



1 This order addresses only the Magistrate Judge’s recommendation to grant the motion to  
2 dismiss. The Magistrate Judge’s findings of fact are presumed correct, *see Orand v. United*  
3 *States*, 602 F.2d 207, 208 (9th Cir. 1979), and legal conclusions are reviewed de novo, *see*  
4 *Robbins v. Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007).

5 The court agrees the complaint against Ms. McGhee cannot proceed because an action for  
6 breach of the duty of fair representation can proceed only against a union, not an individual, and  
7 because any analogous state law tort claims based on the same allegations would be preempted by  
8 federal law. *See Carter v. Smith Food King*, 765 F.2d 916, 920–21 (9th Cir. 1985). The court  
9 also agrees the claims against the Union cannot succeed because they were filed more than six  
10 months after Mr. Reyes knew or should have known the Union had decided not to contest his  
11 termination. *See DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 169 (1983).

12 The court construes Ms. Reyes’s second amended complaint as a request for leave to  
13 amend. His proposed amendments do not correct the problems discussed in the previous  
14 paragraph. The claims against Melinda McGhee and the Service Employees International Union,  
15 United Healthcare Workers are therefore **dismissed without leave to amend**. *See Airs*  
16 *Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th  
17 Cir. 2014) (“A district court may dismiss a complaint without leave to amend if amendment  
18 would be futile.” (citation and quotation marks omitted)).

19 The matter is referred again to the Magistrate Judge to consider Mr. Reyes’s response to  
20 the order to show cause and for all other proceedings.

21 This order resolves ECF No. 26.

22 IT IS SO ORDERED.

23 DATED: December 15, 2020.

  
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CHIEF UNITED STATES DISTRICT JUDGE