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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

<p>DEMETRIA DELARGE, Plaintiff and Appellant, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Defendant and Respondent.</p>

<p>A131626 (Alameda County Super. Ct. No. RG10503899)</p>

Plaintiff Demetria DeLarge appeals from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer of respondent Service Employees International Union, Local 1021 (SEIU). DeLarge contends the trial court erred in concluding that the Public Employment Relations Board (PERB) has exclusive initial jurisdiction over her claims against SEIU. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Hayward Unified School District (District) employed DeLarge as a “para educator,” a position described in the operative first amended complaint (hereafter, complaint) as a “teacher’s aid for special education” students. DeLarge also served as Youth Enrichment Program (YEP) leader. The District terminated her from both jobs effective March 13, 2008.

DeLarge was a dues paying member of SEIU. According to the complaint, she had a written contract with SEIU that required the union to provide her with advice and counsel as to her employment rights. DeLarge alleges that SEIU’s constitution and bylaws required the

union to treat her fairly and to advise her of her rights as an SEIU member.¹ SEIU and the District were parties to a collective bargaining agreement that stated the terms and conditions of DeLarge's employment with the District. SEIU was the exclusive agent for enforcement of the collective bargaining agreement.

DeLarge alleges the District "engaged in a course of unlawful, unreasonable, harassing conduct toward [her] from May 2007 until the end of May 2008." According to the complaint, on several occasions between May 2007 and May 2008, DeLarge requested that SEIU assist her in resolving complaints concerning the conduct of District employees she perceived to be harassment as well as unfair or unlawful employment practices. She alleges that SEIU breached its contractual obligation to represent her. More specifically, she contends that in May 2007 she complained to Ken Glen, the District's SEIU representative, that Christy Gerrin, a District employee, had violated a longstanding policy that would have allowed DeLarge to be reimbursed for items she had purchased for an after-school program. According to the complaint, Glen told DeLarge to complete her project and that SEIU would send a bill to the District to reimburse DeLarge. DeLarge alleges she was never fully reimbursed, that Glen failed to schedule meetings with Gerrin and other District personnel to resolve the dispute, and that SEIU failed to take reasonable action to collect the money DeLarge spent in reliance on Glen's representations.

DeLarge also contends that in May 2007 she applied to work for two summer sessions as a YEP leader and that her seniority entitled her to be hired for two sessions, but that the District only scheduled her to work one session. She complained to the SEIU representative, Glen, about the District's failure to hire her for two sessions. DeLarge contends that Glen refused to take or return her calls, discuss the matter with her, or schedule a meeting with the District to resolve the complaint. She claims he "strung her along with promises of scheduling a meeting to resolve her complaint," leading to her allegedly losing her right to file a grievance due to the passage of time and the failure to take

¹ Although the complaint states that the parties' contract and the SEIU bylaws are attached to the complaint, the appellant's appendix provided to this court does not include a copy of the attachments. In addition, a copy of the complaint attached to the opening brief on appeal likewise omits the attachments.

the necessary procedural steps to pursue a grievance. In July 2007, DeLarge learned that employees with less seniority than her were working two summer sessions for the District even though they had not applied to work both sessions. She complained to Glen about the matter and was promised he would file a grievance on her behalf, although he did not do so.

After DeLarge was purportedly rebuffed in her attempt to discuss her complaints with Glen, she contacted Gerrin's superiors directly in an effort to resolve her claims. Gerrin allegedly retaliated against her by writing unwarranted complaints about DeLarge, including "making [an] unreasonable interpretation of [her] personality."

In August 2007, DeLarge met with Glen to discuss her grievance about the second summer session and to discuss Gerrin's allegedly unfair reprimands and on-the-job treatment of her. Glen took DeLarge's written notes and told her he would file a grievance for unfair treatment. DeLarge learned that Glen did not file a grievance. Further, according to the complaint, Gerrin allegedly "wrote [DeLarge] up by using the information that [she] had given to Mr. Glen." DeLarge received a written reprimand on August 14, 2007, purportedly based on the information she had shared with Glen. She alleges on information and belief that Glen disclosed her information to the District for the purpose of frustrating her claim and the right to grieve her complaint.

On August 15, 2007, DeLarge submitted an internal grievance complaining about Gerrin as well as Gerrin's supervisor and George Cole, the District's director of personnel for classified employees. On August 28, 2007, DeLarge learned she had been placed on administrative leave. She subsequently received an adverse letter from Cole relating to the investigation of her complaint against Gerrin, and on September 5, 2007, DeLarge received notice that she had been suspended. Glen purportedly told her she could not file a grievance for the suspension. On September 25, 2007, DeLarge met with various SEIU personnel, including Glen and his supervisor. Glen told them she had been suspended for going directly to the District while on administrative leave and threatening Cole. DeLarge alleged that Glen "yelled and over talked" her during the course of their meeting.

DeLarge alleges she continued to seek SEIU's assistance until about May 2008 regarding the manner in which she was being treated by the District. She contends generally

that Glen and other SEIU personnel continued to engage in “deceptive conduct for the purpose [of] frustrating [her] attempts to file a grievance and or resolve her employee disputes” Her complaint also includes generalized allegations that SEIU’s conduct was reckless and “was done for the purpose of causing [her] to suffer emotional distress”

DeLarge filed suit against SEIU in the Alameda County Superior Court. Based on the allegations described above, DeLarge’s operative complaint included six causes of action, including breach of contract, breach of the covenant of good faith and fair dealing, breach of a third-party beneficiary contract, intentional misrepresentation, negligent misrepresentation, and intentional infliction of emotional distress. DeLarge’s cause of action for breach of a third-party beneficiary contract was based upon a purported breach of the collective bargaining agreement between SEIU and the District. The other contract-related causes of action were based upon the written contract between DeLarge and SEIU, a copy of which was supposedly attached to the complaint but not provided to this court. DeLarge sought compensatory and special damages estimated at \$500,000, damages for lost income estimated at \$60,000, and punitive damages of \$1,000,000.

SEIU filed a demurrer to the operative complaint on the grounds that (1) the Public Employment Relations Board (PERB) has exclusive jurisdiction to resolve claims concerning the breach of the duty of fair representation, (2) DeLarge failed to exhaust her administrative and judicial remedies with respect to any claim of the breach of the duty of fair representation, and (3) California law does not recognize “concurrent jurisdiction” as between PERB and the trial courts regarding claims for the breach of the duty of fair representation.

In support of its demurrer, SEIU requested that the trial court take judicial notice of certain filings in a PERB case initiated by DeLarge. One such filing was a warning letter dated January 21, 2009, in which a PERB regional attorney concluded that DeLarge had failed to state a prima facie case supporting an unfair practice charge against SEIU. DeLarge filed an amended charge with PERB in response to the warning letter. PERB’s regional attorney filed a dismissal letter on March 16, 2009, indicating that the amended charge would be dismissed unless DeLarge filed a timely appeal to PERB challenging the

decision not to file a complaint. In the dismissal letter, the regional attorney stated there were no grounds for a grievance pursuant to the collective bargaining agreement because the District is a “merit district,” signifying that personnel matters are not subject to collective bargaining. Further, the regional attorney noted that DeLarge had failed to supply facts establishing that SEIU’s failure to file a grievance was “arbitrary, discriminatory, or in bad faith,” noting that “mere negligence in failing to file a grievance” does not constitute an actionable breach of a union’s duty of fair representation to a member. The regional attorney also pointed out that many of DeLarge’s claims were time-barred because they occurred more than six months before she filed her charge against SEIU. DeLarge appealed to PERB, which dismissed her charge against SEIU without leave to amend.

The trial court granted SEIU’s request for judicial notice of PERB filings and sustained SEIU’s demurrer without leave to amend. In its order sustaining the demurrer, the court reasoned that PERB had exclusive jurisdiction over DeLarge’s causes of action, which despite their labels amounted to claims that SEIU had breached its duty of fair representation. As a separate and independent basis for the ruling, the court concluded DeLarge had failed to exhaust her judicial remedies after PERB considered and dismissed her administrative appeal. A judgment of dismissal was entered on February 10, 2011. DeLarge filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

On review of an order sustaining a demurrer without leave to amend, we exercise independent judgment in assessing whether the complaint states a cause of action as a matter of law. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.) “ ‘ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.^[2]” [Citation.] ’ ” (*Zelig v. County of Los Angeles* (2002)

² Taking judicial notice of PERB proceedings is proper for purposes of assessing a demurrer when the moving party alleges PERB has exclusive jurisdiction over a dispute. (See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 950.)

27 Cal.4th 1112, 1126.) “We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court’s stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]” (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.) When a demurrer is sustained without leave to amend, we reverse if there is a reasonable possibility an amendment could cure the defect. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

2. PERB Jurisdiction

“The history of the PERB begins in 1975, when the Legislature adopted the Educational Employment Relations Act (Gov. Code, §§ 3540–3549.3³; hereafter the EERA), which governs employer-employee relations for public schools (kindergarten through high school) and community colleges. [Citation.] As part of this new statutory scheme, the Legislature created the Educational Employment Relations Board (EERB), ‘an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board, to enforce the act.’ [Citation.] The Legislature vested the EERB with authority to adjudicate unfair labor practice charges under the EERA. [Citation.]” (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1085.) EERB was subsequently renamed PERB, and its jurisdiction over employer-employee relations was extended beyond the public school context to public employment more generally. (*Ibid.*)

PERB has authority to investigate and adjudicate unfair labor practices under the EERA. (§ 3541.3, subd. (i).) As set forth in the EERA, “[t]he initial determination as to whether the charges of unfair practices are justified, and if so, what remedy is necessary to effectuate the purposes of [the EERA] shall be a matter within the *exclusive jurisdiction* of the [PERB].” (§ 3541.5, italics added.)

In assessing the scope of PERB’s jurisdiction, California courts have “embraced the preemption doctrine developed by the federal courts” with regard to the jurisdiction of the National Labor Relations Board. (*City of San Jose v. Operating Engineers Local Union*

³ All further statutory references are to the Government Code unless otherwise specified.

No. 3 (2010) 49 Cal.4th 597, 604; see also *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12.) Under principles derived from the federal preemption doctrine, PERB’s exclusive jurisdiction is not limited to cases in which it is clear that an EERA violation is involved. Rather, California courts have adopted a rule establishing that PERB retains “ ‘exclusive jurisdiction over activities *arguably protected or prohibited by*’ the governing labor law statutes. [Citation.]” (*City of San Jose v. Operating Engineers Local Union No. 3, supra*, 49 Cal.4th at p. 604, italics added.) In determining whether conduct in a given case could give rise to an unfair practice claim, a court “must construe the activity broadly” (*California Teachers’ Assn. v. Livingston Union School Dist.* (1990) 219 Cal.App.3d 1503, 1511.)

The aim of the rule giving PERB exclusive initial jurisdiction over “unfair practices,” like the purpose of the federal preemption doctrine, is to “help bring expertise and uniformity to the delicate task of stabilizing labor relations. [Citations.]” (*San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d at p. 12.) Thus, courts “ ‘seek to avoid conflicting adjudications which may interfere with [a labor] board’s ability to carry out its statutory role, yet to permit court action when the board cannot provide a full and effective remedy.’ ” (*El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d at pp. 960-961.)

The EERA imposes upon employee organizations, such as SEIU, a duty of fair representation to their members. (See *Los Angeles Council of School Nurses v. Los Angeles Unified School Dist.* (1980) 113 Cal.App.3d 666, 672.) This duty derives in part from section 3544.9, which requires the exclusive organization representing public employees to “fairly represent each and every employee in the appropriate unit.” The EERA also make it unlawful for an employee organization “to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed” under the EERA. (§ 3543.6, subd. (b).)

A union’s breach of its duty of fair representation to a member may constitute an unfair practice under the EERA. (*Los Angeles Council of School Nurses v. Los Angeles Unified School Dist., supra*, 113 Cal.App.3d at p. 672.) Therefore, PERB’s exclusive

jurisdiction extends to activities that arguably violate a union's duty of fair representation. (*Ibid.*; see also *Anderson v. California Faculty Assn.* (1994) 25 Cal.App.4th 207, 211, 216.)

In this case, although DeLarge's complaint includes various contract and tort causes of action, the underlying factual basis for all of the claims is the same. In essence, she alleges that SEIU failed to properly represent her in disputes with her employer by refusing to file grievances, neglecting her requests for assistance, and frustrating her attempts to vindicate her rights. Notwithstanding the labels DeLarge has chosen to attach to her claims, her allegations amount to a claimed violation of SEIU's duty of fair representation. (See *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908 [court may disregard erroneous labels and look to facts alleged when ruling on demurrer.]; accord *Anderson v. California Faculty Assn.*, *supra*, 25 Cal.App.4th at pp. 210-211 [essence of various contract and tort claims is breach of the duty of fair representation].) Because the sum and substance of DeLarge's allegations constitute activities arguably prohibited by the EERA, PERB has exclusive jurisdiction over her claims.

DeLarge contends the court properly has jurisdiction over her claims, arguing that PERB's exclusive jurisdiction does not extend to (1) cases in which it cannot provide a full and effective remedy, (2) contract claims that do not amount to unfair labor practices, and (3) tort claims not intrinsically related to labor management issues. As an initial matter, we note that DeLarge has done little more in her opening brief than state the generalized principles of law supporting her legal claims. The sections of the brief addressing each of her three main points are left blank, aside from headings stating her contentions. We could deem these arguments waived as a result of DeLarge's failure to provide any analysis or argument in support of her assertions. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37; see also *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.) Nevertheless, because DeLarge has at least laid out the general legal framework governing her contentions, and to avoid any suggestion that her claims would have merit if properly presented to this court, we briefly address the points she has raised.

We begin with DeLarge's contention that PERB does not have exclusive jurisdiction over her breach of contract claims. As support for this argument, DeLarge relies primarily

upon *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259 (*Fresno Unified*), in which the Court of Appeal held that the trial court and PERB had concurrent jurisdiction over a claim by a school district that various teacher's organizations had breached a collective bargaining agreement in which the teachers had agreed not to strike. (See *id.* at pp. 262-263, 273-274.) The court's holding in *Fresno Unified* turned on Labor Code section 1126, which in general provides that a party to a collective bargaining agreement may enforce the contract in state court in the same manner as any other contract.⁴ *Fresno Unified* is inapposite because it pertains to a contractual dispute between an employer and a labor organization. Here, the dispute is between an employee and her labor organization. To the extent DeLarge claims she is suing as a third-party beneficiary under the collective bargaining agreement, she does not claim the District breached the agreement. Rather, her claim is that her exclusive bargaining agent, SEIU, failed to file grievances purportedly allowed under that agreement. Because she does not claim any breach of the collective bargaining agreement by the parties to that contract, her claims are not governed by Labor Code section 1126 or the holding in *Fresno Unified*.

DeLarge also relies upon section 3541.5, subdivision (b), which provides: “[PERB] shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.” DeLarge's reliance on section 3541.5 is misplaced. The statute merely stands for the proposition that PERB's jurisdiction does not extend to a purely contractual dispute that cannot be characterized as an unfair practice claim under the EERA. The statutory language does not suggest the trial court has concurrent jurisdiction over disputes that otherwise fall within PERB's exclusive jurisdiction simply because a contract governs certain aspects of the parties' relationship.

⁴ Labor Code section 1126 provides: “Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State.”

Further, despite DeLarge's denomination of her claims as breach of contract causes of action, they are more appropriately characterized as claims for breach of the duty of fair representation. We are guided by the analysis in *Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1361-1362, in which the court addressed a breach of contract claim by an employee who alleged that the union to which he belonged had refused to pursue a grievance to arbitration as allowed under a collective bargaining agreement. The specific issue addressed by the court was the appropriate statute of limitations to apply to the action. In order to answer that question, the court had to determine whether the claim was one for breach of contract or something else. Setting aside the breach of contract label the plaintiff had attached to his claim, the court held the pleading was obviously an "attempt to state a cause of action against the union for breaching its duty to appellant to represent him in good faith during grievance proceedings pursuant to a collective bargaining agreement. This is a specific and well-defined liability under both federal and state law [citations], not an ordinary contract liability. [Citation.]" (*Id.* at p. 1362.) Thus, "despite appellant's label of breach of contract," the court applied the statute of limitations governing a claim for breach of the duty of fair representation. (*Ibid.*) Just as in *Giffin v. United Transportation Union*, even though DeLarge has attached a breach of contract label to certain causes of action, the claims are properly described as a breach of the duty of fair representation. Because such claims fall within PERB's exclusive jurisdiction, we reject DeLarge's contention that the trial court has jurisdiction over claims she has labeled breach of contract causes of action.

We next consider DeLarge's contention that her tort claims are not subject to PERB's exclusive jurisdiction. DeLarge relies upon *Farmer v. United Broth. of Carpenters & Joiners of America, Local 25* (1977) 430 U.S. 290 (*Farmer*), a case in which the United States Supreme Court considered whether a tort claim for intentional infliction of emotional distress was subject to the exclusive jurisdiction of the National Labor Relations Board. In *Farmer*, the plaintiff union member alleged that his union began to discriminate against him after he had a "sharp disagreement" with other union officials over internal union policies. The plaintiff was subjected to a campaign of personal abuse and harassment in addition to

discrimination in referrals to employers. (*Id.* at p. 292.) He alleged that the defendant union and its agents had engaged in “outrageous conduct, threats, and intimidation” against him. (*Id.* at p. 293.) The Supreme Court held that the National Labor Relations Board did not have exclusive jurisdiction over his intentional infliction of emotional distress claim. (*Id.* at p. 302.) Among other things, the court pointed out that the preemption doctrine as applied to the jurisdiction of the National Labor Relations Board did not apply to activity that was “ ‘a merely peripheral concern of the Labor Management Relations Act . . . [or] that touched interests so deeply rooted in local feeling and responsibility’ ” (*Id.* at p. 296.) The court concluded the state had a “substantial interest in regulation of the conduct at issue and the State’s interest is one that does not threaten undue interference with the federal regulatory scheme.” (*Id.* at p. 302.) The court also observed that “the state-court tort action [could] be adjudicated without resolution of the ‘merits’ of the underlying labor dispute.” (*Id.* at p. 304.) According to the Supreme Court, a state court’s concurrent jurisdiction is not invoked simply because a union member claims to have suffered emotional distress as a result of threatened or actual employment discrimination. (*Id.* at p. 305.) Instead, “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.” (*Ibid.*, fn. omitted.)

Farmer does not provide support for DeLarge’s claim that the trial court has concurrent jurisdiction over her tort claims. She has not alleged that SEIU threatened, intimidated, or verbally abused her. Although she does allege the union representative “yelled and over talked” her during the course of a meeting, her allegation hardly rises to the level of the abusive, threatening, and intimidating course of action alleged in *Farmer*. Further, unlike in *Farmer*, her claim is not a peripheral concern of the EERA that can be adjudicated without having to resolve the merits of her unfair practice claim. Instead, her emotional distress claim is intimately connected to SEIU’s alleged breach of its duty of fair representation. The emotional distress DeLarge is alleged to have suffered is a product of

the manner in which SEIU carried out—or failed to carry out—its duty to fairly represent her. Therefore, PERB has exclusive jurisdiction over DeLarge’s tort claims.⁵

DeLarge also contends the trial court has jurisdiction over her claims because PERB cannot provide a full and effective remedy. Her claim appears to be that PERB cannot award money damages or other forms of relief she seeks in her complaint. She cites general preemption principles that permit state court action when an administrative agency charged with enforcing labor laws “ ‘cannot provide a full and effective remedy.’ [Citation.]” (See *El Rancho Unified School Dist. v. National Education Assn.*, *supra*, 33 Cal.3d at p. 961.) However, these general principles do not allow a party to avoid PERB’s exclusive jurisdiction simply by seeking remedies that PERB is unable to impose. “EERA establishes a comprehensive scheme of law, *remedy* and administration through PERB. [Citation.]” (*Id.* at p. 960, italics added.) Allowing courts to grant remedies withheld from PERB would undermine the statutory scheme and infringe upon PERB’s jurisdiction.⁶ Thus, the trial court does not have concurrent jurisdiction over DeLarge’s claims simply because PERB lacks the ability to award damages.

We conclude the trial court did not err in sustaining SEIU’s demurrer on the ground that PERB has exclusive jurisdiction over the claims alleged in DeLarge’s complaint.

⁵ Because we look at the facts alleged in the complaint instead of the labels applied to a cause of action, it is immaterial that DeLarge denominated her cause of action as one for intentional infliction of emotional distress. (See, e.g., *Anderson v. California Faculty Assn.*, *supra*, 25 Cal.App.4th at pp. 209-210, 218 [claims, including one for intentional infliction of emotional distress, were within PERB’s exclusive jurisdiction because essence of claims was breach of duty of fair representation].)

⁶ An exception to this rule may apply when an award of damages is appropriate under the traditional law of torts, such as when there is conduct marked by violence. (*El Rancho Unified School Dist. v. National Education Assn.*, *supra*, 33 Cal.3d at p. 960, fn. 20.) The exception is inapplicable here. As noted above, the tort claims alleged by DeLarge are intimately connected to her allegations that SEIU breached its duty of fair representation. Although PERB may not be able to award damages, it nonetheless has the power to fashion a remedy to address a union’s breach of the duty of fair representation. By contrast, in the case of certain torts, such as defamation or assault, PERB may be unable to provide any effective relief absent the power to award damages.

3. *Exhaustion of Remedies*

As a separate and independent ground for sustaining the demurrer, the trial court concluded that DeLarge had “failed to exhaust her judicial remedies after . . . PERB considered and dismissed her [administrative] appeal” While we agree that DeLarge failed to exhaust her available judicial remedies, we hasten to add that the lower court would lack jurisdiction over her complaint against SEIU even if she had pursued and exhausted her administrative and judicial remedies.

Section 3542 provides the mechanism for judicial review of final PERB orders. Under that statute, an aggrieved party may file a petition for writ of mandate in the Court of Appeal challenging a final PERB order in “in an unfair practice case, except a decision of the board not to issue a complaint” (§ 3542, subds. (b) & (c).) In 2011, the California Supreme Court agreed with a decision of this court and carved out three narrow exceptions to the general rule that a PERB decision not to issue a complaint is immune from judicial review. (See *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 271 (*IAFF*).) When PERB refuses to issue a complaint, “a superior court may exercise mandamus jurisdiction to determine whether PERB’s decision violates a constitutional right, exceeds a specific grant of authority, or is based on an erroneous statutory construction.” (*Ibid.*) Judicial review of a decision not to issue a complaint is unavailable for “ordinary error, including insufficiency of the evidence to support the agency’s factual findings and misapplication of the law to the facts, or for abuse of discretion.” (*Ibid.*)

Here, PERB refused to file a complaint in response to a charge made by DeLarge. The only judicial remedy available to her was to file a petition for traditional mandate in the trial court on one of the three grounds specified in the *IAFF* decision. (See *Williams v. Public Employment Relations Bd.* (2012) 204 Cal.App.4th 1119, 1130 [challenge to PERB decision not to file complaint must be pursued as a traditional rather than an administrative mandate action].) She did not pursue her judicial remedy against PERB, and had she done so, she still would not be entitled to maintain her complaint against SEIU for the reasons explained in this opinion.

4. Amendment to Cure Defects

We must reverse the judgment if there is a reasonable possibility an amendment would cure the defects in DeLarge’s complaint. (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.) “ ‘The burden of proving such reasonable possibility is squarely on the plaintiff.’ [Citations.]” (*Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1126.) As DeLarge points out, the issue is preserved for appeal even when no request to amend the complaint is made in the trial court. (Code Civ. Proc., § 472c, subd. (a).)

Here, there is no indication DeLarge made a request in the trial court to amend her complaint. On appeal, likewise, she failed to specify how her complaint could be amended to state a cause of action. We note there is no suggestion she could amend her complaint to seek the limited judicial remedy established by the *IAFF* decision. Under the circumstances, DeLarge has plainly not met her burden to establish a reasonable possibility that an amendment could correct the defects in her complaint. Accordingly, there is no basis to allow her leave to amend.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.