preemption of a state regulation imposing a substantive term on the parties. First, the addition of too many substantive terms favoring one of the two parties may be viewed as creating an inequality of bargaining power. Second, there is a more general requirement that the state legislation be not incompatible with general federal goals. As discussed above, it would be incompatible with the federal policy favoring private dispute resolution for every discharge to be examined in a state court.

Although it could be argued that there should be no preemption simply by virtue of the parallel nature of the state and federal policies, this is not the case, since even when states are not obviously acting contrary to federal policy their regulations may be preempted. For example, in Gould, Inc. v. Wisconsin Department of Industry,\textsuperscript{179} the United States Court of Appeals for the Seventh Circuit held preempted a state statute that prohibited the state from purchasing from any company that had been determined by the NLRB and federal courts to have engaged in a certain number of unfair labor practices. The court rejected the state's argument that its statute promoted compliance with the NLRA and was therefore in harmony with federal law, reasoning that the NLRA is a remedial statute and the state's action was punitive in nature, resulting in a conflict of remedial schemes.\textsuperscript{180} Arguably, a state just-cause requirement would be similarly preempted.

It should be noted that the above analysis may well change if the

\textsuperscript{178} 105 S. Ct. 2380 (1985).

\textsuperscript{179} 750 F.2d 608 (7th Cir. 1984), \textit{prob. juris. noted}, 105 S. Ct. 2356 (1985).

\textsuperscript{180} See also IBEW v. Foust, 442 U.S. 42 (1979), where the Supreme Court held that punitive damages are not recoverable against the union in fair representation cases. The Court concluded that "[b]ecause general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, . . . such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance." \textit{Id.} at 52.
dispute is not one that could be brought before an arbitrator. In such a case—which would be rare—there would be no conflict with the federal policy favoring arbitration. There may be other federal policies involved, however, that would in a given instance preempt a state action anyway. For example, the primary jurisdiction rationale, which would prevent a court from exercising jurisdiction over a Hentzel-like joint protest by non-union employees, would also prevent a similar action brought by union employees.

Moreover, where the individual arguably has been terminated for asserting a right under the collective bargaining agreement, preemption also would involve Garmon principles, since in NLRB v. City Disposal Systems, Inc., the Supreme Court recently approved the Board's Interboro doctrine. The Court described the Interboro rule as follows:

As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance.

At issue in City Disposal was a driver who refused to drive a truck that he claimed was unsafe. Since the issue of safety was addressed in the collective bargaining agreement, the employee was deemed to be asserting a collective right even though he made no reference to the agreement when he refused to drive. Applying that reasoning, the employee's activities would also be concerted if he had reported a violation of safety regulations to his employer. In that case, a discharge in retaliation would be an unfair labor practice, as would a discharge for reporting the violation to a government agency. Thus, to the extent a whistle-blower statute purported to give the employee a wrongful discharge claim, it would be preempted because the dispute would fall within the primary jurisdiction of the NLRB.

Although the approach advocated in this article would result in the preemption of most wrongful discharge actions brought by unionized employees, the interference with the ability of the states to determine and

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183. 104 S. Ct. at 1514. The Court noted that it had no occasion to rule on the validity of the Board's ruling in Meyers Industries, Inc., 268 N.L.R.B. 493 (1980), dealing with the non-unionized setting. Given the differences between the Interboro rule and the Meyers Industries rule, it is apparent that the scope of "concerted activity" is broader in the union setting than in the non-union, and thus the potential for federal preemption is greater where a collective bargaining agreement is involved.
enforce their legitimate policies will be slight. At the same time, the furtherance of federal policies relating to collective activity and industrial harmony will be substantial, justifying the slight interference with state prerogatives.

4. Causes of Action that Typically Accompany Wrongful Discharge Actions

Often appended to claims of wrongful discharge are claims for intentional infliction of emotional distress and misrepresentation. In the collective bargaining setting, the facts of the individual cases must be looked to in order to resolve the preemption issues. To the extent that a claim of intentional infliction of emotional distress is premised on the argument that the act of termination itself inflicted the harm, the claim would be preempted under Farmer v. Carpenters if the claim to which it is appended involves an unfair labor practice. On the other hand, if the main claim is not preempted, ordinarily the appended claim would also not be preempted.

