IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACQUELINE CURRY,

Plaintiff, No. CIV. S-10-2592 JAM EFB

vs.

KAISER FOUNDATION HOSPITALS; CNA (CALIFORNIA NURSES ASSOCIATION),

Defendants. FINDINGS AND RECOMMENDATIONS

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This case is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). *See* 28 U.S.C. § 636(b)(1). Pending before the undersigned are defendant California Nurses Association's ("CNA") motion for summary judgment, Dckt. No. 28, and defendant The Permanente Medical Group, Inc.'s ("TPMG") motion to dismiss and motion for a more definite statement, Dckt. No. 12.[1] For the reasons stated herein, the undersigned recommends that CNA's motion for summary judgment be granted, that TPMG's motion to dismiss be granted with leave to amend, and that TPMG's motion for a more definite statement be denied.

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[1] Plaintiff's first amended complaint erroneously named defendant TPMG as Kaiser Foundation Hospitals. Dckt. No. 12-1 at 1.

I. BACKGROUND

On September 23, 2010, plaintiff filed the original complaint in this case alleging wrongful conduct by TPMG, plaintiff's former employer, and by CNA, the collective bargaining representative for nurses employed by TPMG, based on plaintiff's termination as a charge nurse for TPMG. Dckt. No. 1, Compl. Plaintiff subsequently filed a first amended complaint ("FAC") on October 15, 2010. Dckt. No. 10.[2] Although the FAC is separated into three "Cause of Action" sections, plaintiff's allegations within each section are unclear and disjointed. Taking into consideration the liberal pleading standard afforded to pro se litigants, the undersigned construes plaintiff's FAC as alleging the following: (1) a claim for breach of the duty of fair representation against CNA; (2) a negligence claim against CNA; (3) a claim for wrongful termination in breach of the collective bargaining agreement against TPMG; (4) a claim for breach of the implied covenant of good faith and fair dealing against TPMG; (5) a claim for wrongful termination in violation of public policy against TPMG; (6) a claim for breach of contract against TPMG based on TPMG's math testing policy for nurses; and (7) a racial discrimination claim against TPMG.

On October 22, 2010, defendant CNA filed an answer to plaintiff's complaint, Dckt. No. 11, and now seeks summary judgment. CNA's Mot. for Summ. J. ("CNA's MSJ"), Dckt. No. 28. Defendant TPMG moves to dismiss plaintiff's complaint for failure to state claim, Fed. R. Civ. P. 12(b)(6), and in the alternative, moves for a more definite statement. Dckt. No. 12.

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[2] Plaintiff's FAC is identical to her original complaint except in two ways. First, plaintiff filed the FAC in an attempt to correctly name defendant TPMG. As noted above, the FAC still erroneously named TPMG as Kaiser Foundation Hospitals. Second, plaintiff neglected to include with the FAC the documents she attached to her original complaint. Plaintiff's FAC is the operative complaint herein. However, for plaintiff's benefit, the undersigned utilized both the FAC and the documents submitted with the original complaint. This did not affect the ultimate finding that CNA is entitled to summary judgment. Citations to the original complaint are indicated as "Compl." and citations to the first amended complaint are indicated as "FAC".

II. DEFENDANT CNA'S MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

Summary judgment avoids unnecessary trials in cases with no genuinely disputed material facts. *See N. W. Motorcycle Ass'n v. U .S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Thus, Rule 56 serves to screen the latter cases from those which actually require resolution of genuine disputes over material facts; e.g., issues that can only be determined through presentation of testimony at trial such as the credibility of conflicting testimony over facts that make a difference in the outcome. *Celotex*, 477 U.S. at 323.

If the moving party meets its initial responsibility, the opposing party must establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To overcome summary judgment, the opposing party must demonstrate a factual dispute that is both material, i.e. it affects the outcome of the claim under the governing law, *see Anderson*, 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Wool v. Tandem*

Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987). In attempting to establish the existence of a factual dispute that is genuine, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n. 11.

In resolving a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. *See Anderson*, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *See Matsushita*, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

B. Undisputed Facts[3]

In 2002, plaintiff accepted a position as a registered nurse with TPMG. Compl. at 19, Ex.

[3] Plaintiff neither admitted nor denied the facts set forth by CNA in its Statement of Undisputed Facts, as required by Local Rule 260(b). Although a verified complaint based on personal knowledge setting forth specific facts admissible in evidence is treated as an opposing affidavit under Rule 56, *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995), and a verified pleading based on personal knowledge in opposition to a summary judgment motion which sets forth facts that would be admissible in evidence may also function as an affidavit, *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir.), *cert. denied*, 525 U.S. 840 (1998), here, neither plaintiff's FAC nor her opposition to CNA's motion for summary judgment is verified or signed under penalty of perjury. Therefore, the court accepts CNA's version of the facts except where contradicted by the evidence plaintiff submitted with her original complaint and with her opposition to the summary judgment motion. Nonetheless, even if plaintiff's FAC or opposition had been verified, summary judgment must still be granted for the reasons discussed below.

