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NLRA PREEMPTION OF STATE LAW ACTIONS FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

During the past ten years, employees have brought an increasing number of state law actions asserting that they were wrongfully discharged from their employment.[1] Both "at-will"[2] em-

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1. The increase in the number of cases being brought by employees is due to the growing number of state courts that recognize the tort of wrongful discharge. Until 1974, only one court had recognized this action. Petermann v. Local 396, International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). Since 1974, courts in at least 17 states have recognized the public policy theory of liability. *See* Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487 (W.D. Ark. 1982); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Murphy v. Topeka-Shawnee County Dep't of Labor Servs., 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981); Trombetta v. Detroit, Toledo & Ironton R.R. Co., 81 Mich. App. 489, 265 N.W.2d 385 (1978); Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Harless v. First Nat'l Bank, 289 S.E.2d 692 (W. Va. 1978).

Courts in at least four more states have recognized the possibility of a suit under public policy theory: Abrisz v. Pulley Freight Lines, 270 N.W.2d 454 (Iowa 1978); Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. App.), *cert. denied*, 414 So. 2d 379 (1982); Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980); Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979).

In this Note, the term "wrongful discharge" will encompass "retaliatory discharges" and "abusive discharges." Retaliatory discharges are discharges that occur in response to employee action such as the filing of a workers' compensation claim or the reporting of illegal acts of an employer to governmental authorities. Abusive discharges are those that are particularly outrageous, such as the firing of a 13-year employee just before his pension plan is to vest. Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

2. An "at-will" employee is an employee who can be discharged for "a good reason, a wrong reason, or no reason." Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977).

H. Wood first articulated the employment-at-will doctrine over one hundred years ago. H. Wood, Treatise on the Law of Master And Servant § 134, at 272 (1877):

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party . . . .

ployees and employees covered by collective bargaining agreements have persuaded state courts that their discharges were wrongful because they contravened public policy.[3] Employers have recently begun to defend these wrongful discharge actions by asserting that the action for which the employee claims he was discharged is protected by the National Labor Relations Act (NLRA),[4] and therefore the state law claim should be preempted.[5]

The Supreme Court formulated the preemption doctrine in la-

This doctrine has been restated by commentators and reaffirmed by the courts in recent years. *See* 9 S. WILLISTON, CONTRACTS § 1017 (Jaeger ed. 1967); Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977); Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977); Simmons v. Westinghouse Elec. Corp., 311 So. 2d 28 (La. Ct. App. 1975); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

The doctrine has also, however, been criticized by numerous commentators as harsh and unjust to the employee. *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

3. While the term "public policy" has been described as a "vague and indefinite concept," 2A SUTHERLAND, STATUTORY CONSTRUCTION § 56.01 (Sands 4th ed. 1972), it will serve in this Note as a shorthand reference to discharges arising from or relating to an enforcement of a codified state policy or one implicit in well-established state policies or judicial decisions. *See generally* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

4. 29 U.S.C. §§ 151-169 (1982).

5. The federal preemption doctrine has its origin in the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and was first articulated in cases challenging state regulation of interstate commerce. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

Employers have argued for NLRA "arguably protected or prohibited" preemption in the following public policy wrongful discharge cases: Aragon v. Federated Dep't Stores, Inc., 750 F.2d 1447 (9th Cir. 1985); Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468 (9th Cir. 1984); Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985); Viestenz v. Fleming Cos., 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981); Sitek v. Forest City Enters., 587 F. Supp. 1381 (E.D. Mich. 1984); Messenger v. Volkswagen of Am., Inc., 585 F. Supp. 565 (S.D. W. Va. 1984); Thomas v. Kroger Co., 583 F. Supp. 1031 (S.D. W. Va. 1984); Flick v. General Host Corp., 573 F. Supp. 1086 (N.D. Ill. 1983); Sherman v. St. Barnabas Hosp., 535 F. Supp. 564 (S.D.N.Y. 1982); Meyer v. Byron Jackson, Inc., 120 Cal. App. 3d 59, 207 Cal. Rptr. 663 (1984); Anco Constr. Co. v. Freeman, 236 Kan. 626, 693 P.2d 1183 (1985); Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281 (1980); Smith v. Leon-Ferenbach., 114 L.R.R.M. (BNA) 3360 (Tenn. Sup. Ct. Rptr. 1983).

An employer also argued for preemption in an action for wrongful discharge in violation of an implied contract in Morris v. Chem-Lawn Corp., 541 F. Supp. 479 (E.D. Mich. 1982); *see infra* note 83.

bor law because it believed that Congress, in adopting the NLRA, provided for the comprehensive regulation of industrial relations.[6] To ensure that state laws governing labor relations not interfere with the NLRA, the Court in *San Diego Building Trades Council v. Garmon*,[7] established the general principle that when an activity to which the state law would attach liability is "arguably protected" or "arguably prohibited" by the NLRA, the state law is preempted.[8] This means, for example, that the NLRA would preempt a cause of action under a state labor relations statute by an employee who is discharged because of union membership.[9]

It is less clear whether the NLRA preempts an employee's action when the employee alleges that the employer violated well-established public policy in discharging him. This lack of clarity has led courts in three states to give three different answers to the question whether the NLRA preempts a wrongful discharge action by an employee covered by a collective bargaining agreement who was allegedly discharged for filing a workers' compensation claim.[10]

Whether the NLRA preempts a state action for wrongful discharge is important to employers and employees for at least three reasons. First, an employee may be able to receive punitive damages[11] as well as reinstatement with back pay when suing for wrongful discharge in state court. His remedy would be limited to reinstatement with back pay[12] before an arbitrator or the National Labor Relations Board (NLRB).[13] Second, the employee may believe a jury would be more sympathetic to his case than

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6. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239 (1959).

7. 359 U.S. 236 (1959).

8. *Id.* at 245.

9. Viestenz v. Fleming Cos., 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982).

10. The court in Judson Steel Corp. v. Workers' Compensation Appeals Bd., 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978), decided that a state court action was not preempted by federal law. The court in Thompson v. Monsanto Co., 559 S.W.2d 873 (Tex. Civ. App. 1977), found that the federal law preempted the state action. In a third case, Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980), the court held that the collective bargaining agreement provided the sole remedy for the unionized employee and that the employee was barred from bringing a state action.

11. While most courts have stated they would not award punitive damages in wrongful discharge actions, a few have suggested that they might do so in certain cases. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984).

12. *See* 29 U.S.C. § 160(c) (1982).

13. The National Labor Relations Board is the agency created by the National Labor Relations Act to administer its laws. 29 U.S.C. § 153 (1982).

the NLRB.[14] Third, the NLRA has a six-month statute of limitations for bringing unfair labor practice claims.[15] Depending on the state, the statute of limitations for bringing a tort action for wrongful discharge may be longer.

This Note considers the circumstances under which the NLRA should preempt state law tort suits for discharge in contravention of public policy by employees covered by a collective bargaining agreement, and by at-will employees.[16] Part I discusses the rationale behind the preemption doctrine and outlines the tests the Supreme Court has adopted for determining when the NLRA preempts state laws. Part II argues that the specific rationale behind the Court's preemption tests are inapplicable to the typical public policy wrongful discharge action. Part III identifies the ways in which public policy wrongful discharge actions might infringe on the NLRA. It proposes a preemption test that courts should use to determine when the NLRA preempts these actions. Finally, Part IV applies this test to various types of wrongful discharge actions by at-will and union employees. It concludes that the NLRA does not preempt certain types of actions for wrongful discharge in violation of public policy.

I. THE DOCTRINE OF NLRA PREEMPTION

The NLRA protects employee activity and prohibits employer retaliation only if, as a threshold matter, the activity is "con-

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14. The employee may believe that layperson jurors would be more likely to sympathize with her individual claim for wrongful discharge than would the Administrative Law Judges of the National Labor Relations Board who hear hundreds of wrongful discharge cases during their tenure.

15. 29 U.S.C. § 160(b) (1982).

16. This Note will not address the question of whether the remedies for discharge available to a unionized employee are limited to those provided by the collective bargaining agreement. Although great deference has traditionally been given to the remedies provided by a collective bargaining agreement, and arbitrators' decisions have been deemed reviewable only on narrow grounds, in public policy wrongful discharge actions the state's interest in enforcing its own laws may outweigh the federal interest in limiting the remedy to the collective bargaining agreement.

This Note will also not address whether state actions for wrongful discharge based on a breach of contract implied in fact or implied in law, or for breach of an implied covenant of good faith and fair dealing, should be preempted.

Additionally, this Note will not address the applicability of the Supreme Court's recent decision in Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985), regarding preemption of state-law public policy wrongful discharge actions that are substantially dependent upon analysis of the terms of a collective bargaining agreement, to public policy wrongful discharge actions that are not based on a collective bargaining agreement.

certed" and for "mutual aid or protection" within the meaning of section 7 of the Act.[17] Because section 7 protection is not limited to unionized workers or organizational activities,[18] and employees retain their protection under the "mutual aid or protection" clause when they seek to improve their lot as employees outside the immediate employee-employer relationship,[19] there is a potentially large area of overlap between the NLRA and state public policy wrongful discharge actions. For example, employees who are discharged because they inform a state agency of the criminal practices of their employer are arguably engaging in "concerted activity" designed for "mutual aid and protection"; they are therefore protected by section 7 of the NLRA. However, because their discharge also contravenes well-established public policy, the employees have grounds for a tort action under state law. The issue becomes whether the state tort action is preempted by the NLRA. The answer to this question is not readily apparent because Congress, in adopting the NLRA, implicitly limited the degree to which states could regulate labor-management relations,[20] but did not specify the exact scope of this limitation.[21]

A. *The* Garmon *and* Morton-Machinists *Formulas*

The Supreme Court developed two formulas to clarify the scope of this limitation and to help state courts and the NLRB

17. 29 U.S.C. § 157 (1982).

18. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

19. Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978).

20. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-44 (1959); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

21. Uncertainty surrounding the scope of the limitation led Justice Frankfurter to say almost 30 years ago, "what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The litigation occurring since his statement has clarified the law somewhat, but has been far from fully elucidating.

Justice Harlan noted that the litigation had failed to clarify the law when he commented on the "understandable confusion" surrounding the Supreme Court's preemption decisions. Motor Coach Employees v. Lockridge, 403 U.S. 274, 285 (1971). Recently, Justice Brennan said that although the Court has "developed standards to help it decide preemption cases, those standards are by necessity general ones which may not provide as much assistance as we would like in particular cases." Belknap, Inc. v. Hale, 463 U.S. 491, 593 (1983) (Brennan, J., dissenting).

One commentator has described the doctrine of preemption as being "as arcane as the Rule Against Perpetuities." Brody, *Labor Preemption Again—After the Searing of Garmon*, 13 SW. U.L. REV. 201 (1982).

determine when the NLRA preempts state law. It designed these formulas for at least three reasons. First, the Court wanted to prevent state courts from inhibiting federally protected conduct.[22] Second, it wanted to require the Board's expertise in resolving labor conflicts.[23] Finally, the Justices wanted to prevent state courts and the NLRB from producing conflicting answers to labor questions.[24]

The first formula, based on the the notion that the NLRB has primary jurisdiction over labor disputes,[25] is frequently referred to as the *Garmon* rule. The Supreme Court in *San Diego Building Trades Council v. Garmon*[26] decided that the NLRA precluded a California court from awarding damages under state law to an employer who suffered economic injuries as a result of peaceful picketing by labor unions that had not been selected by a majority of his employees. Justice Frankfurter, speaking for the Court, announced that state law is usually preempted when federal and state law might apply to the same labor conduct.[27] The Court adopted the rule that "[w]hen an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."[28] In addition to formulating the foregoing rule, the Court established two exceptions to it. It said that the states could regulate activity which was (1) a "peripheral concern" of the NLRA, or (2) an activity that touched interests "deeply rooted in local feeling and responsibility."[29]

The second formula, also based on the concern that applica-

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22. Motor Coach Employees v. Lockridge, 403 U.S. 274, 286-88 (1971).

23. *Id.*

24. Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953).

25. *Id.* at 488-90.

26. 359 U.S. 236 (1959).

27. *Id.* at 243. The Court reached this conclusion by inferring Congress' purpose in adopting the NLRA. The Court said:

> Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Id. at 242-43 (citing Garner v. Teamsters Unions, 346 U.S. 485, 490-91 (1953)).

28. *Garmon*, 359 U.S. at 245.

29. *Id.* at 243. The exceptions to *Garmon* are significant when considering whether conduct should be presumed preempted or presumed not preempted. Under the *Garmon* rule, arguably protected or prohibited conduct is presumed preempted. Under the exceptions, however, the presumption is that the NLRA will not preempt the state action. *Id.* at 244.

tion of a state law would frustrate the purpose of the NLRA, is often referred to as the *Morton-Machinists* rule. The Supreme Court in *Teamsters Union v. Morton*[30] decided that a state secondary boycott law that prohibited a union engaged in a labor dispute from asking its employer's customers to boycott the employer's product should be preempted even though the NLRA did not cover such activity. The Court held that even when particular conduct is plainly not prohibited or protected by national law, a state may not forbid or award damages if application of the state law would upset the balance of power between labor and management established by the NLRA. In a later case, *International Association of Machinists v. Wisconsin Employment Relations Commission*,[31] the Court found that the NLRA did preempt a state labor relations board decision. The state board would have enjoined a union and its members from continuing to refuse to work overtime pursuant to a union policy to put economic pressure on an employer in collective-bargaining negotiations. It held that when particular employer or employee conduct is an economic weapon that has not been specifically protected or prohibited by Congress, the use of the conduct should be left to the relative economic strength of the employer and the union.

B. *The Evolution of the Preemption Doctrine Since* Garmon

The Supreme Court strictly applied the *Garmon* rule and its exceptions for almost two decades following its adoption. Recently, however, the Court has implicitly modified the rule such that two members of the Court have noted that the "[*Garmon*] 'rule' of uniformity is a tattered myth."[32]

The *Garmon* exceptions for activities that are a "peripheral concern" of the Act or "deeply rooted in local feeling" were broadened in *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*.[33] The Supreme Court held that even though

30. 377 U.S. 252 (1964).

31. 427 U.S. 132 (1976).

32. Motor Coach Employees v. Lockridge, 403 U.S. 274, 329 (1971) (White, J., dissenting). Chief Justice Burger and Justices White and Stewart disapproved the *Garmon* "arguably protected or prohibited" test in International Longshoremen Ass'n Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201 (1970) (White, J., concurring).

33. 430 U.S. 290 (1977). A suit brought by Farmer on behalf of a deceased claimant alleged that the union had threatened and intimidated the claimant, thereby causing him to suffer grievous emotional distress resulting in bodily injury. He also alleged that the union had discriminated against him in referrals for employment because of his dissi-

an employee's tort action against his union for intentional infliction of emotional harm was arguably subject to the NLRA and "potentially interfered" with the Act, the employee action should not be preempted. The Court found that a state could adjudicate cases alleging defamation or violence[34] when three factors were present: (1) the underlying conduct that formed the basis of the state action was not intended to be protected or prohibited by Congress, (2) there was an "overriding state interest" that was "deeply rooted in local feeling,"[35] and (3) there was little risk that the state cause of action would interfere with the effective administration of national labor policy.[36]

Farmer represents a departure from a strict application of *Garmon*. Under *Garmon*, any *potential* interference with the NLRA was sufficient to warrant preemption. Yet, in *Farmer*, the Court explicitly stated that the preemption doctrine is not to be applied inflexibly, especially when the state interest at issue does not threaten *undue interference* with the federal scheme.[37]

The Court in *Sears, Roebuck & Co. v. Carpenters*[38] drew on the *Farmer* analysis in continuing its departure from a pristine reading of *Garmon*. The Court examined whether picketing on an employer's premises by non-employees was arguably protected or prohibited and whether the NLRA should preempt the employer's state action for trespass. In considering the "arguably prohibited" branch of *Garmon*, the Court said that the critical issue was whether the controversy presented to the state court would be the same one that would be presented to the NLRB.[39] It held that because the issue to be presented to the

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dent intra-union political activities.

Farmer is significant when developing a test for preemption of wrongful discharge cases not only because it is the most recent preemption case in which the state action was a tort action, but because it was the first of several post-*Lockridge* cases in which the Court retreated from its previous strict test for preemption.

34. The Court had previously authorized the states to decide employer-employee controversies marked by violence and imminent threat to the public order. UAW v. Russell, 356 U.S. 634 (1958).

35. This exception was foreshadowed in International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), and UAW v. Russell, 356 U.S. 634 (1958).

36. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 283 (1980).

37. *Farmer*, 430 U.S. at 302.

38. 436 U.S. 180 (1978).

39. The Court found that the issue that the owner might have presented to the NLRB was whether the objective of the picketing was prohibited under federal law. The issue presented to the state court was whether the location of the picketing, without regard to its objective, violated state trespass laws. The Court held that because this was different from the issue that could be presented to the NLRB, the state court's exercise of jurisdiction over trespass aspects of the picketing created no realistic risk of interfer-

state court was different from the issue that would be presented to the Board, the state action should not be preempted. In evaluating the "arguably protected" branch, the Court noted that the initial reasons for the Board's primary jurisdiction were to ensure that states not prohibit acts protected by the NLRA, and that the expertise of the Board be used when trying to determine whether the union activity that the employer wants to enjoin is indeed protected. The Court found that if the aggrieved party could not invoke the Board's jurisdiction, there would be little risk of interference with the NLRA. It concluded that the preemption doctrine would not apply in these cases.[40]

By suggesting that a state controversy will not be preempted under the arguably prohibited branch if it is not identical to the controversy that would be presented to the Board, the Court in *Sears* expanded the scope of permissible state actions. After *Sears*, the greater the difference between state substantive law and federal law, the less likely the state action is to be preempted.[41] The Court also cut back on the strict application of *Garmon* in discussing the arguably protected branch. The Court suggested that if the union had filed an unfair labor practice charge against the employer asserting that its picketing was protected, the state court should determine whether the employer's trespass action should be preempted by determining the probability that the union would prevail before the Board.[42] This undermines the rationale behind *Garmon*. One of the primary goals of the arguably protected branch of *Garmon* was to ensure that state courts not misinterpret the NLRA. Yet, the Court in *Sears* seemed willing to allow that possibility.

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ence with the NLRB. *Id.* at 197-98.

40. Because the union did not invoke the Board's jurisdiction under the arguably protected branch, and Sears could not invoke the Board's jurisdiction under this branch, the Board did not have jurisdiction over the union's arguably protected conduct. Because the Board did not have jurisdiction, there was no risk of interference with the Board's primary jurisdiction. The Court concluded that the mere fact that the union's conduct *might* be protected was "insufficient" to warrant preemption. *Id.* at 207.

41. The leading commentator on labor law preemption, Archibald Cox, has argued that *Sears* suggests

> a conscious or unconscious rewriting of decisional precepts in ways that imply a significant narrowing of the area of exclusive federal jurisdiction. The more widely applicable state substantive law differs from the federal law, the greater will be the differences in the proof required to make a case for judicial relief.

Cox, *supra* note 36, at 285.

42. *Sears*, 436 U.S. at 205.

II. APPLICATION OF *Garmon* AND *Morton-Machinists* TO ACTIONS FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

The focus of inquiry and holdings of *Farmer* and *Sears* indicate that *Garmon* is no longer the final word in labor preemption. The Court's failure to apply *Garmon* strictly without providing a definitive alternative formulation has created difficulty for lower courts in determining whether the NLRA preempts state law.[43] This difficulty has been exacerbated by the fact that there are differences between actions for wrongful discharge based on state public policy and discharges for typical NLRA-related activity. Evaluation of lower court efforts to apply the traditional preemption tests, along with analysis of the differences between public policy wrongful discharge actions and traditional preemption cases, indicates that the specific rationale behind the *Garmon* and *Morton-Machinists* tests do not apply to public policy wrongful discharge actions.

A. *Lower Court Efforts to Apply* Garmon *and* Morton-Machinists *to Public Policy Wrongful Discharge Actions*

The Ninth Circuit had difficulty applying the traditional preemption tests in *Garibaldi v. Lucky Food Stores, Inc.*[44] In that case, Garibaldi, a milk truck driver, refused his employer's directive to deliver a load of spoiled milk to the company's customers. Instead, he reported the employer's request to the local health department. Garibaldi was fired soon after making his report. He filed a claim for damages in state court for wrongful discharge and intentional infliction of emotional harm. The employer filed for removal and successfully argued before the district court that the case should be removed to federal court. Garibaldi appealed the district court's decision.

The Ninth Circuit, noting that the case was one of first impression, relied first on *New York Telephone Co. v. New York*

43. *See* discussion of Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985), *infra* note 44 and accompanying text; discussion of Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981), *infra* note 52 and accompanying text; discussion of Sitek v. Forest City Enters., 587 F. Supp. 1381 (E.D. Mich. 1984), *infra* note 57 and accompanying text.

44. Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985).

State Department of Labor,[45] a progeny of *Machinists*, and then on *Farmer*,[46] for its holding that the NLRA did not preempt Garibaldi's claims for wrongful discharge and intentional infliction of emotional harm.[47] Because it looked first to a case in the *Morton-Machinists* line, the Ninth Circuit did not apply traditional preemption analysis in *Garibaldi*. Under traditional analysis, the court would first have applied *Garmon* and determined whether the employee activity was arguably protected or prohibited. Only if it determined that neither section 7 nor section 8 of the NLRA applied would the court look to a case in the *Morton-Machinists* line to determine whether Congress intended to leave the matter to the free play of economic forces.

In addition to not applying the traditional analysis, the court only summarily examined whether Garibaldi's state claim would interfere with the NLRA. The court, after conducting minimal analysis, concluded that Garibaldi's claim did not pose a significant threat to the collective bargaining process because the remedy was in tort, distinct from the collective bargaining agreement.[48]

The court also misinterpreted *Farmer* in considering Garibaldi's claim for intentional infliction of emotional harm. The court correctly determined that Garibaldi's claim, like the *Farmer* claim, was grounded in the state's interest in protecting the health and well-being of its citizens. It erred, however, in finding that Garibaldi met the *Farmer* requirement that the infliction of emotional harm be based on the "manner" rather

45. 440 U.S. 519 (1979). In *New York Telephone*, a three-Justice plurality held that a New York law that provided unemployment compensation to strikers should not be preempted by the NLRA. The plurality distinguished the case from *Morton-Machinists*. It found that unlike the statutes struck down in those cases, the New York statute did not attempt to regulate or prohibit private conduct. It held that the New York law was one of general applicability designed to ensure employment security, not to interfere with labor-management relations. The plurality found that laws of general applicability were entitled to a presumption of validity unless there was compelling congressional direction to the contrary.

Five of the other Justices applied the *Machinists* test to this case. They considered whether, even though the state's provision of unemployment compensation to strikers has an impact on the balance of bargaining power between labor and management, Congress had decided to tolerate this degree of interference. The five also disagreed with the plurality's finding that laws of general application are entitled to a presumption of validity. They read *Machinists* to suggest that the presumption should be in favor of preemption when the state action alters the balance of bargaining power.

That the Justices wrote four opinions in *New York Telephone*, and no opinion was joined by more than three of the Justices, suggests that, like *Garmon*, *Morton-Machinists* is being read in different ways and/or not being strictly applied.

46. *Garibaldi*, 726 F.2d at 1372-74.

47. *Id.* 726 F.2d at 1375.

48. *Id.*

than the "function" of the discharge. The employee in *Farmer* was intimidated and threatened by the respondent. In deciding that the NLRA did not preempt Farmer's suit, the Court emphasized that the respondent's conduct was particularly outrageous, and that it led to the petitioner's physical and emotional distress.[49] There is nothing in the facts of *Garibaldi* to indicate that the petitioner suffered any of the intimidation or threats that the employee in *Farmer* had.[50] Thus, the Ninth Circuit incorrectly found that Garibaldi's discharge fell within the *Farmer* "function-manner" limitation.[51]

The Tenth Circuit in *Peabody Galion v. Dollar*[52] took a different approach in examining whether the NLRA preempted an employee's claim for wrongful discharge for filing a workers' compensation claim. The court recognized that this wrongful discharge claim might not lend itself to the doctrine of preemption.[53] It noted at the very beginning of its analysis that the preemption doctrine might be inapposite because the statute under which the plaintiff brought action was "in its nature remote"[54] from the NLRA or the collective bargaining agreement. Nevertheless, the court apparently felt compelled to proceed through the traditional preemption analysis. It applied the *Garmon* and *Morton-Machinists* tests, as well as a third, the "frustration of purpose" test, to determine whether to preempt the employee's action.[55] The court found that under each of these tests the underlying activity that provoked the discharge, filing a workers' compensation claim, created no risk of conflict with the NLRA and should not be preempted.[56]

The district court in *Sitek v. Forest City Enterprises*[57] took

49. *Farmer*, 430 U.S. at 293-94, 301-02.

50. While it might be said that an employer's discharge of an employee for reporting the employer's violation of a state safety law was outrageous, this characterization would be due to the function of the discharge rather than its manner.

51. The court in Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978), properly applied the *Farmer* "function-manner" distinction. In *Magnuson*, an employee was fired when his employer found that he was responsible for a collision between two freight trains. The employee contended that the railroad fired him to conceal its own negligence. He sued for intentional infliction of emotional distress. The Ninth Circuit held that the employee did not state a claim for intentional infliction of emotional distress because the distress was an incident of the wrongful discharge, not the manner in which the discharge was performed. The court said, "the gravamen of the complaint is wrongful discharge." 576 F.2d at 1369.

52. 666 F.2d 1309 (10th Cir. 1981).

53. *Id.* at 1313.

54. *Id.*

55. *Id.* at 1314-15.

56. *Id.* at 1316-19.

57. 587 F. Supp. 1381 (E.D. Mich. 1984).

yet another approach in determining that the NLRA preempted a supervisor's claim that he was wrongfully discharged because he refused to discourage his employees from unionizing.[58] The court adopted traditional preemption analysis and relied on *Garmon* and *Sears*. Applying *Garmon*, the court determined that the employee's discharge was arguably prohibited by the NLRA. It then rejected the supervisor's claim that his activity was a peripheral concern of the Act. The court applied *Sears* in concluding that because the plaintiff's claim, that he was discharged in violation of Michigan's public policy after he refused to discourage his employees from unionizing, was the same claim that would be presented to the NLRB on an unfair labor practice charge, the NLRA preempted the employee's claim.[59]

The courts in the foregoing cases construed the various preemption tests in different ways and took different approaches in considering whether the NLRA preempted certain public policy wrongful discharge actions. These differing constructions of the law and differing approaches indicate that the current preemption tests may be either unclear or inappropriate in determining whether the NLRA preempts public policy wrongful discharge actions.[60]

58. *Id.* at 1382.

59. *Id.* at 1385.

60. Whether the preemption decisions are unclear or inappropriate would be a moot point if the Supreme Court's reasoning in Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963), or Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), applied to public policy wrongful discharge actions. If these cases are applicable, courts would not need to determine whether the NLRA preempted public policy wrongful discharge actions.

In *Colorado Commission*, a black man claimed he was discriminated against in hiring because of his race. He asserted a claim under a state statute that prohibited discrimination in employment on the basis of race, creed, color, national origin, or ancestry. The employer contended that the state statute should be preempted by either the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1958), or the Railway Labor Act, 45 U.S.C. §§ 151-188 (1958).

The Court held that the state law would not be preempted unless it frustrated the purpose or effectiveness of a federal statute. It found that while the Federal Aviation Act of 1958 contained general provisions prohibiting unfair treatment to any particular person, no provision specifically prohibited or even mentioned discrimination in hiring. The Court added that the Railway Labor Act did not address discrimination in hiring even in general terms. The Court concluded that because neither Congress nor the Civil Aeronautics Board had expressly or impliedly intended to bar state legislation governing race discrimination in hiring in interstate commerce, the state prohibition would not frustrate the purpose of the federal legislation.

The Court's analysis in *Colorado Commission* suggests that if neither the purpose nor the provisions of the NLRA either implicitly or explicitly govern wrongful discharge actions, the actions should not be preempted. The purpose of the NLRA is

> to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have oc-

B. *Application of the Rationale Behind* Garmon *and* Morton-Machinists *to Public Policy Wrongful Discharge Actions*

Explication of the rationale behind *Garmon* and *Morton-Machinists*, in conjunction with analysis of the nature and charac-

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curred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1982). Section 7 of the NLRA gives employees

the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157 (1982). Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158 (1982).

Neither the purpose nor the foregoing key provisions of the NLRA expressly refer to public policy wrongful discharge actions. They do, however, protect an employee's right to engage in concerted activity and prohibit an employer from discharging an employee for participating in such activity. The threshold issue in determining whether to preempt wrongful discharge actions is whether the employee was engaging in concerted activity. If the employee was acting concertedly, the NLRA will protect the employee's behavior. This means that unlike the Federal Aviation Act of 1958 and the Railway Labor Act, which did not govern discrimination in hiring, it is possible that the NLRA will be applicable to a particular wrongful discharge action.

Farmer makes clear that mere possible applicability and potential frustration of the federal scheme is not enough to warrant preemption. Parts II and III of this Note also point out that the concerted aspect of the employee activity may not be the nature and gravamen of the employee's public policy wrongful discharge action; it may be only incidental to the employee's activity. Despite these observations, a state court must still determine what the nature and gravamen of the employee activity is, or, in the Court's terms, whether there is undue interference with the federal scheme. If *Colorado Commission* were broadly applied to public policy wrongful discharge actions, courts might not be compelled to make such a determination because public policy wrongful discharge actions would be presumed to be independent of the NLRA. This would create the possibility of the state deciding a wrongful discharge case that the NLRA should have preempted.

For similar reasons, *Alexander v. Gardner-Denver* is also not applicable to public policy wrongful discharge actions. In *Gardner-Denver,* a black employee who had been discharged from employment filed a grievance under a collective bargaining agreement and asserted that his discharge resulted from racial discrimination. The employee brought his grievance to arbitration. Prior to the hearing, he also filed a claim with the Colorado Civil Rights Commission. The arbitrator ruled that the employee was discharged for cause. The Civil Rights Commission referred his case to the Equal Employment Opportunity Commission (EEOC) which also determined that there was no reason to believe the employer violated Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e (1982). The employee then filed a claim in district court alleging that his discharge resulted from a racially discriminatory employment practice in violation of the Act. The district court held, and the court of appeals affirmed, that the employee was bound by the arbitrator's decision and had no right to sue under Title VII.

teristics of public policy wrongful discharge actions, further supports the contention that traditional preemption tests are inappropriate in these cases.

On appeal, the Supreme Court determined that there was nothing in Title VII that indicated that a prior arbitral decision foreclosed an individual's right to sue in federal court. It found that the policy against discrimination was of the "highest priority" and that Congress had provided for overlapping remedies to prevent discrimination. Noting that the arbitrator has the authority to interpret the collective bargaining agreement but has no general authority to invoke public laws that conflict with the collective bargaining agreement, the Court held that the contractual right to submit a claim to arbitration is legally independent of the employee's statutory claim against discrimination, and that the employee could pursue both.

Wrongfully discharged employees might argue that under *Gardner-Denver* they should be able to pursue both their state law actions and NLRA or arbitration remedies. If this were so, there would be no preemption problem. There are, however, possible supremacy clause issues with analogizing federal claims for discrimination with state claims for wrongful discharge in violation of public policy.

Although state public policy actions can usually be characterized as independent of the NLRA, not all of the actions are indeed independent of the Act. An action for wrongful discharge by a union employee for union activity can be characterized as an action for wrongful discharge in violation of a state policy prohibiting such discharges. It is clear, however, that the public policy wrongful discharge action for union activity is not wholly independent of the purposes and policies of the NLRA because the Act specifically governs this type of activity.

There would also be supremacy clause problems because the state policies in certain public policy wrongful discharge actions would not be of the same importance as the federal policy against discrimination. The Court emphasized in *Gardner-Denver* that laws against discrimination were of the highest priority. Although state public policies generally represent important societal values, not all of them are as important as the policy against discrimination. If a blanket rule were established that employees could pursue both state and federal remedies without an evaluation of the importance of the state policy in question, there would be potential for undue interference with the federal scheme. This would create a possible violation of the supremacy clause. The Court in *Gardner-Denver* did not confront the supremacy clause question. The conflict in that case was between the federal policy in favor of arbitration and federal laws prohibiting discrimination. The Ninth Circuit in *Garibaldi* recognized that the Court did not decide this possible federal/state conflict and implied that there might be a supremacy clause issue if all employees were allowed to pursue both forums. 726 F.2d at 1375 n.13. A commentator has also recognized this potential conflict. Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635, 658 n.134 (1983).

The Supreme Court of Oregon applied the reasoning of *Gardner-Denver* to a public policy wrongful discharge action. Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281 (1980). In that case, an employer refused to reinstate a union employee following her recovery from compensable job-related injury. She sued under state statutes that prohibited discrimination on the basis of race, religion, color, sex, national origin, marital status, application for workers' compensation benefits, and physical or mental handicap that does not prevent performance of the work involved. In analogizing the employee's claim to that made in *Gardner-Denver*, the court rejected the employer's contention that the compelling policy considerations behind Title VII to prohibit racial or other antiminority discrimination were not present in this case. The court found that the state statutory scheme providing a personal action for an employee claiming discrimination was sufficient to override the policy favoring exclusivity of collective bargaining remedies. It held that the employee was not required to exhaust her remedies under the collective bargaining agreement before filing suit for injunctive relief in state court.

Vaughn does not necessarily undercut the argument made earlier that there would be

1. *Application of the specific rationale behind* Garmon *to public policy wrongful discharge actions*— The general rationale behind *Garmon*—to prevent the states from interfering with the NLRA—is applicable to wrongful discharge actions. The specific rationale, that a state might prohibit activity that the NLRA protects[61] or issue a remedy that conflicts with that provided by the NLRA,[62] are, however, absent in the typical wrongful discharge action.

In the prototypical employee state action for wrongful discharge in violation of public policy, the employee contends that the employer violated a codified law or long-established state policy by discharging him.[63] The employer may then assert that the employee activity that led to the discharge is protected under section 7 of the NLRA. He would argue that *Garmon* dictates that the NLRA preempt the state action. In this scenario, the employee is not asserting that the activity that led to his discharge is protected by the NLRA. Therefore, there is virtually no risk that the state will fail to protect activity which is in fact protected by the NLRA. For example, the employee in *Petermann v. Local 396, International Brotherhood of Teamsters*[64] asserted that he was discharged for refusing his employer's request to commit perjury. Petermann sued in state court under public policy wrongful discharge theory. He did not contend that he was discharged in violation of his section 7 rights. Because he was not asking the state court to protect his section 7 rights, there was no risk that the state would fail to protect them. This example indicates that the primary motiva-

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supremacy clause problems with allowing all employees bringing public policy wrongful discharge actions to pursue both arbitration and the state remedy. In *Vaughn*, the state statutes were important ones similar in content and character to those of Title VII. Furthermore, the rights protected under Title VII are separate from those protected by the NLRA. It will not always be true, however, that the state statute or policy under which the employee will sue will be analogous to Title VII, i.e., important enough to override the federal policy favoring exclusivity of collective bargaining remedies, or to protect interests separate from those guarded by the NLRA. Thus, if the employee were allowed to pursue both remedies, there would be potential conflict with the federal scheme if courts were not compelled to determine whether the state law protects interests independent of the NLRA or comparable in importance to Title VII.

61. *See* Hanna Mining Co. v. Marine Engineers Beneficial Ass'n, 382 U.S. 181, 193 (1965); Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 203 (1978).

62. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

63. *See, e.g.*, Olguin v. Inspiration Consolidated Copper, Co., 740 F.2d 1468 (9th Cir. 1984); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981); Flick v. General Host Corp., 573 F. Supp. 1086 (1983).

64. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

tion behind *Garmon,* the fear that state courts will fail to protect employee activity that is in fact protected, is not applicable to the public policy wrongful discharge case.

The concern that the state remedy would be different from that provided by the NLRA is also not pertinent to the public policy wrongful discharge case. The remedy provided by the NLRA—reinstatement with back pay—is the same remedy that state courts order or allow juries to consider ordering.[65] This means that the employee in *Thomas v. Kroger Co.,*[66] who was discharged for filing a workers' compensation claim, could expect the same remedy from the state court and the NLRB.[67]

2. *Application of the rationale behind* Morton-Machinists *to public policy wrongful discharge actions*— The rationale behind *Morton-Machinists* was that Congress left certain economic weapons unregulated and to the free play of economic forces. This rationale is also inapplicable to public policy wrongful discharge actions. In the typical public policy wrongful discharge action, the employee conduct that leads to the discharge does not involve an employee's or union's use of an economic weapon against an employer. This is due in part to the fact that public policy wrongful discharge actions are generally brought by a single employee based on an alleged violation of public policy. The actions of a single employee in this area usually will not affect the balance of power between labor and management. In perhaps the only public policy wrongful discharge case involving more than one employee, a court rejected the argument that *Morton-Machinists* applied. The court in *Peabody Galion* held that although Congress had not indicated its intention to regulate workers' compensation discharges, it was unlikely that al-

65. *See, e.g.,* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978); Harless v. First Nat'l Bank, 289 S.E.2d 692 (W. Va. 1978).

66. 583 F. Supp. 1031 (S.D. W. Va. 1984).

67. In United Automobile, Aircraft & Agricultural Implement Workers v. Russell, 356 U.S. 634 (1958), the Supreme Court held that the primary jurisdiction of the NLRA did not prevent an employee, who was denied access to his employer's plant by a striking union, from bringing a tort action for compensatory damages for loss of earnings and mental anguish plus punitive damages. The Court reasoned that if the employee's common law rights against a union tortfeasor were cut off, the union would be granted substantial immunity from the consequences of mass picketing or coercion. It concluded that "an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here" and that "[t]he power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board." 356 U.S. at 646. *See also* United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

lowing the states to regulate such discharges would affect the balance of power between labor and management.[68] This analysis indicates that *Morton-Machinists* will generally not apply to public policy wrongful discharge actions.[69]

III. A PREEMPTION TEST FOR ACTIONS FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Although the foregoing analysis indicates that the specific rationale behind *Garmon* and *Morton-Machinists* are not applicable to the public policy wrongful discharge actions, the general rationale behind these cases—to prevent states from interfering with the NLRA—is applicable. For example, an action for wrongful discharge for union activity could be characterized as an action for wrongful discharge in violation of a state policy against discrimination on the basis of union activity.[70] It is clear, however, that this wrongful discharge action is not wholly independent of the NLRA. The purposes and policies of the Act specifically govern discharges for union activity. Thus, a state decision would likely infringe on the NLRA if the NLRA were not held to preempt wrongful discharge actions for union activity. Therefore, courts, when confronted with a wrongful discharge action in which the discharge may be prohibited by the NLRA, must still determine whether the state action would "frustrate effective implementation of the Act's processes."[71]

In deciding whether the NLRA preempts an employee's state action, courts should apply a preemption test that gives them the flexibility, freedom, and guidance to decide whether a partic-

68. 666 F.2d at 1316.

69. The Associate General Counsel of the NLRB for the Division of Advice has stated that he believes that *Morton-Machinists* will generally not be applicable to wrongful discharge actions of at-will employees. *See* H. Datz, Wrongful Discharge Cases and the Doctrine of Preemption Under the NLRA, Remarks at the Meeting of the American Bar Association Labor Law Section 5, 6 (Aug. 1984) (available from the Office of the Associate General Counsel for the Division of Advice of the National Labor Relations Board).

70. *See supra* notes 27-28 and accompanying text.

71. This is the critical question in determining whether the state action should be preempted. Vaca v. Sipes, 386 U.S. 171 (1966). Five Justices in New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979), recently reaffirmed that this is the ultimate issue. Justice Blackmun, joined by Justice Marshall, quoted *Machinists*, 427 U.S. at 150 (quoting Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)), in saying that state action should be preempted when it would "frustrate effective implementation of the Act's processes." 440 U.S. at 549. Justice Powell, joined in his dissent by Chief Justice Burger and Justice Stewart, cited the same passage from *Railroad Trainmen*, 394 U.S. at 558.

ular state action would indeed infringe on the NLRA. This test should encourage courts to examine the nature of the employee action, the state and NLRA interests in question, the relationship between the state law and the NLRA, and the overall potential for infringement of state law on the NLRA.

A. *The Threshold Question—"Arguably Protected or Prohibited?"*

A court's first step in deciding whether the NLRA preempts the state action is determining whether the employee activity is arguably protected, and the discharge, therefore, arguably prohibited. If the action is not arguably protected, there will be no preemption problem.[72] To determine whether the activity is protected, the court must decide whether the employee activity was "concerted" and "for purposes of collective bargaining or other mutual aid or protection," as required by section 7 of the NLRA.

1. *Employees covered by a collective bargaining agreement*— The Supreme Court's recent 5-4 decision in *NLRB v. City Disposal Systems, Inc.*[73] endorsed the *NLRB v. Interboro Contractors, Inc.*[74] broad definition of concerted activity as it applies to employees covered by a collective bargaining contract. The Court in *City Disposal* determined that the action of an individual employee, who was discharged when he refused to drive a truck that he honestly and reasonably believed was unsafe due to faulty brakes, constituted concerted activity. The Court explained that because a single employee's invocation of rights derived from a collective bargaining agreement affects all employees covered by the agreement, a single employee's actions can constitute concerted activity.[75] The Court specifically held that the phrase, "to engage in concerted activities," does not require that two or more employees work together towards the same goal.[76] This broad definition of concerted activity means that, in most cases, the conduct of an employee covered by a

72. This is because there is no need to determine whether *Morton-Machinists* might apply. *See supra* note 69 and accompanying text.

Courts will generally not need to determine whether the employee conduct was arguably prohibited because employers will rarely if ever assert that the activity that led to the employee's discharge was prohibited by the NLRA.

73. 104 S. Ct. 1505 (1984).

74. 388 F.2d 495 (2d Cir. 1967).

75. *City Disposal*, 104 S. Ct. at 1511.

76. *Id.* at 1513.

collective bargaining agreement that leads to an allegedly wrongful discharge will be arguably protected as concerted, and the discharge arguably prohibited.

2. *At-will employees*— The potential overlap between activities of at-will employees protected by state law and activities arguably protected as concerted activity under the NLRA was narrowed by the Board's recent decision in *Meyers Industries*.[77] The Board in *Meyers* considered the claim of a truck driver who asserted that he was discharged for refusing to drive a truck that he believed was unsafe and for informing the state inspection commission that the vehicle violated certain state safety provisions. The Board ruled that the truck driver's refusal to drive the truck and his report of the violation to the local authorities did not constitute concerted activity under its new definition of the term. The Board said that to receive section 7 protection, an employee must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[78] This narrowing of the definition of concerted activity for at-will employees will make it considerably more difficult for employers to persuade courts that the activities that led to the employee's discharge were protected as concerted under section 7.

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77. 268 N.L.R.B. 493 (1984), *remanded sub nom.*, Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 106 S. Ct. 313 (1985). The Board's decision in *Meyers Industries* overruled its holding in *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). The Board in *Meyers* said that it was returning to the "pre-*Alleluia Cushion*" definition of concerted activity.

Alleluia Cushion had held that a solitary employee's protest of an alleged Occupational Safety and Health Act violation was concerted activity. The Board reasoned that the existence of federal and state occupational health and safety laws suggested a widespread employee concern with such matters such that "the consent and concert of action emanated from the mere assertion of such statutory rights." 221 N.L.R.B. at 1000. Numerous progeny of *Alleluia Cushion* applied this reasoning to find concerted activity in single-employee discharge situations frequently actionable under state law wrongful discharge theory.

The D.C. Circuit refused to enforce the Board's *Meyers* decision and remanded it for reconsideration. The court determined that the decision was not a return to the pre-*Alleluia Cushion* standard the Board and the courts applied, but was "substantially more restrictive" than the standards the courts and the Board had previously applied. 755 F.2d at 956.

This Note assumes that *Meyers* is still the law of the NLRB. If the Board decides to broaden the *Meyers* definition of concerted activity, it is probable that more employers will defend wrongful discharge actions brought by at-will employees by arguing that the NLRA preempts the state action because the employee activity that led to the discharge was protected, and the discharge therefore prohibited.

78. 268 N.L.R.B. at 497. The Board's decision emphasized that the question under this standard is "a factual one, the fate of a particular case rising or falling on the record evidence." *Id.*

B. The Proposed Preemption Test

If the court determines that the employee activity is arguably protected and the discharge arguably prohibited, the court should start with the presumption that the NLRA preempts the state action. If, however, it falls within the following exceptions to this rule, the court should presume that the NLRA does not preempt the state action.[79] In both cases, the court should then weigh the nature of the federal and state interests in question and determine whether application of the state law would infringe on national labor policy.[80]

Even when the court presumes that the NLRA protects the

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79. *See supra* note 29. The exceptions are designed to assist a court in determining whether application of the state law would frustrate the purposes and policies of the NLRA in a given case.

80. The Court in Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, 430 U.S. 290, 300 (1977), advocated this balancing of state and federal interests. This Note will not, however, conduct this balancing test in most of the factual situations discussed in Part IV. The Note will generally assume that once a court determines the appropriate presumption, it will find in favor of that presumption.

The equities militate against allowing an employer to use preemption as a defense to public policy wrongful discharge actions. Traditionally, employees and unions have argued for preemption when an employer has brought a state action against them. For example, in *Garmon* the unions argued that their peaceful picketing was protected by the NLRA. They contended that the state court did not have jurisdiction to award damages arising out of peaceful union activity that it could not enjoin. In addition to not wanting the state court to issue a remedy that the Board could not have issued, they may have believed the state court did not have the expertise to deal with labor controversies and/or had sympathies unfavorable to those of the labor movement. As suggested *supra* text accompanying notes 22-24, these employee and union fears were some of the reasons for the *Garmon* rule.

In the case of an employee suing for wrongful discharge, the employer is using preemption as a defense. The employer argues that the employee/union conduct that led to the discharge was protected under section 7 of the NLRA. This creates the "absurd spectacle," Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469, 474 (1972), of an employer arguing that even though his discharge of an employee might violate state public policy theory, because it might also be an unfair labor practice under the National Labor Relations Act, it should be preempted. For example, the employer in Meyer v. Byron Jackson, Inc., 161 Cal. App. 3d 402, 207 Cal. Rptr. 663 (1984), argued that even though he might have violated state public policy by discharging an employee for filing a workers' compensation claim, because he might have also violated the NLRA by discharging an employee engaged in concerted activity, the employee's state action should be preempted. In effect, the employer is asking the court to conclude that his two alleged wrongs, violation of the state law and violation of the NLRA, give him the right to have the employee's action preempted.

For reasons similar to this, commentators have recommended that *Garmon's* arguably protected-arguably prohibited inquiry be abandoned. They would argue for an approach that focuses directly on balancing the state interest in regulating the challenged conduct with the federal interest in prohibiting the state regulation. *See, e.g.*, Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1351-68 (1972); Recent Development, 64 CORNELL L. REV. 595, 609-12 (1979).

employee activity, the court should not preempt the state action if it falls within one of the following three exceptions. The first two exceptions were identified as exceptions to the *Garmon* rule. The determinations to be made are: (1) whether the activity in question lies at the core rather than the periphery of the NLRA, and (2) whether the state guards governmental interests separate from or at the periphery of the NLRA.[81] Generally, states have a strong regulatory interest in laws relating to crime, health, and safety. The final exception is a two-part test. The court should examine whether the employee's wrongful discharge action is based on a state law that guards governmental interests separate from the NLRA, and whether the nature and gravamen of the employee activity is grounded in this law.[82] If the court determines that the true nature of the employee's complaint is an unfair labor practice or a grievance for violation of a collective bargaining agreement, or that the wrongful discharge is based on a state law that occupies an area covered by the NLRA, then the court should decide that the NLRA preempts the wrongful discharge action. If, however, the state law protects interests other than those guarded by the NLRA, and the employee activity that led to the discharge is rooted in this law, the state action should not be preempted. There would be little risk of infringement on the NLRA in this case.[83]

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81. *See supra* note 36.

82. In determining whether the nature and gravamen of the employee activity was rooted in the state claim, a court would be determining whether the complaint was "well-pleaded." According to the well-pleaded complaint doctrine, a plaintiff may not avoid federal jurisdiction simply by omitting from the complaint or by casting in state law terms a claim that can only be made under the federal law. In a wrongful discharge action, a court will be investigating whether the employee has merely recharacterized a grievance or unfair labor practice as a wrongful discharge action to avoid preemption. *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722 (1976).

The Court in Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), noted that it is the nature of the conduct rather than its characterization that is critical in preemption. The Court said: "[p]reemption . . . is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Id.* at 292. *See also* Vaca v. Sipes, 386 U.S. 171, 180 (1967).

A district court in Texas held that "the issue of whether an 'unfair labor practice' is the real nature of plaintiff's complaint is a matter to be resolved in the state tribunal." Galveston v. International Org. of Masters, 338 F. Supp. 907, 909 (S.D. Tex. 1972).

83. The court in Morris v. Chem-Lawn Corp., 541 F. Supp. 479 (E.D. Mich. 1982), applied much of the proposed preemption test to the action of an employee who claimed she was wrongfully discharged in violation of an implied contract. In that case, the employee claimed that she had been told that she would have her job as long as she performed her duties satisfactorily. In her deposition, however, she testified that she thought she was fired because of her union activity. The court looked to the true nature of the conduct that led to the discharge, rather than the legal theory she used to frame

The foregoing exceptions incorporate the traditional exceptions, as well as reflect the belief that although the NLRA occupies the field of employer-employee relations with respect to the field of collective bargaining, it does not encompass the entire field of employee protection.[84] The third exception recognizes that state courts are free to supplement federal protection if the state law does not infringe on the policies or purpose of the federal law.[85] As long as the state law protects interests separate from those protected by the NLRA, and the employee activity is based on this state law, there will be little risk of infringement with the NLRA.[86]

IV. APPLICATION OF THE PREEMPTION TEST TO STATE LAW ACTIONS FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Actions for wrongful discharge in violation of public policy may be divided into three categories based on the interest the

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her claim. It found that even though she couched her claim in terms of breach of an employment contract, the true basis of the claim was the NLRA. The Court followed Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1979) in holding that because the controversy presented to the state court would be identical to the one that could have been presented to the NLRB, the claim should be preempted.

84. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). This statute governs discrimination in employment.

85. This was the Supreme Court's view in UAW v. Russell, 356 U.S. at 634, 644 (1958); *see supra* note 56 and accompanying text. Furthermore, parallel purposes between statutes do not necessarily mean that the state statute will be preempted; *see* discussion of *Colorado Commission, supra* note 60.

86. Judge Richard Posner viewed the nature and gravamen of the employee's action for wrongful discharge as a key factor in his dissent in Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1057-61 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In that case, an injured railway employee brought action against the railroad under the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1982). He was discharged soon after filing his injury claim. The court held that because the complaint was identical to the claim he would have made had he pursued the grievance through administrative channels, the potential interference with the federal regulatory scheme was too great to permit an exception to the preemption doctrine. The court held that the employee's state tort remedy was preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982).

Judge Posner found that Jackson's claim was an action separate from the collective bargaining agreement. He said, "The collective bargaining agreement in this case is no more the source of Jackson's cause of action than if he were suing Conrail for a battery committed against him by his supervisor." 717 F.2d at 1061. He hypothesized that the Railway Labor Act and the arbitration provision would not prohibit the employee from bringing a battery action against his supervisor if the supervisor punched him in the nose. He concluded by saying that even though the employer might be violating the collective bargaining agreement by discharging the employee, it would be surprising if arbitration under the agreement was intended to eliminate the employee's common law rights.

employee asserts and the factual situation giving rise to the claim. The first category involves discharges in violation of state policies relating to wages, hours, or working conditions. The action for which the employee was discharged might, for example, relate to union activity or complaints about working conditions. The second category covers discharges in retaliation for assertion of state institutional interests.[87] Institutional interests are those relating to enforcement of a statutory right or violation of a state law. These can include, for example, discharges in retaliation for filing a workers' compensation claim[88] or discharges for refusing to obey the employer's request to commit perjury.[89] Discharges in retaliation for "whistleblowing"[90] constitute the final category. The employee's whistleblowing activity might be a nurse's preparation of a report critical of her employer's hospital procedures,[91] or a truck driver's informing a state agency that the truck he was driving had poor brakes.[92]

A. *Discharges in Violation of State Policies Relating to Wages, Hours, or Working Conditions*

Because the NLRA protects concerted employee activity relating to wages, hours, or working conditions, the NLRA will almost always preempt state laws that protect employee interests in these areas.

1. *Employees covered by a collective bargaining agreement*— Unionized employees sometimes assert that they were discharged in violation of a state public policy for activity relating to wages, hours, or working conditions.[93] For example, in *Vi-*

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87. The term "institutional" was given this meaning by a commentator. Comment, *supra* note 60, at 661-62.

88. *See, e.g.*, Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981); Thomas v. Kroger Co., 583 F. Supp. 1031 (S.D. W. Va. 1984); Wyatt v. Jewel Cos., 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Murphy v. Topeka-Shawnee County Dep't of Labor Servs., 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

89. Petermann v. Local 346, International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

90. "Whistleblowing" may be defined as "the disclosure by an employee of his employer's improper activities." Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983).

91. Misericordia Hosp. Medical Center, 246 N.L.R.B. 351 (1979), *enforced*, Misericordia Hosp. Medical Center v. NLRB, 623 F.2d 808 (2d Cir. 1980).

92. Meyers Indus., 268 N.L.R.B. 493 (1984), *remanded sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, Meyers Indust., Inc. v. Prill, 106 S. Ct. 313 (1985).

93. Cases that fall into this category include: Buscemi v. McDonnell Douglas Corp.,

estenz v. Fleming Cos.,[94] the employee alleged that he was discharged because of his union activities, rather than for stealing as the employer claimed. He argued that discrimination on the basis of union activity violated state policy. Under *City Disposal*, regardless of the particular union activity in question, Viestenz's activity was arguably protected because he was a union employee engaging in NLRA protected activity. The question then is whether the state action would infringe on the NLRA.

Viestenz's wrongful discharge action would be preempted under the proposed preemption test. The activity does not lie at the periphery of the NLRA because union activity is exactly the type of activity that the NLRA prototypically protects. Moreover, the state law or public policy under which Viestenz brought suit is the same type of activity that the NLRA was specifically designed to protect. Therefore, because Viestenz's activity was arguably protected and does not fall within one of the exceptions, his claim should be preempted.

2. *At-will employees*— The Board's decision in *Meyers* will make it more difficult for employers to prove that the activity of an individual employee, even if it relates to wages, hours, or working conditions, constitutes concerted activity. For example, a nurse's aide in *Autumn Manor v. Broz*[95] was discharged after questioning her employer about the dismissal of two fellow employees. If the nurse's aide had questioned the employer in private and did so solely for her own benefit and not on behalf of the other employees, the employee activity would not be concerted under *Meyers*. If, however, as actually happened, the nurse's aide questioned her employer in front of other employees and with their encouragement, then the employee activity would meet the *Meyers* test. The next question, if the employer were arguing for preemption, would be whether the activity fell within one of the exceptions to the preemption test. The nurse's aide's concern with job security relates to interests that lie at the core rather than the periphery of the NLRA. Also, the nature of her activity is grounded in the NLRA and any state policy under which she might bring action would overlap with an area traditionally occupied by the NLRA. Therefore, the nurse's aide's action, and most, if not all, at-will employee actions arising from

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736 F.2d 1348 (9th Cir. 1984); Viestenz v. Fleming Cos., 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982); Sitek v. Forest City Enters., 587 F. Supp. 1381 (E.D. Mich. 1984); Sherman v. St. Barnabas Hosp., 535 F. Supp. 564 (S.D.N.Y. 1982); Smith v. Leon-Ferenbach, 114 L.R.R.M. (BNA) 3361 (Tenn. Sup. Ct. 1983).

94. 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982).

95. 268 N.L.R.B. 239 (1983).

concerted activity relating to wages, hours, or conditions of employment, should be preempted.[96]

B. Discharge in Violation of State Institutional Interests

Unlike actions for wrongful discharge arising under state laws or policies relating to wages, hours, or working conditions, actions for wrongful discharge in violation of state institutional interests should generally not be preempted.

1. Action for discharge in retaliation for refusing to violate state laws— Both at-will and union employees have claimed to have been discharged for refusal to obey their employer's request to violate the law. For example, employees have been discharged for refusing to alter pollution control reports,[97] drive an ambulance that lacked medical equipment required by the state,[98] drive a truck with poor brakes,[99] or perform a medical procedure on a hospital patient that the employee was not qualified to perform.[100]

In each of the above cases, the employer might have argued that the employee refusal constituted concerted activity, was protected, and should be preempted. In *Tameny v. Atlantic Richfield*,[101] the employee was discharged for refusing to fix gasoline prices. The employer might have argued that the employee's refusal constituted concerted activity under the NLRA. It is unlikely, however, that the employer's argument would have been persuasive, even if the employee was part of a union and the *City Disposal* standard were applied. Employees generally do not have a section 7 right to protest employer actions that are unlawful under local laws if these laws have nothing to do with safeguarding wages, hours, or working conditions.[102] This is be-

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96. *See* H. Datz, *supra* note 69, at 4.

97. Trombetta v. Detroit, Toledo & Ironton R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978).

98. NLRB v. Parr Lance Ambulance Serv., 723 F.2d 575 (7th Cir. 1983).

99. Meyers Industries, Inc., 268 N.L.R.B. 493 (1984), *remanded sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied,* Meyers Indus., Inc. v. Prill, 106 S. Ct. 313 (1985).

100. O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978).

101. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

102. H. Datz, *supra* note 69, at 7; *see* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1961). The Court in Eastex, Inc. v. NLRB, 437 U.S. 556, 567-68 (1978) stated:

> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection clause."

cause the NLRA only protects employee activity relating to employee interests in wages, hours, or conditions of employment. Refusing to fix gasoline prices does not relate to these employee interests. Therefore, because the employee activity is not protected under the NLRA, the employer would not meet the threshold test and the state action should not be preempted.

Even if the employer could show the activity were concerted, the employee's action should not be preempted if he were discharged for refusing to violate a state criminal, health, or safety law. In *Trombetta v. Detroit, Toledo & Ironton Railroad Co.,*[103] the employee refused to violate environmental pollution laws. In this case, the employee action would not be preempted because laws relating to health and safety have long been viewed as falling within "the deeply rooted in local feeling" exception.[104]

The potentially difficult case occurs when the employee was discharged for refusing to violate a law that does not relate to crime, health, or safety. The relevant question then is whether the employee's activity was based on that law or whether it was based on the NLRA, the state law claim being a ruse designed to prevent the NLRA from preempting the potentially more successful state law claim.[105] For example, if the employee in *Tameny* had refused to fix gas prices to protect the public interest, i.e., to ensure that gasoline prices not be increased beyond what the market would dictate, his activity would not be protected under section 7. There would be no risk of preemption. If, however, his objective were to spark other employees to participate in union activity, he would be engaging in prototypical NLRA protected activity, regardless of his characterization of his action as purely a "state law" claim. His activity would then fall under the first category of employee activities—employee claims arising from activity relating to wages, hours, or working conditions—and his claim would be preempted.

103. 81 Mich. App. 489, 265 N.W.2d 385 (1978).

104. In Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942), the Supreme Court decided that the NLRA did not prevent the Wisconsin Employment Relations Board from ordering the members of a striking union to cease picketing employee homes and threatening employees who wanted to work, despite the strike under the Wisconsin Employment Peace Act, 1939 Wis. Laws ch. 57. The Court held that the NLRA did not preclude a state from enacting legislation in exercise of "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways." *Id.* at 749.

105. In some cases, it might be argued that the employee's refusal to break the law was concerted. For example, the employee might have refused the employer's request because he thought that if he were caught, it would make it more difficult to find future employment. This, however, is at best tenuously related to employee interests or conditions of employment and would probably not constitute concerted activity.

2. *Workers' compensation claims*— Both at-will[106] and unionized employees[107] have been fired allegedly in retaliation for filing workers' compensation claims. Filing a workers' compensation claim usually has little or nothing to do with union organization or collective bargaining.[108] This was the case in *Flick v. General Host Corp.*[109] In *Flick*, an at-will employee filed a claim for workers' compensation after he was injured lifting a heavy bag during the course of his employment. There was nothing in the employee's filing of the claim to make it seem like part of organized activity. Therefore, in cases like *Flick*, regardless of whether the party filing the claim is employed at-will or under a collective bargaining agreement, the employee activity will probably not be protected under *City Disposal* or *Meyers* and the claim should not be preempted.

Even if a court determines that the factual situation in which the claim was filed makes the filing concerted, the state action will usually fall within the exceptions to the proposed preemption test. Filing a workers' compensation claim is a peripheral concern of the NLRA.[110] Also, the nature and gravamen of the state claim for wrongful discharge arises from a state statutory right, not the NLRA right to engage in concerted activity. Furthermore, the right granted by the statute is not governed by the NLRA. Therefore, wrongful discharge actions for filing workers' compensation claims should generally not be preempted.[111]

C. *Discharges for "Whistleblowing"*

Some employees have been discharged not for refusing their employer's request to violate state law, but for informing state authorities that their employer was breaking the law. For example, a milk truck driver was discharged for reporting to local

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106. Flick v. General Host Corp., 573 F. Supp. 1086 (N.D. Ill. 1983).

107. Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981); Thomas v. Kroger Co., 583 F. Supp. 1031 (S.D. W. Va. 1984).

108. *Peabody Galion*, 666 F.2d at 1316-19. The NLRB recently held that an employer's refusal to hire a former employee who filed a workers' compensation claim did not constitute an unfair labor practice because the individual had not engaged in concerted activity protected under § 7 of the NLRA. WABCO Constr. & Mining Equip. Group, 270 N.L.R.B. 887 (1984).

109. 573 F. Supp. 1086 (N.D. Ill. 1983).

110. *Peabody Galion*, 666 F.2d at 1316-19.

111. In the rare case of an employee filing a workers' compensation claim to spur other employees into engaging in other concerted activity, the employee's state action should be preempted. This is because the nature and gravamen of the employee's action are rooted in the NLRA.

health authorities his employer's request that he deliver spoiled milk to customers.[112] In this case, the employer argued that the employee whistleblowing constituted concerted activity, was protected, and that the NLRA should preempt the state action.

The initial question under the proposed preemption test is whether the employee's whistleblowing constituted concerted activity. Under either the *City Disposal* or *Meyers* test for concertedness, determination of whether the employee's whistleblowing was concerted will depend in great part on whether the employee blew the whistle to protect employee interests or public interests.[113] In general, if the employee blew the whistle for the sole purpose of protecting state public interests, he would not be acting to protect wages, hours, or conditions of employment.[114] This means that his activity would not be arguably protected under the NLRA and should not be preempted. If, however, the whistleblower sought to protect employee interests, then the employee activity would arguably be protected under section 7. In these cases, the court should determine whether the employee activity falls within the exceptions to the proposed preemption test.

Garibaldi v. Lucky Food Stores, Inc.,[115] the case in which the employee reported to the local health authorities his employer's request that he deliver spoiled milk to his customers, illustrates the importance of determining whether the employee blew the whistle to protect employee or public interests. In that case, if Garibaldi, a unionized employee, blew the whistle to protect employee interests, his activity would meet the threshold test of

112. Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1372-74 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985).

113. Under *Meyers*, an at-will employee would also have to be acting on behalf of others for the activity to be termed concerted.

114. The Associate General Counsel of the NLRB for the Division of Advice took this view in Daniel International, 104 L.R.R.M. (BNA) 1496 (1980). In that case, a unionized employee of a general contractor constructing a nuclear power plant blew the whistle on his employer's alleged construction safety violations. He appeared on radio and television programs criticizing the employer's shoddy construction; he also filed numerous complaints with the U.S. Nuclear Regulatory Commission, the Missouri Public Service Commission, the Office of the Governor of Missouri, and the Occupational Safety & Health Administration. The Associate General Counsel indicated that he believed that the focus of the employee's activity was toward the future safety of the general public who would be exposed to the risk of radiation resulting from alleged construction defects. He determined that because the employee was only concerned with the safety of employees who would work at the utility after its completion, the employee himself did not intend to work at the plant after completion, and he was not concerned with the health and safety of employees constructing the plant, his whistleblowing did not constitute concerted activity. *Id.*

115. 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985).

being concerted under *City Disposal*,[116] regardless of whether he also sought to protect public interests. The question would then be whether his activity falls within one of the exceptions to the proposed test. If the nature and gravamen of Garibaldi's act were to protect his job or other employee interests, then his activity would fall within the first category of preemption cases—actions designed to protect employee wages, hours, or working conditions. In most cases, this would mean that his state claim should be preempted. Because Garibaldi also blew the whistle to protect a state health and safety law, however, his action could be viewed as deeply rooted in local feeling. This would usually mean that his state action would not be preempted. Employee desires to protect state health and safety laws would be diminished if employees knew that their state claims for wrongful discharge would be preempted. Thus, in balancing federal and state interests in this case, the public interest in protecting citizen health and safety should probably dictate that the NLRA not preempt the state action.[117]

Even if the public policy interests in health or safety were not present, and the employee were acting to protect employee as well as public interests, an at-will employee's wrongful discharge action should probably not be preempted. For example, in *Harless v. First National Bank*,[118] an at-will employee was discharged from his employment at a bank after he informed a member of the bank's board of directors that the bank was violating state and federal consumer credit laws. In this case, if the employee was acting solely to protect public interests, then his activity would not meet the threshold test of being concerted. If, however, he were concerned with his own employment—for example, that the bank might discharge him for alleged violations of state consumer credit laws—then he might be acting con-

116. If he blew the whistle solely to protect the public interest, his activity would not even be arguably protected under the NLRA. There would be no preemption problem. *See supra* note 114.

117. If, however, Garibaldi had been discharged for informing the authorities that his employer had violated a federal law, he probably would not even have a state claim for wrongful discharge. This was the case in Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468 (9th Cir. 1984). Olguin said he was discharged for reporting his employer's violation of the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801-962 (1982). Olguin brought a claim in state court for wrongful discharge. He alleged that he was discharged in violation of the state's mine safety policies. Because the state in this case did not have a mine safety policy, Olguin did not have a state claim for wrongful discharge. If, however, the state incorporated the federal law into its own policies, and an employee could make out a claim for wrongful discharge, his case would be similar to Garibaldi's, and probably should not be preempted.

118. 289 S.E.2d 692 (W. Va. 1978).

certedly as well as to protect the public interest. The question then would be whether his activity fell within one of the exceptions in the proposed preemption test. In this case, the employee activity is rooted in a state law that protects interests separate from those protected by the NLRA. Even if the at-will employee activity has the dual purpose of protecting the public interest and protecting his interests as an employee, the gravamen of the activity is based on the state law. That his activities also happen to protect his interests as an employee is incidental to, rather than the source of, his action. As such, the NLRA should not preempt his state law claim.[119]

CONCLUSION

The recognition of the tort of wrongful discharge in violation of public policy has given rise to a potential overlap between state actions for wrongful discharge in violation of public policy and the National Labor Relations Act. This overlap can occur when an employee sues his employer for wrongful discharge under state law, but the activity for which the employee believes he was discharged is also covered by the NLRA. In these cases, the state court must determine whether the NLRA preempts the state action.

The traditional preemption tests are inapposite to the public policy wrongful discharge action because the specific rationale behind the arguably protected branch of *Garmon* and *Morton-Machinists* do not apply to these cases. Nevertheless, because the general rationale behind them does apply, courts must still determine whether a particular wrongful discharge action would infringe on the NLRA. In making this determination, courts, because the specific rationale do not apply in these cases, should apply a flexible test that gives them freedom and guidance to determine whether a particular state action would truly interfere with the NLRA. The proposed test gives courts this flexibility. It suggests that a court first determine whether the employee activity is protected under the NLRA. If the court finds that the activity is protected, the court should generally rule that the NLRA preempts the state action unless it finds that the action falls within one of the following exceptions to the rule: the state action is deeply rooted in local interest, the employee activity lies at the periphery of the NLRA, or the nature and gravamen

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119. *See supra* note 105.

of the employee's complaint are grounded in a state law that guards governmental interests separate from the NLRA. If it falls within one of the exceptions, the court should presume that the NLRA does not preempt the state action. The court should then weigh the federal and state interests in question to determine whether the state action would truly infringe on the NLRA.

Application of the foregoing test to the most common types of actions for wrongful discharge in violation of public policy indicate that except in the case of an employee who engages in activity the underlying nature of which is governed by the NLRA, or of an employee who sues under a state law that covers an area occupied by the NLRA, the employee action should not be preempted.

—Thomas Bean