For example, in Carter v. Sheet Metal Workers, the Eleventh Circuit held that a claim that a union, by discriminatorily refusing to reinstate the plaintiff's union card, had caused the plaintiff to suffer embarrassment, scorn, and derision, was preempted by Farmer. Because the facts essential to the state cause of action were the same as those essential to an unfair labor practice complaint, the Board was the exclusive forum to hear the case.

On the other hand, in certain situations, a claim for intentional infliction of emotional distress may not be preempted. For example, in Moore v. Kaiser Foundation Hospitals, the plaintiff was an x-ray technician covered by a collective bargaining agreement who claimed that he had been terminated for protesting the defendant's use of a particular x-ray machine. Although the statement of facts in the opinion is sparse, it appears that one of the allegations was that a naked woman had been wheeled into the x-ray room, apparently for the purpose of causing plaintiff emotional distress. Because the act was not "inextricably intertwined" with the wrongful discharge claim, the intentional infliction claim was pro tanto valid. The facts of Kaiser are unusual, however, and in most cases the "outrageous conduct" alleged in support of the intentional infliction claim is in large part the mere allegation of termination without right. Therefore, most courts faced with these claims have held them preempted.

The same is true of allegations of misrepresentation, which do not appear to be as common in cases involving union workers as they are in non-union cases. The typical misrepresentation claim is that the employer entered into a contract, under which discharges were to be made only for cause, without a contemporaneous intention to perform. Since the breach of contract claims are universally held preempted, it is not surprising that the misrepresentation cases, which generally involve the circumstances surrounding the formation of the same contracts, have met similar fates. In fact, the courts considering these claims usually do not treat the breach of contract claims and the misrepresentation claims separately.

III
CONCLUSION

Difficult federal preemption questions arise in the context of state wrongful discharge actions. Careful analysis of each species of wrongful discharge case is necessary, since some such cases should be held preempted and others should not. In the non-union setting, the principal issue is whether the conduct of the employee that prompted the discharge was concerted and protected. If it was, then the employer's response may be an unfair labor practice and a state action would be preempted by Garmon. Therefore, the NLRB would have primary jurisdiction over the dispute. In the union setting, this same issue is present, and because of the broader definition of "concerted" under the Interboro doctrine, more actions should be preempted than in the non-union setting.

The most significant threat that wrongful discharge actions pose, however, is disruption of the collectively bargained grievance and arbitration procedures. There now seems to be little room for dispute that actions by union employees for breach of contract and breach of the covenant of good faith and fair dealing are preempted. The more difficult

188. See Moore v. General Motors Corp., 739 F.2d 311 (8th Cir. 1984), cert. denied 105 S. Ct. 2320 (1985). The plaintiff in that case alleged breach of contract and fraud with respect to her transfer between plants. She had been laid off from the plant in St. Louis and offered employment in a plant in Bowling Green, Kentucky. She sold her house in St. Louis and bought a new home in Bowling Green. Subsequently, the offer of the job in Bowling Green was withdrawn. Plaintiff brought suit claiming breach of contract and fraud, alleging that, at the time that GM represented to her that she would be employed at the Bowling Green plant, the company had no intention of having her work there.

The Eighth Circuit held that plaintiff's action was preempted because her complaint "arises from an employment contract." The court stated that the alleged tortious conduct "involves [plaintiff's] right of transfer to the new plant" and since that right "evolves from the Collective Bargaining Agreement" the matter is governed by federal law. Her sole remedy lay in the grievance procedures of the agreement. One member of the panel dissented, stating that "I do not believe that federal labor law gives GM the license fraudulently to injure an employee with impunity from the control of state tort law." Id. at 317 (Fagg, J., dissenting).
cases are those based on an alleged violation of a state public policy. Only where the state is acting pursuant to a clearly defined, narrowly tailored policy, unrelated to the protection of employee protest, should a state-law action be permitted to proceed. In such cases, the state's interest may be great enough that it cannot be concluded that Congress intended to deprive the states of power to protect that interest. On the other hand, absent such a strong state interest, the states must defer to the grievance and arbitration procedure set forth in the labor agreement.