D[4]; *see also* CNA's Stmt. of Undisp. Facts ("SUF"), Dckt. No. 26, ¶ 1.[5] Defendant CNA is the exclusive collective bargaining representative for nurses employed by TPMG. CNA's MSJ, Henke Decl., Dckt. No. 25, ¶ 2. Plaintiff was a member of the CNA bargaining unit during her employment with TPMG. SUF ¶ 3. Maryanne Henke, a CNA labor representative, was responsible for representing plaintiff in all matters, including processing grievances. Henke Decl. ¶ 1.

In 2008, TPMG enacted the "Medication Math Testing for RNs and LVNs" policy ("math policy"). Compl. at 17-18, Ex. C; Henke Decl., Ex. 13. The math policy requires those employees who administer or verify medications to complete and pass a math test, with a score of at least 90 percent, annually. *Id.* at 17. A person who fails to achieve a passing score after three attempts will be terminated. *Id.* The math policy is a TPMG policy and is not a part of the collective bargaining agreement between CNA and TPMG. CNA Reply, Dckt. No. 30, at 6; Henke Decl., Exs. 1, 13; *see also* Dckt. No. 21 at 2.

Plaintiff attempted the math test on December 8, 2008 and December 15, 2008, and on both occasions failed to achieve a passing score. SUF ¶¶ 4-5. On December 16, 2008, plaintiff e-mailed CNA labor representative Maryanne Henke stating that the math testing was discriminatory. Pl.'s Resp. to CNA's Mot. for Summ. J. ("Pl.'s Resp."), Dckt. No. 29, Ex. E at 1. On December 22, 2008, plaintiff attempted the math test for a third time, again failing to achieve a passing score. SUF ¶ 6. On December 24, 2008, TPMG terminated plaintiff's employment, citing her failure "in passing the math tests per the 'Medication Math Tests for RNS and LVNS' policy" as the reason for termination. SUF ¶ 7; *see also* Henke Decl., Ex. 4.

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[4] Plaintiff has not labeled the documents attached to her original complaint. To avoid confusion, the undersigned refers to page numbers as assigned by the CM/ECF system.

[5] All citations to the Statement of Undisputed Facts herein incorporate by reference those citations stated in the SUF in support of each undisputed fact.

On December 28, 2008, Henke, on behalf of plaintiff, initiated the internal union grievance procedure at Step 2, alleging that TPMG terminated plaintiff without just cause in violation of paragraph 4021 of the collective bargaining agreement. SUF ¶ 8. TPMG denied the grievance on March 3, 2009. SUF ¶ 9. Henke pursued the matter by filing a Step 3 grievance. SUF ¶ 10. On April 22, 2009, this grievance was also denied. SUF ¶ 11. That same day, Henke informed plaintiff of the Step 3 grievance denial. Henke Decl., Ex. 11 at 1. Plaintiff responded that she had "no problem taking the exam again" now that she had "utilized the on line courses." *Id*.

Following TPMG's denial of the Step 3 grievance, Henke negotiated an agreement with TPMG whereby TPMG agreed to provide plaintiff with a tutor to prepare for the math test, to allow plaintiff an opportunity to re-take the math test with the tutor as the proctor, and to negotiate terms for plaintiff's return to TPMG if plaintiff passed the test. SUF ¶ 12. On April 27, 2009, Henke informed plaintiff of the agreement. Henke Decl., Ex. 15 at 3. On May 1, 2009, plaintiff responded that she was ready to re-take the math test. *Id.* at 2-3; *see also* Henke Decl. ¶ 14.

On May 19, 2009, Henke informed plaintiff that a tutor was available and provided the tutor's contact information. SUF ¶ 13. That same day, plaintiff responded again that she looked forward to re-taking the math test. SUF ¶ 14. Henke then unsuccessfully attempted to contact plaintiff by telephone on May 29, 2009, June 15, 2009, and June 22, 2009. SUF ¶¶ 16, 17. On June 22, 2009, Henke also contacted plaintiff by e-mail to inquire why plaintiff had not yet re-taken the math test. SUF ¶ 18. Plaintiff did not respond. SUF ¶ 19.

