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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLAUDIA MILLER, an individual,

No. C 12-03482 WHA

Plaintiff,

v.

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION AND  
MOTION FOR JUDGMENT ON  
THE PLEADINGS**

SOUTHWEST AIRLINES, CO., a Texas  
corporation, and DOES 1 through 10,  
inclusive,

Defendants.

**INTRODUCTION**

In this employment-discrimination action, defendants move under Rule 12(b)(1) to dismiss plaintiff's claims for lack of subject-matter jurisdiction and under Rule 12(c) for judgment on the pleadings. For the reasons stated below, defendants' motions are **GRANTED IN PART** and **DENIED IN PART**.

**STATEMENT**

Plaintiff Claudia Miller is an African-American female who was employed by defendant Southwest Airlines, Co. as an operations agent at the San Francisco International Airport. During the first six months of her employment, plaintiff was a probationary employee who was not entitled to all of the benefits offered to permanent Southwest employees (Compl. ¶¶ 9–10). While as a probationary employee plaintiff was not entitled to union membership, the parties agree that plaintiff was subject to the collective bargaining agreement (CBA) between defendant and the Transport Workers Union of America.

1 During plaintiff's employment with defendant, she was often required to work excessive  
2 mandatory overtime hours. Plaintiff alleges that non-African American employees were not  
3 asked to nor required to work excessive mandatory overtime hours. Plaintiff was often assigned  
4 to work alone at stations that required a constant employee presence or to relocate from gate to  
5 gate, which prevented her from taking her meal-and-rest breaks (*id.* at ¶¶ 12–15).

6 Plaintiff's overwhelming work schedule, which included double-shifts and her inability  
7 to take her meal-and-rest breaks, began to take a physical and emotional toll. In July 2011, after  
8 nearly four months of employment, plaintiff wrote an email to her supervisor Assistant Station  
9 Manager Lei'Lani Dresser describing her concerns about understaffing certain shifts and forcing  
10 plaintiff to miss meal-and-rest breaks as well as bathroom breaks. Plaintiff also explained that  
11 operations agents, like herself, who work long shifts without breaks were more likely to make  
12 errors and pose safety concerns (*id.* at ¶¶ 16–17).

13 The day after the email was sent, Manager Dresser allegedly began issuing plaintiff  
14 disciplinary write-ups for minor errors. Other non-African American employees allegedly made  
15 the same minor errors and were not written up. Plaintiff alleges that defendant wanted her out  
16 of the company because she had complained about workplace practices (*id.* at ¶¶ 19–21).

17 Less than two months after plaintiff sent Manager Dresser the email, defendant  
18 terminated plaintiff. Plaintiff had two weeks left before her probationary period ended.  
19 Plaintiff was told that her performance problems were the reason for termination (*id.* at ¶ 22).  
20 Plaintiff, however, alleges that she had received multiple employee commendations for her  
21 excellent work performance, one of which was given to plaintiff less than one month before  
22 being terminated (*id.* at ¶ 11).

23 Plaintiff allegedly observed defendant terminate several African-American and Latino  
24 employees within close proximity to the end of their probationary periods. Plaintiff allegedly  
25 did not observe or learn of a single termination of a non-African American or non-Latino  
26 probationary employee (*id.* at ¶ 23).

27 Plaintiff timely filed charges with the California Department of Fair Housing and  
28 Employment (DFEH) and the U.S. Equal Employment Opportunity Commission (EEOC).

1 Plaintiff received a notice of case closure and right-to-sue notice from the DFEH, and a  
2 right-to-sue notice from the EEOC (*id.* at ¶¶ 24–26).

3 On July 2012, plaintiff filed the complaint herein. Plaintiff alleges race discrimination  
4 under Title VII and California’s FEHA, failure to provide meal-and-rest breaks, retaliation under  
5 California Labor Code Section 226.7, and wrongful termination in violation of public policy.

6 Defendant has now filed a motion to dismiss for lack of subject-matter jurisdiction  
7 arguing that all of plaintiff’s claims are preempted by the Railway Labor Act. Defendant has  
8 also filed a motion for judgment on the pleadings, arguing that plaintiff’s claims for meal-and-  
9 rest breaks, retaliation, and wrongful termination are preempted by the Airline Deregulation Act.

10 On February 7, 2013, the parties attended the hearing on the instant motions. At the  
11 hearing, plaintiff’s counsel raised for the first time a decision by our court of appeals that was  
12 not included in plaintiff’s opposition. Defendant was allowed to file a supplemental brief in  
13 response, which the Court has reviewed.

#### 14 ANALYSIS

15 As an initial matter, plaintiff contends that defendant’s Rule 12(b)(1) motion is not timely  
16 because defendant filed an answer prior to filing the motion. As stated by our court of appeals,  
17 however, “the deadline for making a Rule 12(b)(1) motion to dismiss for lack of subject-matter  
18 jurisdiction is prolonged by Rule 12(h)(3), which provides that [i]f the court determines at any  
19 time that it lacks subject-matter jurisdiction, the court must dismiss the action.” *Wood v. City of*  
20 *San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012) (quoting *Arbaugh v. Y. & H. Corp.*, 546 U.S.  
21 500, 506 (2006)) (internal quotations omitted). A motion for subject-matter jurisdiction “may be  
22 raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial  
23 and the entry of judgment.” *Ibid.* The Rule 12(b)(1) motion is, therefore, timely.

24 Our court of appeals has held that a Rule 12(c) motion “is properly granted when,  
25 accepting all factual allegations in the complaint as true, there is no issue of material fact  
26 in dispute, and the moving party is entitled to judgment as a matter of law.” *Chavez v.*  
27 *United States*, 683 F.3d 1102, 1108–09 (9th Cir. 2012) (quoting *Fleming v. Pickard*, 581 F.3d  
28 922, 925 (9th Cir. 2009)). The analysis under a Rule 12(c) motion is substantially identical to a

1 Rule 12(b)(6) motion because “under both rules, a court must determine whether the facts  
2 alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.” *Ibid.*

3 **1. RETALIATION CLAIM UNDER LABOR CODE.**

4 To pursue a retaliation claim under California Labor Code Section 1102.5, plaintiff  
5 must first exhaust her administrative remedies. “Where an administrative remedy is provided  
6 by statute, relief must be sought from the administrative body and this remedy exhausted before  
7 the courts will act.” *Campbell v. Regents of Univ. of Cal.*, 35 Cal. 4th 311, 321 (2005) (internal  
8 quotations omitted).

9 Under *Campbell*, the administrative remedy for a violation of Section 1102.5(c) is  
10 provided by California Labor Code Section 98.7, which provides that an aggrieved person must  
11 first file a complaint with the California Labor Commissioner prior to bringing suit in court.  
12 *Ferretti v. Pfizer, Inc.*, 855 F. Supp. 2d 1017, 1023 (N.D. Cal. Feb. 29, 2012) (Judge Lucy Koh).  
13 The complaint to the Labor Commissioner must be filed within six months after the violation  
14 occurred. Cal. Lab. Code § 98.7(a). The undersigned has held that administrative exhaustion is  
15 required before a plaintiff may bring a retaliation claim under Section 1102.5. *Wright v. Kaiser*  
16 *Found. Hosps.*, 2012 U.S. Dist. LEXIS 132459, at \*6 (N.D. Cal. Sept. 17, 2012). Plaintiff’s  
17 complaint states that she filed charges with the DFEH and the EEOC, but not with the Labor  
18 Commissioner (Compl. ¶ 24). Plaintiff’s opposition does not address at all the failure to exhaust.  
19 Defendant’s motion for judgment on the pleading is **GRANTED**.

20 **2. RAILWAY LABOR ACT PREEMPTION.**

21 Congress enacted the Railway Labor Act (RLA) to handle labor disputes. In 1936, the  
22 RLA was extended to cover the airline industry. The Supreme Court stated:

23 Congress’ purpose in passing the RLA was to promote stability  
24 in labor-management relations by providing a comprehensive  
25 framework for resolving labor disputes . . . To realize this goal,  
26 the RLA establishes a mandatory arbitral mechanism for the  
27 prompt and orderly settlement of two classes of disputes . . .  
28 Major disputes relate to the formation of collective bargaining  
agreements or efforts to secure them . . . Minor disputes grow  
out of grievances or out of the interpretation or application of  
agreements covering rates of pay, rules, or working conditions.

1 *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252 (1994) (internal quotations and citations  
2 omitted). The Supreme Court has held that minor disputes, *e.g.* those “involving the  
3 interpretation or application of existing labor agreements,” are preempted by the RLA. *Id.* at  
4 256. Claims involving the enforcement of rights independent of a CBA, however, are not  
5 preempted. *Ibid.*

6 **A. Title VII Race Discrimination Claim.**

7 Plaintiff asserts a race discrimination claim under Title VII of the Civil Rights Act of  
8 1964. Under Title VII, it is unlawful for an employer to discharge or “discriminate against any  
9 individual with respect to his compensation, terms, conditions, or privileges of employment”  
10 because of an individual’s race. 42 U.S.C. 2000 *et seq.* Our court of appeals has held that  
11 Title VII rights exist independent of the CBA. *Felt v. Atchison, T. & S. F. Ry.*, 60 F.3d 1416,  
12 1419 (9th Cir. 1995). In *Felt*, our court of appeals stated that whether the plaintiff has a  
13 meritorious Title VII claim cannot be conclusively resolved merely by consulting the CBA, so  
14 the RLA does not preclude litigation of Title VII rights. *Id.* at 1420. Plaintiff’s Title VII claim  
15 is, therefore, not preempted by the RLA.

16 Defendant argues that the RLA preempts plaintiff’s Title VII claim because such claims  
17 cannot be resolved without interpreting and applying the CBA. It argues that plaintiff’s  
18 allegations of shift and staffing assignments, assigned overtime, and termination during her  
19 probationary period are terms of the CBA that must be interpreted (Br. 8). Our court of appeals,  
20 however, has affirmed that Title VII rights are independent rights outside of the CBA and thus  
21 are not preempted by the RLA. *See Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir.  
22 1999). Defendant’s motion to dismiss the Title VII claim for lack of subject-matter jurisdiction  
23 is, therefore, **DENIED**.

24 **B. FEHA Race-Discrimination Claim.**

25 Plaintiff also asserts a race-discrimination claim under FEHA. As with Title VII, the  
26 FEHA makes it unlawful for an employer to discharge a person or to “discriminate against the  
27 person in compensation or in terms, conditions, or privileges of employment” because of a  
28 person’s race. Cal. Govt. Code § 12940(a). As with the Title VII claim, defendant argues that

1 plaintiff's race-discrimination claim is preempted by the RLA because it cannot be resolved  
2 without interpreting the CBA. Our court of appeals, however, has repeatedly affirmed that  
3 FEHA claims are also independent of the CBA and not preempted by the RLA. *See Saridakis*,  
4 166 F.3d at 1277. In *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1457 (9th Cir. 1996), our  
5 court of appeals applied a three-part analysis to determine if a disability discrimination claim  
6 brought under the FEHA was preempted by the RLA. It concluded that the FEHA claim was not  
7 preempted because: (i) the CBA did not govern the actions that gave rise to the discrimination  
8 claims, (ii) the FEHA statute has clear statutory and regulatory standards to evaluate the claim  
9 without considering provisions of the CBA, and (iii) the FEHA statute's intent is that  
10 employment without discrimination is a public policy of California that cannot be altered by  
11 private contract. *Id.* at 1457–58. Plaintiff has asserted a FEHA claim that is not preempted by  
12 the RLA. Defendant's motion to dismiss the FEHA claim for lack of subject-matter jurisdiction  
13 is, therefore, **DENIED**.

#### 14 C. Wrongful Termination in Violation of Public Policy.

15 The Supreme Court in *Hawaiian Airlines* held that a wrongful discharge in violation of  
16 public policy claim was not preempted by the RLA because it is state tort law that is apart from  
17 any CBA provision. *Hawaiian Airlines*, 512 U.S. at 258. Moreover, our court of appeals has  
18 reached the same conclusion "because such claims are derived from sources outside the CBA."  
19 *Saridakis*, 166 F.3d at 1278. Here, defendant argues that this claim should be dismissed because  
20 it is derivative of the race-discrimination claims that are preempted. This argument fails because  
21 the race-discrimination claims are not preempted. Defendant's motion to dismiss the wrongful  
22 termination in violation of public policy claim, therefore, is **DENIED**.

#### 23 3. AIRLINE DEREGULATION ACT PREEMPTION.

24 In 1978, Congress enacted the Airline Deregulation Act in "determining that maximum  
25 reliance on competitive market forces would best further efficiency, innovation, and low prices  
26 as well as variety [and] quality . . . of air transportation services []." *Morales v. Trans World*  
27 *Airlines, Inc.*, 504 U.S. 374, 378 (1992) (internal quotations and citations omitted).

28 The Deregulation Act includes an express federal preemption provision which provides that

1 “a State . . . may not enact or enforce a law, regulation or other provision having the force  
2 and effect of law related to a price, route, or service of an air carrier.” 49 U.S.C. 41713(b)(1).  
3 The Supreme Court articulated the standard that “state enforcement actions having a connection  
4 with, or reference to, airline rates, routes, or services are pre-empted [].” *Id.* at 384 (internal  
5 quotations and citations omitted). In a subsequent case, the Supreme Court specified that the  
6 Deregulation Act preempts state-imposed regulation of air carriers, but does not preempt  
7 contract terms set by the parties themselves. *Am. Airlines v. Wolens*, 513 U.S. 219, 221 (1995).

8  
9 **A. Meal-and-Rest Break Claim.**

10 At issue now is whether the Deregulation Act’s preemption provision is broad enough  
11 to apply to plaintiff’s meal-and-rest break claim. There is no decision by our court of appeals  
12 that specifically addresses whether a state meal-and-rest break statute is preempted by the  
13 Deregulation Act. Recently, however, our court of appeals highlighted the distinction the  
14 Supreme Court made in *Wolens* “between state laws that regulate airlines [which are preempted]  
15 and state enforcement of contract disputes [which are not preempted]” to conclude that state  
16 claims of implied covenant of good faith and fair dealing were not preempted. *Ginsberg v.*  
17 *Northwest, Inc.*, 695 F.3d 873, 880–81 (9th Cir. 2012) (quoting *Wolens*, 513 U.S. at 228–30).

18 The undersigned has previously considered whether the Deregulation Act preempts  
19 claims brought under California’s meal-and-rest break statute. In *Alim v. Aircraft Serv. Int’l.*,  
20 2012 U.S. Dist. LEXIS 119964, at \*2 (N.D. Cal. Aug. 23, 2012), the plaintiffs were employees  
21 who maintained and repaired ground equipment for airlines. The undersigned noted that a  
22 meal-and-rest break claim alleged by workers who do not directly work for an airline, but for  
23 a provider of contract services to airlines, may be too tenuous, remote or peripheral to affect  
24 airline services. *Id.* at \*7–8.

25 The Supreme Court has stated that the Deregulation Act and the Federal Aviation  
26 Administration Authorization Act (FAAAA) are subject to a similar analysis because both  
27 contain identical preemption provisions. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 368  
28 (2008). In the decisions analyzing FAAAA preemption, courts have held that federal law

1 preempts meal-and-rest break claims. *See Campbell v. Vitran Express, Inc.*, 2012 U.S. Dist.  
2 LEXIS 85509, at \*9 (C.D. Cal. June 8, 2012) (Judge R. Gary Klausner); *Cole v. CRST, Inc.*,  
3 2012 U.S. Dist. LEXIS 144944, at \*11 (C.D. Cal. Sept. 27, 2012) (Judge Virginia A. Phillips);  
4 *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1122 (S.D. Cal. Oct. 19, 2011) (Judge Janis  
5 L. Sammartino).

6 Defendant’s argument that applying the state’s meal-and-rest break regulations would  
7 affect airline rates, routes, or services has merit. Most of the job duties for operations agents  
8 revolve around two main areas. *First*, operations agents handle many aspects of customer  
9 service such as coordinating customer boarding/deplaning; coordinating servicing lavatories,  
10 cabin grooming, and wheelchairs for customers; ascertaining that aircrafts are properly cleaned  
11 and provisioned to prior to departure; and working with gate agents to collect boarding passes  
12 and verify boarding counts (Br. 17–18, CBA Art. 5.2). *Second*, operations agents handle many  
13 aspects of ensuring flight timeliness and safety such as transmitting required messages about  
14 conditions; operating stations/flight communications equipment and radio communications  
15 equipment; collecting weather reports for the crew; arranging to have aircraft fueled; preparing  
16 weight and balance computations at each station and advising dispatch, flight information, and  
17 stations of flight departures; and keeping other station personnel advised on flight movements,  
18 weather conditions, and irregular operations. *Ibid*. If meal-and-rest breaks were strictly applied,  
19 airline routes, services and costs would be affected and “the [Deregulation Act’s] purpose to  
20 leave largely to the airlines themselves” would be diminished. *Wolens*, 513 U.S. at 228.

21 Plaintiff’s arguments fail. Plaintiff’s counsel, without citing the decision from which he  
22 copied verbatim, argues that the decisions cited by defendant do not recognize the flexibility of  
23 the meal-and-rest law and the employer can comply with the law by paying the employee an  
24 additional hour of wages. The decisions cited by plaintiff are either misquoted or inapposite.  
25 The holding of the majority of decisions quoted by plaintiff support Deregulation Act  
26 preemption of state statutes or city ordinances.

27 The only persuasive decision cited by plaintiff is one in which our court of appeals held  
28 that the Deregulation Act did not preempt California’s prevailing wage law. *Californians for*

1 *Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998).  
2 However, as subsequent district court decisions have pointed out, California’s prevailing wage  
3 law is different from the meal-and-rest law at issue because wage laws require the payment of a  
4 higher wage while meal-and-rest laws require off-duty breaks. *See Cole v. CRST, Inc.*, 2012  
5 U.S. Dist. LEXIS 144944, at \*16–17 (C.D. Cal. Sept. 27, 2012) (Judge Virginia A. Phillips);  
6 *Esquivel v. Vistar Corp.*, 2012 U.S. Dist. LEXIS 26686, at \*15–16 (C.D. Cal. Feb. 8, 2012)  
7 (Judge Jacqueline H. Nguyen); *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1121 (S.D.  
8 Cal. Oct. 19, 2011) (Judge Janis L. Sammartino).

9 At the hearing, plaintiff’s counsel raised for the first time a decision from our court of  
10 appeals, *Ventress v. Japan Airlines*, 603 F.3d 676, 681 (9th Cir. 2010), to argue that the  
11 Deregulation Act does not preempt certain state laws. In *Ventress*, our court of appeals held  
12 that the Deregulation Act does not preempt California Labor Code Section 1102.5(b), the state  
13 whistleblower-protection statute. Here, however, the statute at issue concerns meal-and-rest  
14 breaks under California Labor Code Section 226.7, not whistleblower protection. As illustrated  
15 by the *Ventress* decision, whistleblower claims do not inherently conflict with an airline’s  
16 scheduling and service. But, strict compliance with meal-and-rest breaks do impact an airline’s  
17 scheduling and service because it dictates when, during the course of a shift, the employee can  
18 go off-duty.

19 To the foregoing extent only, defendant’s motion for judgment on the pleadings is,  
20 therefore, **GRANTED**.

### 21 CONCLUSION

22 Defendant’s motion to dismiss for lack of subject-matter jurisdiction is **DENIED** with  
23 respect to preemption of the Title VII, FEHA, and wrongful termination in violation of public  
24 policy claims. Defendant’s motion for judgment on the pleadings is **GRANTED** with respect to  
25 the retaliation and meal-and-rest break claims. Leave to amend is not allowed.

26 **IT IS SO ORDERED.**

27 Dated: February 12, 2013.

28   
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE