April J Grundfor v California Department of State Hospitals, et al. 17CVP0107

Re: Demurrer to Complaint

Date: July 11, 2017

Plaintiff's complaint alleges that she was terminated from her employment as a clinical social worker with the California Department of State Hospitals (DSH) during her probationary period because of her reports of inadequate protocols and refusal to alter records in connection with the murder of a patient (Turner) by patient (Carey).[1] Her causes of action rely upon statutes intended to protect employees from retaliation for whistleblowing.

Defendant DSH demurs to all causes of action based upon the failure to exhaust administrative remedies, the failure to comply with the government claims procedure and the statute of limitations.

First Cause of Action: Government Code §8547.3:

The Whistleblower Protection Act prohibits improper governmental activities, which include interference with or retaliation for reporting such activities. *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939.

Government Code § 8547.8(c) states in part that "any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has issued, or failed to issue, findings pursuant to Section 19683." DSH argues that Plaintiff's administrative complaint was dismissed without being filed because of Plaintiff's failure to file an amended complaint.

Defendant requests judicial notice of communications between Plaintiff and the State Personnel Board that demonstrate Plaintiff's failure to meet the filing requirements of the State Board. The documents subject to the request for judicial notice reflect that the State Personnel Board dismissed Plaintiff's complaint in case number 15-0954W and closed the case by virtue of its letter dated July 16, 2015. (RJN 1)[2]

Plaintiff attaches Exhibit 1 to her opposition. Exhibit 1 is a letter from Scott Sommerdorf, Senior Staff Counsel for the State Personnel Board dated June 1, 2017. It states that the Board's dismissal of Plaintiff's complaint constituted an "exhaustion of administrative remedies" with respect to SPB case number 15-0954W.

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[1] *Turner v State of California et al*., 15CVP0105 is the wrongful death action arising from this murder. The state action is stayed pending the outcome of the federal action arising from the same event.

[2] The Court takes judicial notice only of the existence of the letter and the fact that it advises of a dismissal of Plaintiff's complaint and a closure of the case.

Defendant's reply brief does not address the June 1, 2017 communication relied upon by Plaintiff. Moreover, DHS' conclusion (based upon the July 16, 2015 letter from SPB) that Plaintiff's administrative complaint was never actually filed is, at best, debatable. It is not established, as a matter of law, that there was a failure to exhaust administrative remedies. Accordingly, the demurrer to the first cause of action is overruled.

Second Cause of Action: Labor Code §1102.5/Third Cause of Action: Health & Safety Code §1278.5.

Labor Code §1102.5(b) prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. "This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation." *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.

Defendant contends that Plaintiff failed to file a timely governmental entity claim pursuant to Government Code §911.2 and §945.4 thereby rendering the cause of action subject to a general demurrer.

Defendant relies on Government Code §905.2(b)(3) for the proposition that claims for money or damages for an injury for which the state is liable is subject to the claim presentation requirement.

Plaintiff contends that no administrative claims process for a claim pursuant to Labor Code §1102.5 is required because Labor Code §244 (a) provides that an individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision the Labor Code unless that section under which the action is brought expressly requires exhaustion of an administrative remedy. Plaintiff reasons that, since Labor Code §1102.5 has no such specific requirement, no governmental entity claim is required.

There was some debate in the courts of appeal concerning whether a Plaintiff relying on Labor Code §1102.5 was required to exhaust administrative remedies pursuant to Labor Code §98.7 by filing an administrative claim with the Labor Commissioner. In what has been characterized as a declaration of existing law, enactment of Labor Code §244(a) and case law, state that no exhaustion of an administrative remedy is required.

> …[C]onsistent with *Lloyd*, the amendments merely confirm that a party may bring a civil action for violation of the Labor Code without first exhausting the remedy provided by *section 98.7, subdivision (a)*. (*§§ 98.7(g), 244(a).*) *Satyadi v. West Contra Costa Healthcare District* (2014) 232 Cal.App.4th 1022, 1032[3].

The question here is whether Labor Code §244(a) and Labor Code §98.7(g) excuses Plaintiff claims presentation requirements of Government Code §945.4 or their application is limited to excusing relief from exhaustion of administrative remedies provided by the Labor Commissioner. Case law distinguishes exhaustion of administrative remedies from claims presentation requirements from the Government Code.

> The presentation of a claim pursuant to the Tort Claims Act is a separate, additional prerequisite to commencing an action against the state or a local public entity and is not a substitute for the exhaustion of an administrative remedy. *Richards v. Department of Alcoholic Beverages Control* (2006) 139 Cal.App.4th 304, 315.

One federal district court opinion (currently on appeal) relies on *Richards* in support of its conclusion that Labor Code § 244 does not excuse Plaintiff from complying with the claims presentation requirement of the CTCA. See *Tobin v. City & County of San Francisco* (N.D. Cal., Oct. 4, 2016, No. 13-CV-01504-MEJ) 2016 WL 5791224, at *11.

Plaintiff cites no case holding that the Labor Code excuses a party from a governmental claims filing requirement. Instead, Plaintiff broadly interprets language of cases addressing Labor Code §244 to include such an excuse from presenting a governmental claim.

The Court notes that the government claims requirement is sometimes excused under circumstances where a functionally equivalent claims process exists.

> Ordinarily, filing a claim with a public entity pursuant to the Claims Act is a jurisdictional element of any cause of action for damages against the public entity (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454, 115 Cal.Rptr. 797, 525 P.2d 701; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 865, 193 Cal.Rptr. 760 (*Snipes*)) that must be satisfied *in addition to* the exhaustion of any administrative remedies (*Richards v. Department of Alcoholic Beverages Control* (2006) 139 Cal.App.4th 304, 315, 42 Cal.Rptr.3d 782 [mere filing of claim does not satisfy need to exhaust remedy by applying for license before bringing suit]; see *Ortiz v. Lopez* (E.D.Cal.2010) 688 F.Supp.2d 1072, 1079–1080; *Creighton v. City of Livingston* (E.D.Cal.2009) 628 F.Supp.2d 1199, 1221–1222 [both holding that allegation of compliance with Claims Act insufficient without allegation of exhaustion of administrative remedy as well]). There are certain types of claims in section 905 expressly exempted from the presentation requirement; otherwise, a court will infer a legislative intent to excuse compliance only

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[3] **Retroactivity of Lab.C. § 244(a):** Because Lab.C. § 244(a) merely clarified existing law and does not create new rights or impose new liabilities, it can be applied retroactively to claims that arose prior to its January 1, 2014 effective date. [See *Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 CA4th 1022, 1032-1033, 182 CR3d 21, 28-29—prior California case law did not require exhaustion under Lab.C. § 98.7; *Gonzalez v. City of McFarland* (ED CA 2014) 2014 WL 294581, *2; *Stone v. Walgreen Co.* (SD CA 2014) 2014 WL 1289470, *4 (collecting cases)] Chin, et al., *Employment Litigation* (TRG 2017) §16:333.1.

> where a claim is based on a statutory scheme with a "functionally equivalent claim process" and a comparable scheme for administrative enforcement. (*Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 763–764, 120 Cal.Rptr.2d 550 [state civil rights actions lack such equivalency and are therefore not exempt from Claims Act; as a result, limitations period extended and action is timely]; accord, *Bates v. Franchise Tax Bd.* (2004) 124 Cal.App.4th 367, 373, 383–385, 21 Cal.Rptr.3d 285 [agency's violations of restrictions on disseminating personal information; Information Practices Act of 1977 (Civ.Code, § 1798 et seq.) does not have an administrative mechanism for enforcement of its provisions, and nothing gives agency notice that damages might be sought for noncompliance; thus failure to file claim bars action].) Such exceptions to the presentation procedure are rarely found. (*Gatto, supra,* 98 Cal.App.4th at p. 764, 120 Cal.Rptr.2d 550.) *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 938–39.

In the context of Labor Code §1102.5, there is no comprehensive administrative procedure available that would render a governmental claim unnecessary. The lack of a comprehensive administrative process further militates in favor of finding that the governmental claim is required.

Plaintiff broadly cites *Ramirez v. County of Marin* (9th Cir. 2014) 578 Fed.Appx. 673, for the proposition that one generally does not have to exhaust administrative remedies prior to filing a civil action for violation of the Labor Code. However, *Ramirez* does not discuss the necessity of presentation of a governmental entity claim. It states:

> The district court granted summary judgment on Ramirez's retaliation claim under California Labor Code § 6310 because Ramirez had not exhausted his administrative remedies prior to filing his complaint. At the time, the California Labor Code was silent as to whether a plaintiff must exhaust administrative remedies prior to filing a complaint. That changed on January 1, 2014, when the State of California amended its Labor Code by adding §§ 98.7(g) and 244(a), both of which provide that one generally does not have to exhaust administrative remedies prior to filing a civil action for a violation of the California Labor Code. Because the district court did not have the benefit of these changes to the California Labor Code when it granted summary judgment, we reverse and remand so that the district court may consider Ramirez's California Labor Code retaliation claim in light of these changes. *See Bullfrog Films, Inc. v. *675 Wick,* 959 F.2d 778, 781–82 (9th Cir.1992) (remanding in light of new statute). *Ramirez v. County of Marin* (9th Cir. 2014) 578 Fed.Appx. 673, 674–75.

Moreover, the underlying district court decision in *Ramirez* was focused on the necessity of filing an administrative claim with the Labor Commissioner pursuant to Labor Code §98.7 and it also did not address the necessity of a governmental entity claim. See *Ramirez v. County of Marin* (N.D. Cal., Oct. 25, 2011, No. C 10-02889 WHA) 2011 WL 5080145, at *8, aff'd in part, rev'd in part (9th Cir. 2014) 578 Fed.Appx. 673.

The same analysis concerning the lack of an alternative administrative remedy holds true for retaliation claims brought pursuant to Health and Safety Code §1278.5.

> In the context of private employment the court concluded that "section 1278.5 neither provides, nor acknowledges the existence of, a parallel administrative proceeding in which the complainant's claim of retaliation, as such, might be addressed and resolved. Section 1278.5's failure to mention resort to such an administrative forum as a condition to suit, where the Legislature has included such a requirement in similar statutes, is a significant indicator that the Legislature did not contemplate such a precondition in this instance." *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 676.

Thus, it appears that Plaintiff was required to comply with the Government Code's claims presentation procedures as a prerequisite to the causes of action based upon Labor Code §1102.5 and Health and Safety Code §1278.5. The claims presentation procedures are not the administrative remedies contemplated in Labor Code §244 and § 98.7(g).

Statute of Limitations:

Defendant relies upon *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, *review granted and cause transferred* (Cal., June 21, 2017, No. S241146) 2017 WL 2694887 for the proposition that Health and Safety Code §1278.5 is a claim for a penalty subject to a one year statute of limitations. The Court notes that Supreme Court remanded *Melamed* to the court of appeal for reconsideration in light of *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057. Despite the remand, Defendant contends that the Court can rely on the opinion as persuasive authority.

The Court does not conclude that the action is barred by the statute of limitations as the case relied upon is currently on review with the State Supreme Court. As a result, the running of the statute of limitations does not appear affirmatively on the face of the complaint.

Conclusion:

The Court sustains the demurrer to the second and third causes of action without leave to amend because of a failure to satisfy the governmental claims presentation procedure. The demurrer to the first cause of action is overruled.