On June 30, 2009, Henke informed plaintiff by e-mail and letter that unless plaintiff contacted CNA by July 13, 2009, CNA would no longer pursue plaintiff's claim and would consider the grievance closed. SUF ¶¶ 20, 22. CNA received no response from plaintiff and, as a result, on August 18, 2009, CNA closed plaintiff's grievance. SUF ¶¶ 21, 23-24. Henke informed plaintiff by e-mail that CNA considered plaintiff's grievance closed. SUF ¶ 24.

At some point after she was terminated, plaintiff filed a discrimination complaint with the California Department of Fair Employment and Housing ("DFEH") against TPMG.[6] Compl. at 14, Ex. B. DFEH informed plaintiff that her complaint was considered closed as of June 25, 2010. *Id.* On August 5, 2010, the United States Equal Employment Opportunity Commission ("EEOC") adopted DFEH's findings and issued plaintiff a notice of her right to sue. Compl at 16, Ex. A.

C. Analysis

1. Breach of the Duty of Fair Representation Claim Against CNA

Plaintiff's FAC alleges a breach of the duty of fair representation by CNA for its bad faith failure to submit plaintiff's grievance to arbitration. FAC at 4. Additionally, plaintiff argues that Henke, plaintiff's CNA representative, "refused to provide factual information that would have been favorable toward the plaintiff's case" during meetings with TPMG and that Henke refused to "represent plaintiff in a fair manner." FAC at 4, 8.

Defendant CNA moves for summary judgment on plaintiff's claim for breach of the duty of fair representation, asserting that the claim is barred by the statute of limitations and that plaintiff cannot establish the elements of the claim.[7] CNA's MSJ at 5-7.

Plaintiff opposes the motion, arguing her complaint is timely. Pl.'s Resp. to CNA's Mot. for Summ. J. ("Pl.'s Resp."), Dckt. No. 29, at 2. Plaintiff contends that she filed a complaint

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[6] Attached to plaintiff's original complaint is a "Notice of Case Closure" from DFEH, Compl. at 14, Ex. B, and a "Dismissal and Notice of Rights" from EEOC, Compl. at 16, Ex. C. As plaintiff has not provided a copy of the complaint she filed with DFEH, it is unclear against whom she filed the complaint or when it was filed. The caption of the DFEH notice that plaintiff received reads, "RE: CURRY/KAISER PERMANENTE" suggesting that the DFEH complaint was filed against TPMG only. Additionally, the EEOC notice that plaintiff received was forwarded only to "Kaiser Permanente," as evidenced by the notation on the lower left hand corner of the notice. Thus, it appears plaintiff filed a complaint only against TPMG, not CNA, as CNA contends. *See* CNA Reply at 3. Plaintiff does not specifically contend otherwise.

[7] CNA also contends that plaintiff's duty of fair representation claim is barred for failure to exhaust internal union remedies. However, as explained below, because CNA is entitled to summary judgment on alternative grounds, this argument need not be addressed.

with the EEOC and DFEH "within 180 days of the alleged unlawful act." *Id*. She states she then received a "right to [s]ue letter notice from the EEOC dated August 05, 2010 which stated plaintiff must file [a] law suit within 90 days of receipt of [the] notice." *Id.* Plaintiff contends that her complaint, filed September 23, 2010, was filed within ninety days of receiving the right to sue letter and is thus not barred by the statute of limitations. *Id.*

Plaintiff also contends that Henke's actions during the grievance process, such as Henke's refusal to present favorable evidence during meetings with TPMG and Henke's failure to explain to plaintiff the negotiations between CNA and TPMG regarding plaintiff's re-testing, establish that Henke breached the duty of fair representation that Henke owed to plaintiff. *Id.* at 3-5.

Section 9(a) of the Labor Management Relations Act ("LMRA") empowers a union to act as the exclusive bargaining agent of all employees in collective bargaining. *See* 29 U.S.C. § 159(a). "The duty of fair representation is a corollary of the union's status as the exclusive representative of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). It is a judicially created doctrine which requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. "Under the doctrine, a union must represent fairly the interest of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements. In particular, a union breaches its duty when its conduct is arbitrary, discriminatory, or in bad faith. . . ." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979) (citations omitted). This federal statutory duty displaces and preempts "state law that would impose duties upon unions by virtue of their status as the workers' exclusive collective bargaining representative." *Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008).

When an employee sues both the employer for unfair labor practices and the union for breach of the duty of fair representation, the claim is barred if not filed within six months of the

alleged breach. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169-170 (1983) (where employee alleges a union's breach of fair representation, the six-month statute of limitations set forth in National Labor Relations Act barred filing of the claim); *Kalombo v. Hughes Mkt., Inc.*, 886 F.2d 258, 259 (9th Cir. 1989) (plaintiff's claim of breach of the duty of fair representation against local union was subject to NLRA's six-month statue of limitations). The limitations period begins to run when the employee knows or has reason to know that the union has quit pursuing her grievance short of arbitration. *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1049 (9th Cir. 1987) (limitations period began to run when plaintiff received union's letter notifying her it would no longer pursue her grievance).

Here, it is clear that plaintiff knew or should have known of CNA's alleged wrongdoing at least as of August 18, 2009. On June 30, 2009, Henke informed plaintiff by e-mail and letter that CNA would no longer continue to pursue plaintiff's grievance if she did not contact CNA by a specified date. Plaintiff did not respond and consequently, on August 18, 2009, CNA closed plaintiff's grievance. CNA then informed plaintiff of this action. Plaintiff did not file a complaint against CNA until September 2010, over a year after she first learned that CNA would no longer pursue her grievance. Accordingly, because plaintiff did not initiate her lawsuit within six months after learning of CNA's alleged breach (*i.e.*, by February 18, 2010), her claim against CNA for breach of the duty of fair representation is barred by the statute of limitations.

In her opposition, plaintiff argues that her complaint is not barred by the statute of limitations because she filed it within ninety days of receiving a right-to-sue letter from the EEOC. Pl.'s Resp. at 2. To the extent plaintiff is arguing that her complaint with DFEH and EEOC tolls the statute of limitations on her breach of the duty of fair representation claim against CNA, the argument fails. The complaint plaintiff filed with DFEH and EEOC was premised on TPMG's conduct, not CNA's. Moreover, even if plaintiff's complaint with DFEH or EEOC contained allegations against CNA, neither a DFEH nor an EEOC complaint has any effect on a breach of the duty of fair representation claim and neither is a required precondition

to filing such a claim. *See* 29 U.S.C. § 160(b).

Nevertheless, neither equitable tolling nor equitable estoppel saves plaintiff's claim from being barred by the statute of limitations.[8] "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). However, "once a claimant retains counsel, tolling ceases because [the claimant] has gained the means of knowledge of [the claimant's] rights and can be charged with constructive knowledge of the law's requirements." *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997). In this case, plaintiff retained counsel on December 17, 2008.[9] Therefore, as of December 17, 2008, plaintiff is charged with constructive knowledge of the law's requirements regarding the statute of limitations for a breach of the duty of fair representation claim and she is not entitled to tolling. Additionally, although an employee is entitled to tolling of the applicable statute of limitations while pursuing grievance procedures, *see, e.g.*, *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines*, 790 F.2d 727, 738 (9th Cir. 1986), this also provides plaintiff no assistance here. Even presuming that plaintiff was pursuing the internal union grievance procedures up to August 18, 2009, the date that CNA closed plaintiff's grievance due to plaintiff's failure, or refusal, to maintain contact with CNA, plaintiff would be entitled to equitable tolling only up to that date. Plaintiff does not allege that she attempted to continue to utilize the internal union grievance procedures after August 18, 2009. She did not initiate her lawsuit until September 2010, more than a year after she first learned of CNA's

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[8] Plaintiff has neither pled nor argued that she is entitled to either equitable estoppel or equitable tolling of the statute of limitations. *See Stallcop*, 820 F.2d at 1050.

[9] CNA submitted a copy of a "Notice of Representation," dated December 17, 2008, that it received from the Law Offices of Elmendorf & Windheim explaining that the firm was retained by plaintiff. Henke Decl., Ex. 3. Plaintiff signed the notice of representation, affirming that she had retained the law firm to represent her. However, she mistakenly dated the letter November 17, 2008.

alleged breach. Therefore, equitable tolling cannot render her claim timely and it is barred by the statute of limitations.

To invoke equitable estoppel, a plaintiff must allege facts indicative of "improper purpose by the defendant, or of the defendant's actual or constructive knowledge that its conduct was deceptive." *Stallcop*, 820 F.2d at 1050. "Conduct or representations" by the defendant that "tend to lull the plaintiff into a false sense of security can estop the defendant from raising the statute of limitations, on the general equitable principle that no man may take advantage of his own wrong." *Atkins v. Union Pac. R.R. Co.*, 685 F.2d 1146, 1149 (9th Cir. 1982) (internal quotations omitted). A plaintiff must show that the defendant engaged in "affirmative misconduct." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001). "Affirmative misconduct" involves "a deliberate lie" or "a pattern of false promises." *Id.* Here, plaintiff alleges that CNA "failed by not taking the matter to arbitration"; that Henke was "negligent in performing her duties by not submitting this matter into arbitration"; and that Henke refused to use evidence favorable to plaintiff, FAC at 3-4, but she does not allege any facts to show that CNA acted deceptively. Her allegations of negligence simply fail to indicate "improper purpose by the defendant, or of the defendant's actual or constructive knowledge that its conduct was deceptive." *Stallcop*, 820 F.2d at 1050. Thus, plaintiff is not entitled to equitable estoppel. Accordingly, her claim against CNA for breach of the duty of fair representation is barred by the statute of limitations.

Moreover, in addition to the fact that plaintiff's claim for breach of the duty of fair representation is barred by the statute of limitations, CNA is entitled to summary judgment on the claim since plaintiff fails to raise a triable issue as to that claim. CNA will only have breached the duty of fair representation when its conduct toward plaintiff is "arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190. "A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46 (1998). "To establish that the union's exercise of

judgment was discriminatory, a plaintiff must adduce 'substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.'" *Beck v. UFCW, Local 99,* 506 F.3d 874, 879 (9th Cir. 2007) (quoting *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971)). Bad faith requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Id.* at 880 (quoting *Lockridge,* 403 U.S. at 299). Here, plaintiff makes only conclusory allegations such as, "Henke handled the case in bad faith," Pl.'s Resp. at 4, Henke's "motives" in certain statements that Henke made to plaintiff were "marked by venality and dishonesty," *id.*, and "Henke refused to provide factual information that would have been favorable toward the plaintiff's case instead [she] handled the case in bad faith," FAC at 4. While plaintiff claims that CNA acted in bad faith, she has failed to explain why Henke's handling of plaintiff's case constituted bad faith and has failed to proffer any substantial evidence to support this assertion. She also has not introduced any evidence demonstrating that CNA's conduct or Henke's conduct was arbitrary or discriminatory. Therefore, there are no genuine issues of material fact in dispute with regard to plaintiff's claim that CNA breached its duty of fair representation and CNA is entitled to summary judgment on that claim.

2. Negligence Claim Against CNA

Plaintiff also alleges that CNA labor representative Maryanne Henke "was negligent in performing her duties." FAC at 4. Plaintiff further argues, in opposition to CNA's motion for summary judgment, that CNA assumed and breached a legal duty to ensure that her grievance was "properly handled and the investigation conducted in a fair, impartial and/or non-discriminatory manner." Pl.'s Resp. at 10.

CNA's motion for summary judgment does not address plaintiff's negligence claim because CNA contends that plaintiff purported to assert a negligence claim for the first time in her opposition to CNA's motion for summary judgment. *See* CNA Reply, Dckt. No. 30, at 2-4.

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Although plaintiff's FAC does not clearly allege a negligence claim, to the extent that such a claim is asserted, CNA is entitled to summary judgment on that claim.

As discussed above, a union owes its members a duty of fair representation. The "federal duty of fair representation preempts the application of state substantive law which attempts to regulate conduct that falls within the union's duty to represent its members." *Thomsen v. Sacramento Metro. Fire Dist.*, No. 09-1108, 2009 U.S. Dist. LEXIS 97242, at *11 (E.D. Cal. Oct. 19, 2009). Indeed, "[s]tate law claims are preempted '*whenever*' a plaintiff's claims invoke rights derived from a union's duty of fair representation." *Id*. (emphasis in original); *see also Richardson v. United Steelworks of Am.*, 864 F.2d 1162, 1168 (5th Cir. 1989) (holding that because plaintiffs allege that the union breached a duty arising from its status as their exclusive collective bargaining agent pursuant to the NLRA, *Vaca* requires this duty to be defined by federal law). Specifically, "[s]tate law negligence claims are preempted if the duty relied on is created by a collective bargaining agreement and without existence independent of the agreement." *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 999 (9th Cir. 2007).

Plaintiff's allegation that CNA and Maryanne Henke owe her a duty to process her grievance in an impartial and fair way arises from the collective bargaining agreement. Plaintiff has not argued or referenced any legal authority to support the notion that this alleged duty is independent of any right established by the collective bargaining agreement. Accordingly, plaintiff's negligence claim is preempted and subsumed by CNA's duty of fair representation. Therefore, CNA is entitled to summary judgment on plaintiff's negligence claim.

III. DEFENDANT TPMG'S MOTION TO DISMISS

Defendant TPMG moves to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Dckt. No. 12. Plaintiff opposes the motion. Dckt. No. 16.

