NO. 23387

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STANLEY J. McCORMICK, Plaintiff-Appellee,

vs.

ADRIAN KEOHOKALOLE, DONALD R. DOSER, and OPERATING ENGINEERS LOCAL UNION NO. 3, AFL-CIO, Defendants-Appellants,

and

DAVID SOUZA and JOHN DOES 1-25, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-1807)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Circuit Judge Raffetto, in place of Acoba, J., recused, JJ.; and Ramil, J., Concurring Separately)

Defendants-appellants Adrian Keohokalole, Donald R. Doser, and Operating Engineers Local Union No. 3, AFL-CIO (the Union or Local 3) [hereinafter, collectively, appellants] bring this interlocutory appeal, challenging the circuit court's denial of their motion for summary judgment. On appeal, appellants argue that the circuit court abused its discretion inasmuch as there were no disputed genuine issues of material fact and that, as a matter of law, plaintiff-appellee Stanley J. McCormick's claims for relief are preempted by federal law. We agree. Accordingly, the circuit court's order denying appellants' motion

for summary judgment, filed February 23, 2000, is vacated, and the case is remanded with instructions that McCormick's complaint against the appellants be dismissed on the ground that McCormick's claims for relief are preempted by federal law and that, therefore, the circuit court lacks jurisdiction.

I. BACKGROUND

On May 2, 1997, McCormick filed a complaint against appellants and defendant David Souza, who is not a party to this appeal. McCormick, a field agent for the Union, alleged that he had been wrongfully terminated, in violation of the Whistleblowers' Protection Act, Hawai'i Revised Statutes (HRS) § 378-61 (1993), et seq.,[1] (Count I) and in violation of public

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[1] Under the provisions of HRS § 378-62, it is illegal for an employer to:

> discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
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> (1) The employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; or
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> (2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Although appellants do not raise the issue, we note that McCormick's complaint fails to allege a claim for relief under the Whistleblowers' Protection Act. For purposes of the statute, recited above, a "public body" is defined primarily as a state or local governmental body. See HRS § 378-61. McCormick, however, alleges only that he filed charges with and testified before the National Labor Relations Board (NLRB). The NLRB is a federal governmental agency and, therefore, not a "public body" as defined by the Whistleblowers' Protection Act.

policy (Count II). McCormick also alleged that his termination resulted, in part, from Souza's tortious interference with the contractual relations between McCormick and the Union (Count III).

For purposes of this appeal, appellants have not challenged any of the facts alleged by McCormick in his complaint nor any of the facts asserted in affidavits in support of McCormick's memorandum in opposition to the motion for judgment on the pleadings.[2] We, therefore, accept as true the following version of the events leading to McCormick's termination in determining whether McCormick's claims are preempted by federal law as appellants allege.

Local 3 is a labor organization representing heavy equipment operators in several western states. Local 3 does business in Hawai‘i and is the bargaining representative for the majority of heavy equipment operators in the organized sector of Hawaii's construction industry. During the relevant period, Doser was the chief executive officer of Local 3, whose headquarters are based in California, while Keohokalole, the Union's district representative, was responsible for managing the day-to-day activities in Hawai‘i.

[2] The circuit court, pursuant to Hawai‘i Rules of Civil Procedure (HRCP) Rule 12(c) (2000), converted appellants' motion for judgment on the pleadings to a motion for summary judgment inasmuch as matters outside of the four corners of the pleadings were presented to the court. In light of our disposition of this case, we need not address appellant's argument that the circuit court erred in converting the motion.

McCormick began working for Local 3 in 1992 as, inter alia, a union organizer and business agent. In 1995, he took a constructive discharge because of disagreements with Keohokalole, who had been made district representative that year. McCormick, however, resumed employment with Local 3 in 1996.

In February 1996, McCormick cooperated with the NLRB by responding to questions involving the termination of a Local 3 employee, Katherine Bellinger, who had been attempting to unionize Local 3's clerical staff. McCormick was subsequently subpoenaed to testify before the NLRB in support of Bellinger's claim. McCormick let it be known that he would testify even if doing so would adversely impact the Union.

During the course of 1996 and 1997, McCormick uncovered evidence of collusion between Local 3 and Souza, who controlled Big Island Top Soil, a union trucking company, as well as Island Top Soil, a non-union outfit. Souza's non-union company, Island Topsoil, had been subcontracted by a union contractor, Hawaiian Dredging, to perform on-site hauling for the Kahekili Highway road widening project. Hawaiian Dredging's use of a non-union subcontractor constituted a violation of Local 3's collective bargaining agreement. Corrective measures were immediately taken, and Souza's non-union company was removed from the project site. On October 30, 1996, however, McCormick filed a charge against Souza with the NLRB, alleging that Souza had "created an

alter ego trying to bypass . . . Local 3[,]" as well as a contract grievance, pursuant to the Union's grievance procedure, alleging that Souza had violated the terms of the collective bargaining agreement. Keohokalole was upset that McCormick had filed the NLRB charge and the contract grievance without his authority. During the ensuing mediation meetings between Local 3 and Souza, Souza agreed to resolve the problem, and McCormick was instructed by the Union's legal counsel to withdraw the NLRB charge. Insofar as McCormick received no specific instruction with respect to the contract grievance, he did not withdraw it. When Souza learned that the contract grievance charge had not been withdrawn, he made what McCormick considered to be "idle threats," suggesting that McCormick would lose his job and that legal action would follow if the contract grievance was not withdrawn. Keohokalole instructed McCormick to withdraw the contract grievance against Souza and to replace it with a contract grievance against Hawaiian Dredging, the contractor who had subcontracted work to Souza's non-union company. Thereafter, McCormick filed a contract grievance against Hawaiian Dredging, but did not withdraw the grievance against Souza. McCormick's grievance alleged that, as a result of the collusion between Keohokalole and Souza, Local 3 failed to enforce its collective bargaining agreement to the detriment of Union members who were losing work that was theirs by right of contract.

At the beginning of February 1997, Local 3 terminated McCormick's employment due to "changed economic circumstances." On February 4, 1997, McCormick filed charges against the Union with the NLRB, claiming that the stated reason for his termination was pretextual. Essentially, McCormick maintained that Local 3's termination of his employment violated Section 8(a) of the National Labor Relations Act (NLRA), 20 U.S.C. § 151, et seq. (2000),[3] discussed infra. Specifically, the charge McCormick filed with the NLRB alleged that Local 3 terminated him "because of his Union and/or protected concerted activity" and "because he attempted to enforce various provisions of the collective bargaining agreement and because he gave testimony to the NLRB."

On February 5, 1997, the NLRB assigned a Board Agent to verify McCormick's allegations and notified Local 3 of its investigation. Local 3 defended its termination of a business agent on economic grounds and noted that McCormick had been chosen because he was the last hired and because it was "reasonable for a district representative, if given the choice, to chose [sic] to lay off the business agent who is openly hostile." According to the Union, the hostility between McCormick and Keohokalole dated back to 1995 when McCormick

[3] All references to the United States Code are to the 2000 version, which is not different from the edition that was in effect at the time of the circuit court proceedings.

resigned because he thought he, and not Keohokalole, should have been given the job of district representative. The Union also denied any awareness of McCormick's intention to testify before the NLRB in the Bellinger case. Consequently, it asked the NLRB to dismiss McCormick's charge inasmuch as the reasons for McCormick's termination were not in violation of the NLRA. The NLRB Board Agent requested that the Union provide documentation to support its position by March 4, 1997. Presumably satisfied by the Union's submissions, the regional director of the NLRB wrote to the parties, on March 6, 1997, "to advise [them] that the charge . . . ha[d], with [his] approval, been withdrawn."[4]

Following the regional director's approved withdrawal of the NLRB charge, McCormick filed the instant complaint in the First Circuit Court. The complaint alleges that McCormick was wrongfully terminated "because of his attempts to correct Local 3's contractual breaches and breaches of the duty of fair representation established by United States law, through, inter alia, the lodging of complaints with governmental entities." The complaint also alleges that McCormick's termination was due to "his willingness to testify truthfully pursuant to subpoena, and

[4] Although the record indicates that the Union asked the NLRB to "dismiss" McCormick's charge, the record is unclear as to why the regional director, instead, approved the "withdrawal" of the charge. In an affidavit, McCormick claimed that he "never heard nor was made aware of the outcome of his charge against Local 3 until [his] attorney received documents pursuant to a [Freedom of Information Act] Request to the NLRB, which stated that the charge had been withdrawn." McCormick further averred that he "did not withdraw the charge" and that he "did not know who did withdraw the charge."

to deny him access to any further information damaging to Local 3." Finally, the complaint alleges that Souza tortiously interfered with McCormick's employment relationship with the Union "in consequence of McCormick's attempts to uphold Local 3's contract against the interests of Souza and in favor of the interests of the members of Local 3."

On December 30, 1999, appellants filed their motion for summary judgment, arguing that, even if the allegations in the complaint were taken as true, federal law preempted McCormick's claims. Finding that genuine issues of material fact existed, the court denied the motion on February 23, 2000. Thereafter, appellants filed a motion for leave to file an interlocutory appeal, which was granted by the court on April 20, 2000, based upon its belief that, if all of McCormick's claims were, in fact, subject to preemption by federal law, a determination of this issue on appeal would resolve the litigation.

II. STANDARD OF REVIEW

We review the denial of a motion for summary judgment de novo under the same standard applied by the circuit court. Dairy Road Partners v. Island Ins. Co., 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000). It is well settled that

> summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential

> elements of a cause of action or defense asserted by the parties.

Bitney v. Honolulu Police Dep't, 96 Hawai'i 243, 250, 30 P.3d 257, 264 (2001) (quoting Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997) (citations, quotation marks, parentheticals, and brackets omitted)).

III. DISCUSSION

A. Interlocutory Certification Was Proper

McCormick argues that it was an abuse of discretion for the circuit court to grant appellants' motion to appeal from an interlocutory order. We disagree. HRS § 641-1(b) (1993) states that interlocutory appeals "may be allowed by a circuit court in its discretion from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy termination of litigation before it." In this case, appellants are appealing the circuit court's determination that the Union was not entitled to judgment as a matter of law based on its federal preemption defense. This issue is outcome dispositive because, if appellants are correct, the circuit court would be without jurisdiction to hear the case and would have no option but to dismiss McCormick's complaint against the appellants. In this respect, the circuit court's determination that allowance of the interlocutory appeal might more speedily terminate all of

McCormick's claims against some, if not all of the parties, satisfies the requirements of HRS § 641-1(b).

McCormick also argues that the circuit court abused its discretion when it granted appellants' motion for an extension of time to file its notice of interlocutory appeal on the basis of excusable neglect. This court has held that "only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect" for purposes of Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a). Enos v. Pacific Transfer & Warehouse Inc., 80 Hawai'i 345, 352, 910 P.2d 116, 123, reconsideration denied, 80 Hawai'i 345, 910 P.2d 116 (1996).

In this case, appellants' counsel asserted that, at the time he was called on to interpret the newly adopted version of HRAP Rule 4(a)(1) (1999), he was under extreme emotional distress due to the sudden illness and subsequent death of his mother and misconstrued the deadline for filing the notice of appeal. We note that, prior to its modification, HRAP Rule 4(a)(1) (1985) explicitly required parties to file a notice of appeal "within 30 days after the date of entry of the judgment or order appealed from" and specifically references its applicability to interlocutory appeals. Id. The version of the rule applicable to this case omits any specific reference to interlocutory appeals and requires that a party file a notice of appeal "within

30 days after entry of the judgment or appealable order." HRAP Rule 4(a)(1) (1999) (emphasis added).[5]

Appellants' counsel construed the new rule as requiring that the notice of appeal be filed within 30 days of the entry of the certification order authorizing the interlocutory appeal. We conclude that, under these circumstances, counsel's belief that an order was not "appealable" until it was so certified by the court amounted to a "plausible misconstruction" that rose to the level of excusable neglect. See Enos, 80 Hawai'i at 352, 910 P.2d at 123. We, therefore, hold that it was not an abuse of discretion for the circuit court to grant appellants' motion for an extension of time to file the notice of appeal.

B. No Genuine Issues of Material Fact Exist

On appeal, appellants argue that the circuit court erred when it found that genuine issues of material fact existed and, therefore, denied appellants' motion for summary judgment. We agree. For purposes of its motion, appellants conceded the veracity of all the allegations contained in McCormick's complaint and argued that it was entitled to judgment as a matter of law because McCormick's claims were preempted by federal law and that, therefore, were not properly before the circuit court. Accordingly, the only issue before the court was one of law, and not fact. Consequently, under these circumstances, we hold that

[5] Portions of HRAP Rule 4 were again amended in 2001. The amendments, however, did not affect HRAP Rule 4(a)(1).

the circuit court erred in finding that genuine issues of material fact existed.

C. McCormick's Claims Fall Within the Scope of the NLRA

In light of appellants' contention that the NLRA operates to divest state courts of jurisdiction to hear claims covered by the NLRA, we first examine the applicable federal labor law. Under Section 8(a)(1) of the NLRA, employers commit an unfair labor practice when they "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA. 29 U.S.C. § 158(a)(1). The rights set forth in Section 7 are as follows:

> Employees shall have the right to 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. In addition, an employer commits an unfair labor practice under NLRA § 8(a)(3) by discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Finally, NLRA § 8(a)(4) makes it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]." 29 U.S.C. § 158(a)(4).

It is well-settled that Congress, in enacting federal labor laws, intended to create a pervasive scheme of federal

regulation. Nearly fifty years ago, the United States Supreme Court noted that the very existence of the NLRB was a clear sign of Congress's intention to preempt certain areas of labor law. The Court noted that

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. 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.

Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A.F.L.), Teamsters Local Union No. 776, 346 U.S. 485, 490 (1953). The existence of federal labor law does not, however, require preemption of local claims as a per se matter. Cf. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 13 P.3d 1235, reconsideration denied, 94 Hawai'i 403, 15 P.2d 815 (2000). In fact, the Court has noted that some latitude is left "to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." Garner, 346 U.S. at 488.

The Supreme Court, in San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959), has clearly spelled out the parameters of Sections 7 and

8 of the NLRA. In Garmon, the Court was asked to decide "whether [a] California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin." Id. at 239. In resolving the issue, the Court noted that the union's picketing activity was protected under Section 7 of the NLRA and it, therefore, concluded that, "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id. at 245.

The Court has also stated that the "critical inquiry" in an NLRA preemption analysis is

> whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978).

This court has recognized these fundamental preemption principles in Gouveia v. Napili-Kai, Ltd., 65 Haw. 189, 649 P.2d 1119 (1982). There, an employee sued his employer for damages resulting from an allegedly unlawful termination. Id. at 190, 649 P.2d at 1121. Prior to filing his complaint, the employee had brought an unfair labor practice charge against his employer before the NLRB, claiming that his discharge was in violation of

Section 8 of the NLRA. Id. Subsequently, the parties executed a settlement under the auspices of the NLRB. Id. at 191, 649 P.2d at 1122. The employee then filed a complaint in state court, alleging "willfully malicious" termination. Id. at 197, 649 P.2d at 1126. We quoted extensively from the Supreme Court's decision in Garmon, and held that the complaint could not be adjudicated in state court without undermining the preemption doctrine and ordered the circuit court to dismiss the complaint. Id. at 198, 649 P.2d at 1126. Our adherence to the preemption principles outlined in Garmon was further solidified in Briggs v. Hotel Corporation of Pacific, Inc., 73 Haw. 276, 831 P.2d 1335 (1992), where we again held that the court "must resolve arguable instances of pre-emption in favor of pre-emption, leaving federal labor law to determine the obligations of employers who are subject to the [NLRA]." Id. at 284, 831 P.2d at 1340.

Here, the gravamen of McCormick's complaint is identical to that contained in the charge McCormick filed with the NLRB, namely that McCormick was fired because he testified before the NLRB, filed charges with the NLRB, and engaged in concerted activity to promote the rights of union members under a collective bargaining agreement. McCormick's filing of charges with the NLRB and evidence that the NLRB actively investigated these charges is, therefore, relevant to our preemption analysis because "[t]he primary jurisdiction rationale unquestionably

requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." Sears, Roebuck & Co., 436 U.S. at 202 (emphasis added); cf. Parker v. Connors Steel Co., 855 F.2d 1510, 1517 (11th Cir. 1988) ("By initially pursuing relief with the NLRB[,] the employees have implicitly recognized the Board's jurisdiction over their claims."). Accordingly, we conclude that McCormick's state court claims are clearly subject to the NLRA; however, our inquiry does not end there in light of McCormick's reliance on exceptions to the Garmon doctrine.

D. Exceptions to the Garmon Preemption Doctrine

Although McCormick does not challenge the conclusion that his state court claims are subject to Sections 7 and 8 of the NLRA, he contends that certain exceptions to the Garmon preemption doctrine are applicable to his claims. In analyzing the scope of the preemption doctrine, the Supreme Court has recognized the validity of certain exceptions. Specifically, the Court noted that

> the States need not yield jurisdiction where the activity regulated was a merely peripheral concern . . . or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 60 (1966) (internal citations, quotation marks, and brackets omitted) (emphases added). The Supreme Court has also stated,

however, that these recognized exceptions "in no way undermine the vitality of the preemption rule. To the contrary, they highlight our responsibility . . . to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." Farmer v. United Brotherhood of Carpenters Kicak 25, 430 U.S. 290, 297 (1977) (internal quotation marks and citation omitted).

In this case, McCormick claims that he was terminated for testifying before, and filing charges with, the NLRB. Such claims can hardly be termed a matter of "merely peripheral concern" to the Board. Likewise, we are not persuaded that the "substantial state interests" McCormick has identified are such that preemption can be avoided.

In Briggs, this court analyzed the "substantial state interest" exception. We recognized, for example, that "nothing in the federal labor statutes immunizes violence or threat of violence in labor disputes from state action." Briggs, 73 Haw. at 284, 831 P.2d at 1341. We also noted that "[a]llegation of tortious conduct such as 'outrageous conduct, threats, intimidation, and words' which cause the plaintiff to suffer 'grievous mental and emotional distress as well as great physical damage' may also fall within an exception to the federal interest in the national labor policy and therefore permit state law

recovery." Id. (citing Farmer, 430 U.S. at 301). However, although recognizing the exception, we emphasized that "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." Briggs, 73 Haw. at 285, 813 P.2d at 1341 (quoting Farmer, 430 U.S. at 305) (emphases in original).

McCormick contends that the state of Hawai'i has an interest in preventing "collusion between the union and a scab subcontractor" and "preventing the use of a 'scab' subcontractor by the general contractor on a State project." However, unlike the state interests we have previously recognized as being exempt from the federal preemption doctrine, the interests identified by McCormick are closely intertwined with the forms of employment discrimination that the NLRA seeks to regulate. We, therefore, hold that neither the "peripheral concern" nor the "substantial state interest" exceptions are applicable to McCormick's claims.

E. The Labor Management Relations Act (LMRA), 29 U.S.C. § 171, et seq.

McCormick also argues that his claims are exempt from preemption because his complaint alleges that appellants breached a collective bargaining agreement as well as a duty of fair representation. These allegations, he contends, are sufficient to state a claim for relief predicated upon section 301 of the

LMRA, 29 U.S.C. § 185 [hereinafter, Section 301].[6] In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court recognized that

> [t]here are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under [Section] 301 charging an employer with a breach of contract . . . Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. Garmon and like cases have no application to [Section] 301 suits.

Id. at 183-84 (emphases added).

Although McCormick relies upon the above language to argue that his claims are not preempted by Garmon, the exception carved out in Vaca and its progeny is inapplicable to McCormick's claim. McCormick's complaint contains allegations that: (1) "Local 3 was failing to enforce its collective bargaining agreement"; (2) "Local 3 was failing to represent members

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[6] Section 301 provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (emphasis added). The United States Supreme Court has recognized that Section 301 claims may also be adjudicated in state courts if federal law is applied. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985) ("[A] suit in state court alleging a violation of a provision of a labor contract must be brought under [Section] 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law.").

displaced by Souza's [non-union] company"; and (3) he was terminated "because of his attempts to correct Local 3's contractual breaches and breaches of the duty of fair representation established by United States law." These allegations, however, are insufficient to state a claim under Section 301 because he has failed to allege that the Union owed him a duty as his exclusive representative. See Kuhn v. National Assoc. of Letter Carriers, Branch 5, 528 F.2d 767, 770 (8th Cir. 1976) (holding that "exclusive representation is a necessary prerequisite to a statutory duty to represent fairly") (citing Vaca, 386 U.S. at 177). McCormick has also failed to allege the existence of a collective bargaining agreement governing the terms of his employment with Local 3 in its capacity as his employer. Absent such a contract, there can be no breach of its terms. McCormick's reliance on the line of cases holding that Section 301 cases survive Garmon preemption is, therefore, misplaced.

F. Estoppel

McCormick's final argument is rooted in the equitable doctrine of judicial estoppel. He contends that it would be improper for this court to accept appellants' position that the NLRB is the proper forum for resolution of this wrongful termination suit when the Union previously urged the NLRB to

dismiss the claim subsequent to McCormick's filing of charges with the agency.

In Roxas v. Marcos, 89 Hawai'i 91, 969 P.2d 1209, reconsideration denied, 89 Hawai'i 91, 969 P.2d 1209 (1998), this court recognized that,

> [p]ursuant to the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.

Id. at 124, 969 P.2d at 1242 (block quotation format in original omitted). Appellants' efforts to persuade the NLRB that McCormick's charges should be dismissed on the merits was not incompatible with their argument that dismissal of McCormick's circuit court claims based upon lack of jurisdiction was appropriate. Accordingly, this claim is without merit.

IV. CONCLUSION

McCormick's claim that he was terminated in retaliation for testifying before, and filing charges with, the NLRB cannot be adjudicated in a state court. We are unpersuaded that any exceptions to the Garmon preemption doctrine are applicable to this case and, therefore, must defer to the exclusive competence of the NLRB.[7] Accordingly, we vacate the order denying

[7] Given our disposition of this case, we need not address appellants' alternative argument that McCormick's claims are preempted pursuant to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-431.

appellants' motion for summary judgment, filed February 23, 2000, and remand this case to the circuit court with instructions that it dismiss McCormick's claims against appellants.

DATED: Honolulu, Hawai'i, August 22, 2002.

On the briefs:

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