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A. Motion to Dismiss Standard

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id*. (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Dismissal is appropriate based either on the lack of cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal theories. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh'g denied*, 396 U.S. 869 (1969). The court will "'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985). However, the court's liberal interpretation of a pro se litigant's pleading may not supply essential elements of a claim that are not plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

Furthermore, "[t]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Neither need the court accept unreasonable inferences, or unwarranted deductions of fact. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

The court may consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts which may be judicially noticed, *Mullis v. U.S. Bankr. Ct.*, 828 F.2d at 1388, and matters of public record, including pleadings, orders, and other papers filed with the court. *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

A pro se litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

B. Plaintiff's Claims Against TPMG

Plaintiff alleges that defendants CNA and TPMG "entered into a joint Math Policy contract agreement" in which they "agreed to contractual provision[s] to place nurses who failed the math test into a [r]emediation [p]rogram." FAC at 2. Plaintiff contends that TPMG then breached this contract agreement "[b]y failing to perform in good faith to offer the plaintiff the remediation program" after she failed the math test for a second time. *Id.* Plaintiff further argues that she was "terminated without just cause" by TPMG on December 24, 2008 "for allegedly not passing a [m]ath test" in violation of "paragraph 4021 of the union agreement." *Id.* at 3, 7. Finally, plaintiff alleges that as an African-American, she was treated differently with regard to the math policy. FAC at 5. She claims that "non African Americans" were permitted to take the math test in a supervisor's office where the supervisor discussed the questions and answers with the test takers. *Id.*

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As discussed above, although plaintiff's FAC is unclear, taking into consideration the liberal pleading standard afforded to pro se litigants, the FAC is construed as alleging the following claims against TPMG: (1) wrongful termination in breach of the collective bargaining agreement; (2) breach of the implied covenant of good faith and fair dealing; (3) wrongful termination in violation of public policy; (4) breach of contract based on TPMG's math testing policy for nurses; and (5) racial discrimination.

1. Wrongful Termination in Breach of the Collective Bargaining Agreement

To the extent plaintiff's FAC alleges a breach of contract action against TPMG based on a violation of paragraph 4021 of the collective bargaining agreement, this claim fails. The claim falls under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), which preempts state law claims that are "substantially dependent upon analysis for the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).[10] More specifically, section 301 preempts any state law claim whose resolution depends upon the meaning of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim requires the interpretation of a collective bargaining agreement. *Id.* at 413.

Plaintiff does not challenge that her employment with TPMG was governed by the terms of a collective bargaining agreement between TPMG and CNA. Indeed, plaintiff alleges that her termination was in violation of paragraph 4021 of that collective bargaining agreement. Quite obviously, whether TPMG violated paragraph 4021 requires interpretation of that specific

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[10] Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties."

provision.[11] The meaning of "just cause" must be determined by reference to the collective bargaining agreement. As such, plaintiff's breach of contract claim is preempted by section 301 of the LMRA. To recover from an employer for a violation of a collective bargaining agreement, an employee must first show that her union breached its duty of fair representation in handling her grievance before proceeding with a section 301 suit against the employer. *Vaca*, 386 U.S. at 186. As noted above, plaintiff is unable to bring a claim for breach of the duty of fair representation against the union, defendant CNA, as that claim is barred by the statute of limitations. Thus, plaintiff's claim against defendant TPMG for wrongful termination based on a breach of the collective bargaining agreement must also fail. Since this deficiency cannot be cured by amendment, the claim must be dismissed without leave to amend.

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

To the extent plaintiff alleges a breach of the implied covenant of good faith and fair dealing, this claim is also preempted by section 301. In California, a claim for the breach of the implied covenant of good faith and fair dealing "is necessarily based on the existence of an underlying contractual relationship, and the essence of the covenant is that neither party to the contract will do anything which would deprive the other of the benefits of the contract." *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401, 1411 (9th Cir. 1991). This cause of action developed to protect at-will employees who could be fired without cause under common law. *Id.* The Ninth Circuit has held that because unionized employees operating under a collective bargaining agreement have no comparable lack of job security, their claims for breach of the implied covenant of good faith and fair dealing are preempted by section 301. *Id.*

Here, because a collective bargaining agreement governed plaintiff's employment with TPMG, any claim she makes for breach of the implied covenant of good faith and fair dealing is

[11] Paragraph 4021 of the collective bargaining agreement provides, "The Employer shall have the right to discharge or assess disciplinary action for just cause." Henke Decl., Ex. 1 at 112.

preempted by section 301 and should be recharacterized as a section 301 claim. *See also Smith v. Pac. Bell Telephone Co.*, 2007 WL 1114044, at *7 (E.D. Cal. Apr. 13, 2007) (holding that claim for breach of the implied covenant of good faith and fair dealing is preempted by section 301). Plaintiffs have six months after their cause of action accrues to file a section 301 claim against an employer. *DelCostello*, 462 U.S. at 171-72. As explained above, plaintiff must first show a breach of the duty of fair representation by the union in order to proceed with a section 301 claim and, in this case, plaintiff's duty of fair representation claim is time-barred. Accordingly, her claim for breach of the implied covenant of good faith and fair dealing must be dismissed as time-barred as well, without leave to amend.

3. Wrongful Termination in Violation of Public Policy

To the extent plaintiff alleges that she was wrongfully terminated in violation of public policy, this claim also fails. Under California law, an employee may maintain a cause of action against her employer where the employer's discharge of the employee contravenes fundamental public policy. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 666 (1988). To sustain a wrongful termination claim in violation of public policy, plaintiff must establish that the dismissal violated a policy that is: (1) fundamental; (2) beneficial for the public; and (3) embodied in a statute or constitutional provision. *Wynes v. Kaiser Permanente Hosps.*, 2011 WL 1302916, at *9 (E.D. Cal. Mar. 31, 2011) (citing *Colores v. Bd. of Trustees*, 105 Cal. App. 4th 1293, 1307 (2003)).

Here, plaintiff alleges in her FAC that while she was required to take the math test alone in a conference room, two other nurses, both of whom were not African-American, were invited into a supervisor's office to take the math test with the supervisor's assistance. FAC at 5. Plaintiff also states that TPMG's "actions in firing her were illegal and discriminatory in nature and that Kaiser Permanente Math policy practices are not in compliance with the [g]overnment code statutes." *Id.* at 8. Finally, plaintiff contends she was "being targeted" by TPMG. *Id.* at 9.

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Plaintiff's FAC is vague because it does not identify any express statutes or public policy to support a claim for wrongful termination in violation of public policy. Nor is it clear whether she intends the claim to arise under the collective bargaining agreement or as a statutory discrimination claim. Thus, it is recommended that plaintiff's claim be dismissed with leave to amend for further clarification.

4. Breach of the Medication Math Testing Policy

Plaintiff also appears to allege that she and TPMG are parties to a contract – the math policy – and that TPMG violated this contract by, among other things, failing to offer plaintiff a remediation program when she failed the math test. This argument also fails.

In *Olguin v. Inspiration Consol. Copper Co.*, an employee whose employment was governed by a collective bargaining agreement asserted a breach of contract claim based on an employee manual. 740 F.2d 1468, 1474 (9th Cir. 1984). The Ninth Circuit held that this claim was "clearly preempted" by section 301 because "[t]o the extent that the alleged policy manual [was] inconsistent with the provisions of the collection bargaining agreement, the bargaining agreement control[led]." *Id.* The employee also asserted a claim for wrongful discharge in violation of "an agreement of employment"; however it was unclear to the court whether the agreement the employee referred to was the collective bargaining agreement or the employee manual. *Id.* The Ninth Circuit thus stated in regard to this claim, "Like the personnel policy manual, any independent agreement of employment could be effective only as part of the collective bargaining agreement" and held this claim preempted as well. *Id.* Since *Olguin* was issued, it has often been cited for the proposition that any independent agreement of employment concerning a job position covered by the collective bargaining agreement could be effective only as part of the collective bargaining agreement. *See Aguilera v. Pirelli Armstrong Tire Corp.,* 223 F.3d 1010, 1015 (9th Cir. 2000) (quoting *Olguin* in holding that where the position in dispute is covered by a collective bargaining agreement, the collective bargaining agreement controls and any claims seeking to enforce the terms of a separate agreement are preempted); *Beals v. Kiewit*

Pac. Co., 114 F.3d 892, 894 (9th Cir. 1997) (quoting *Olguin* in holding that any claims to enforce an independent agreement are preempted); *Young v. Anthony's Fish Grottos*, 830 F.2d 993, 997 (9th Cir. 1987) (quoting *Olguin* in holding that alleged oral contract between employee and employer regarding reinstatement was controlled by collective bargaining agreement since employee held position covered by collective bargaining agreement); *Stallcop*, 820 F.2d at 1048 (quoting *Olguin* in holding that oral agreement made in connection with employee's reinstatement should be treated as a collective bargaining agreement for preemption purposes because the independent agreement could only be effective as part of larger collective bargaining agreement).

Based on these authorities, it would appear that this case presents a clear case for preemption. However, "[i]n reality, section 301 has been the precipitate of a series of often contradictory decisions, so much so that 'federal preemption of state labor law has been one of the most confused areas of federal court litigation.'" *Galves v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991) (citation omitted); *see also Todd v. Safeway, Inc.*, 1998 WL 556577, at *3 (N.D. Cal. Aug. 28, 1998) (recognizing the confusion among courts with regard to state law claims and section 301 preemption); *Walton v. UTV of San Francisco, Inc.*, 776 F. Supp. 1399, 1402 (N.D. Cal. 1991) (explaining that several Ninth Circuit cases rely on the *Olquin* quote out of context).

In this case, plaintiff does not dispute that she is a member of CNA and that CNA entered into a collective bargaining agreement with TPMG on her behalf, which governs the terms of employment. She also does not dispute that the collective bargaining agreement sets out a grievance procedure and only allows for termination of employees for "just cause." Henke Decl., Ex. 1 at 108-10, 112. However, plaintiff argues that her termination was in violation of the math policy, which she claims was the basis of a separate contract between TPMG and herself. Although plaintiff articulates her claims as a breach of contract on the basis of the math policy, as well as a wrongful termination in violation of the collective bargaining agreement, the underlying harm that she complains of is the termination of her employment. But, the collective

bargaining agreement "established the grievance and arbitration procedure to resolve disputes over employee terminations" and to the extent that the math policy and the collective bargaining agreement are inconsistent, the collective bargaining agreement controls. *Civardi v. General Dynamics Corp.*, 603 F. Supp.2d 393, 398 (D. Conn. 2009). Thus, whether the claim is articulated as a breach of the math policy or a breach of the collective bargaining agreement, the "just cause" standard from the collective bargaining agreement controls. And, in order to determine whether TPMG had "just cause" to terminate plaintiff, the undersigned would be required to interpret the "just cause" paragraph. Therefore, this claim is preempted by section 301 and should be recharacterized as a section 301 claim. *See id.* (treating a breach of contract claim based on an employee handbook as a claim for breach of the collective bargaining agreement, which included a "just cause" standard and finding the claim preempted by section 301); *see also Price v. Georgia-Pacific Corp.,* 99 F. Supp. 2d 1162, 1166-68 (N.D. Cal. 2000) (claim by plaintiff with access to the collective bargaining agreement grievance procedure is preempted by section 301); *Todd*, 1998 WL 556577, at *3 (claims essentially seeking remedies for breach of a plaintiff's collective bargaining agreement which prevents discharge except for good cause shown is preempted by section 301). As explained above, because plaintiff is time-barred from bringing a breach of the duty of fair representation claim, a requisite for a section 301 claim, her section 301 claim is also time-barred. Accordingly, plaintiff's claim for breach of the math policy must be dismissed without leave to amend.

5. Racial Discrimination Claim

Finally, as noted above regarding plaintiff's wrongful termination/public policy claim, it appears that plaintiff's FAC attempts to articulate an employment discrimination claim based on race, by alleging that "non[-]African[-]Americans" were permitted to take the math test in a supervisor's office with the supervisor's assistance, while plaintiff, an African-American, was required to take the test in a conference room without assistance. FAC at 5. However, plaintiff's FAC does not identify the legal theories pursuant to which she intends to proceed on her racial

discrimination claim and does not contain factual allegations sufficient to raise a right to relief on any such theories beyond the speculative level. If plaintiff intends to pursue a claim for racial discrimination, she should identify what legal theories she wishes to utilize and allege specific facts sufficient to state a claim for relief under those theories. Since it is not clear that such amendments would be futile, plaintiff's racial discrimination claim should be dismissed with leave to amend.[12]

C. Leave to Amend

If plaintiff elects to file a second amended complaint against TPMG as authorized herein, the complaint shall not add other claims not authorized by the court or new defendants and shall not include any claims that were dismissed herein without leave to amend. Plaintiff is reminded that the court cannot refer to a prior pleading in order to make her second amended complaint complete. Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a second amended complaint, the FAC no longer serves any function in this case. Failure to file a second amended complaint will result in a recommendation that this action be dismissed.

IV. CONCLUSION

Accordingly, it is hereby ORDERED that:

1. The Status Conference currently set for July 20, 2011 is CONTINUED to October 12, 2011 at 10:00 a.m. in Courtroom No. 24.

2. The parties shall file status reports not later than September 28, 2011.

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[12] As plaintiff's claims against TPMG are dismissed, TPMG's motion for a more definite statement is denied as moot.

Further, it is RECOMMENDED that:

1. Defendant CNA's motion for summary judgment, Dckt. No. 28, be granted;

2. Defendant TPMG's motion to dismiss, Dckt. No. 12, be granted;

3. Plaintiff's claims against TPMG for wrongful termination in breach of the collective bargaining agreement, breach of the implied covenant of good faith and fair dealing, and breach of contract based on TPMG's math policy be dismissed without leave to amend;

4. Plaintiff's claims against TPMG for wrongful termination in violation of public policy and racial discrimination be dismissed with leave to amend;

5. Defendant TPMG's motion for a more definite statement, Dckt. No. 12, be denied;

6. Plaintiff be provided fourteen days from the date any order adopting these findings and recommendations is filed to file a second amended complaint as provided herein; and

7. Plaintiff be admonished that failure to timely file an second amended complaint will result in a recommendation that this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 6, 2011.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE