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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JANET CAMPBELL, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	A097560 (San Francisco County Super. Ct. No. 312736)

Appellant Janet Campbell filed a "whistle-blower" complaint seeking damages from respondent Regents of the University of California (the Regents). The trial court sustained the Regents' demurrer without leave to amend, on the ground that appellant had failed to exhaust her administrative remedies and had not shown justification for that failure. On appeal from the subsequent judgment of dismissal, appellant contends she was not required to exhaust her remedies and in any case was not adequately informed by the Regents of an exhaustion requirement. We disagree with appellant's contentions and affirm.

I. FACTS

At the demurrer stage we assume the truth of the material facts properly pled in the plaintiff's operative pleading, in this case appellant's second amended complaint. (See *Garcia* v. *Superior Court* (1990) 50 Cal.3d 728, 732.) We may also take into

account matters that can be judicially noticed. (*Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379.)

We may also consider documents attached to the complaint as exhibits. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 901, p. 361.) If recitals in those documents are inconsistent with the allegations of the complaint, the recitals take precedence—and allegations inconsistent with the documents' unambiguous text will be disregarded. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 392, p. 489; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 720-721, disapproved on unrelated ground *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.)

Appellant worked for the Regents as a senior architect in the Architectural Design and Engineering Unit of the Facilities Management Department (FMD) at the University of California at San Francisco (UCSF). Appellant prepared and reviewed architectural plans and specifications for all campus construction projects costing less than $250,000, to ensure that the projects were technically sound and complied with all applicable legal requirements—including competitive bidding laws.

The second amended complaint alleges that California law requires competitive bidding on public works projects: "Public Contracts Code Section 3400 provides that no instrumentality of the state or public office charged with the letting of public works contracts shall draft or cause to be drafted specifications for bids in such a manner as to limit the bidding, directly or indirectly, to any one specific concern, except in certain circumstances not applicable in this lawsuit."

The pleading further alleges that "Section 3400 also prohibits the use of brand names to specify any material, product, thing, or service unless the specification also includes at least two other brands or trade names of comparable quality or utility and is followed by the words 'or equal' so that bidders may furnish . . . any equal material, product[,] thing, or service."

In 1991, the Regents began to instruct appellant to prepare or help prepare bid documents that illegally eliminated competition. These bid documents, inter alia, used

restrictive specifications; specified products by brand name only; included performance specifications in excess of those actually needed for a job; and used "other restrictive requirements that limited competition to one manufacturer of roofing products and their small number of certified contractors."

Appellant protested to the Regents on several occasions that the FMD's use of these bid documents violated state competitive bidding laws. Her opposition to the FMD's use of the illegal bid documents was "well known" to the Regents.

Appellant reported the FMD's ongoing violation of the state competitive bidding laws to the FBI. Appellant's report to the FBI concerned "a matter of public concern" and "violations of state laws and regulations"—not the terms and conditions of her employment.

In the fall of 1997, the FBI questioned UCSF officials about the competitive bidding violations reported by appellant. On appellant's information and belief, the Regents knew that appellant was the source of the FBI's information.

The Regents immediately retaliated against appellant for her FBI report by changing her job assignment, removing her from "meaningful and substantial work," and leaving her with "menial and lesser projects." She soon went on extended disability leave. She returned to work in January 1999. She was almost immediately terminated, supposedly due to downsizing. But appellant "was selected from among several co-workers for termination under irregular circumstances in which . . . less senior and less qualified co-workers were retained in preference to her." The Regents "selected [appellant] for termination in retaliation for her report to the FBI."

On March 4, 1999, appellant filed an internal complaint against her supervisors and UCSF, using the Regents' formal employee grievance procedure. At that time, appellant was represented by an attorney, Pamela E. Smith. Appellant's grievance complaint alleged retaliation against her for being a whistle-blower.[1]

[1] The grievance complaint alleged other matters not germane to this appeal.

On April 23, 1999, Guy Zuzovsky, a senior client services analyst in UCSF's Department of Labor and Employee Relations, responded to appellant's grievance complaint by a letter to appellant's counsel. The Zuzovsky letter is attached to the second amended complaint as exhibit 1, and is incorporated by reference into the pleading.

The letter informs appellant that "Allegations of retaliation for whistle blowing activity fall outside the scope of the PPSM [Personnel Policies for Staff Members] and, therefore, are excluded from the complaint resolution process. Such complaints are properly filed under the UCSF Policy and Procedures for Reporting Improper Governmental Activities and Protection Against Retaliation for Reporting Improper Activities [hereafter "Policy and Procedures"], a copy of which is enclosed with this letter. Alleged violations of state and federal laws will be excluded from the complaint resolution process."

The Regents' Policy and Procedures are also attached to the second amended complaint as exhibit 2, and are referenced in appellant's allegations. Moreover, the Regents' Policy and Procedures may be judicially noticed. (See *Scharf v. Regents of University of California* (1991) 234 Cal.App.3d 1393, 1398, fn. 3; *Mendoza v. Regents of University of California* (1978) 78 Cal.App.3d 168, 176, fn. 3.)

As discussed in detail below, the Zuzovsky letter informed plaintiff that the usual formal grievance procedures were inapplicable, and she had to avail herself of a separate set of grievance procedures tailored to whistle-blowing complaints. But despite the directions given by the Zuzovsky letter, appellant did not file a grievance complaint under the Policy and Procedures.

On June 7, 2000, appellant filed her original whistle-blower complaint against the Regents, seeking damages for retaliatory termination under Government Code section 12653, a component of the False Claims Act (section 12653) and Labor Code section

1102.5 (section 1102.5).[2] She alleged she had either exhausted all administrative remedies or was not required to. She alleged that the Zuzovsky letter "excluded" all of her claims "from the scope of the administrative proceeding."

The Regents demurred, arguing appellant had failed to exhaust administrative remedies because she had failed to file a grievance under the Policy and Procedures—despite having been instructed to do so by the Zuzovsky letter. Appellant responded with a legal argument that by their plain terms, sections 12653 and 1102.5 did not require exhaustion of administrative remedies as a precondition of filing a lawsuit. She did not address the issue of the availability of the Policy and Procedures grievance mechanism, or the meaning of the Zuzovsky letter.

The trial court sustained the demurrer with leave to amend "to allege exhaustion of administrative remedy or other valid excuse for failure to comply with administrative procedures," citing *Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515 (*Edgren*).

Appellant filed a first amended complaint on March 27, 2001. She alleged that she filed an internal grievance complaint under the Regents' "formal grievance procedures," even though she was "not required to." She again referred to the Zuzovsky letter, alleging that it "informed [her] that [her] grievance . . . was outside the scope of [the Regents'] grievance procedures and was therefore excluded from the Regents' grievance procedures." Appellant further alleged that the wording of sections 12653 and 1102.5 did not require, as a matter of law, that she exhaust administrative remedies.

The Regents again demurred, arguing that appellant had failed to plead either exhaustion or any recognized exception to the exhaustion requirement. Appellant again responded with the legal argument that the language of sections 12653 and 1102.5 does not require exhaustion of administrative remedies. She also briefly argued that the

[2] The original complaint alleged other causes of action which were omitted from subsequent pleadings.

Regents' grievance procedures were inadequate, an argument she has not renewed on appeal.

The record suggests that at oral argument on the demurrer, appellant argued she was not obligated to exhaust administrative remedies under the rule of *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*) because the Regents had failed to adequately notify her of applicable grievance procedures. The trial court sustained the demurrer to the first amended complaint with leave to amend "to plead facts[,] if [appellant] can do so in good faith[,] of 'futility' and 'failure to apprise of administrative proceedings.' "

Appellant filed her second amended complaint on August 8, 2001. She did not allege facts supporting futility, but did attempt to allege she was not adequately informed of the administrative proceedings.

The second amended complaint repeated the allegation that the Zuzovsky letter "informed [appellant] that [her] whistle-blowing allegations were outside the scope of [the Regents'] grievance procedures and were therefore excluded from the Regents' grievance procedures."

Appellant further alleged the letter did not inform her that she "must grieve her whistle-blowing claims" and that her failure to do so would preclude legal action. She alleged that the Policy and Procedures states that a party "may" file a retaliation complaint, and thus such a complaint was not mandatory. She charged that the Policy and Procedures did not inform her that she must file a grievance under the Policy and Procedures or forfeit her right to pursue a lawsuit. Her allegations concluded with a claim that the Regents were estopped from arguing failure to exhaust because they had failed to inform her of "the necessity to file a grievance under the whistle-blowing policy."

But the clear text of the Zuzovsky letter and the Policy and Procedures contradict these allegations and present an accurate and complete picture. Since the letter and the Policy and Procedures are attached to the second amended complaint as exhibits, their unambiguous text controls over inconsistent allegations in the pleading.

The Zuzovsky letter unambiguously informs appellant that the normal grievance procedures do not apply, and that her whistle-blowing grievance is outside their scope. Rather, the whistle-blowing grievance is governed by the Policy and Procedures, in part because it involves violation of state law as opposed to a typical personnel grievance.

The Policy and Procedures, while couched in more formal legalese, are also unambiguous. Section V of the Policy and Procedures provides that any person, including an employee of the Regents, may file a confidential complaint regarding "improper governmental activities." "Improper governmental activities" are defined to include violations of state and federal law.

After describing the scope of any such confidential complaint and the investigative and decision process, the Policy and Procedures conclude with section IX, roughly two full pages in length, entitled "Procedures for Protection Against Retaliation for Reporting Improper Activities."

Section IX (A) provides, as here pertinent, that "Any UC employee . . . may file a written complaint against a University employee alleging threatened or actual interference or retaliation resulting from the reporting of improper activities . . . . Retaliation is defined as the use of official authority or influence by a UC employee for the purpose of interfering with the right of a person to file a report as described in Section V above, or the right to file such a report with the University Auditor or with the Auditor General of the State of California, or with other public officials designated to receive reports of improper activity. Use of 'official authority to influence' includes promising to confer, or conferring, any benefit; effecting or threatening to effect any reprisal; or taking, or directing others to take, or recommending, processing or approving any personnel action, including but not limited to appointment, promotion, transfer assignment, performance evaluation, suspension, or other disciplinary action."

The balance of section IX (A) contains detailed provisions governing the contents of a retaliation complaint, the persons or entities with whom a complaint may be filed, and timeliness. Immediately after these provisions is a conspicuous paragraph headed "Use of Existing Mechanisms":

"A complaint of retaliation/interference must be filed under existing University grievance or complaint resolution procedures (including procedures in personnel program policies and collective bargaining agreements, and procedures established by the Academic Senate) *if acceptable under those procedures*. *If the complaint is not within the scope of any complaint resolution procedure available to the complainant under the appeals mechanism described in the previous paragraph[s], . . . the complaint may be filed under this policy*." (Italics added.)

Thus, the Zuzovsky letter informed appellant that (1) the normal, personnel-manual grievance procedure was inapplicable to her grievance complaint because she alleged violations of state law, and (2) appellant was required to file her grievance under the Policy and Procedures. In other words, the Zuzovsky letter simply informed appellant that her whistle-blowing claims were subject to a separate set of internal grievance procedures.

The Regents demurred to the second amended complaint, arguing that appellant had not alleged that exhaustion of administrative remedies would have been futile, or that she fell under any other exception to the exhaustion requirement. The Regents also argued that appellant was properly advised of the applicable grievance procedures under *Westlake*.

In response, appellant repeated her legal arguments that the two statutes at issue do not require exhaustion. She also argued the Zuzovsky letter and the Policy and Procedures misled her into thinking she did not have to file an administrative grievance as a precursor to bringing a lawsuit.

The trial court sustained the Regents' demurrer to the second amended complaint without leave to amend and dismissed the action.

II. DISCUSSION

Appellant contends the trial court erred because (1) the language of sections 12653 and 1102.5 does not require exhaustion of administrative remedies, and (2) even if exhaustion was required the Regents are estopped from relying on exhaustion because they did not adequately inform her of the need to file a grievance. We disagree.

Generally, a party seeking legal remedies against an administrative agency must exhaust administrative remedies before a court can act. The failure to exhaust remedies deprives the court of jurisdiction. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293; *Edgren, supra,* 158 Cal.App.3d at p. 520; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 981.) "Before seeking judicial review a party must show that [s]he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings. [Citations.]" (*Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432.)

There are four recognized exceptions to the exhaustion requirement. A party need not exhaust her administrative remedies (1) when the subject of the controversy lies outside the administrative agency's jurisdiction; (2) when pursuing an administrative remedy would result in irreparable harm; (3) when the agency cannot grant an adequate remedy; and (4) when the party can positively state what the administrative agency's decision will be—i.e., the "futility" exception. (See *Edgren, supra,* 158 Cal.App.3d at pp. 520-521; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834.)

In addition, our Supreme Court has held that an administrative agency cannot rely on the exhaustion doctrine when it fails to inform the aggrieved party of her right to file a grievance. (*Westlake, supra,* 17 Cal.3d at pp. 477-478.)

There is no question that the Regents are an administrative agency within the meaning of the exhaustion doctrine. (See *Edgren, supra,* 158 Cal.App.3d at pp. 520-522 & p. 522, fn. 1.) There is also no question that appellant does not qualify for any of the four exceptions to the doctrine.

But appellant contends the doctrine of exhaustion of administrative remedies does not apply to her action against the Regents. She seeks damages under sections 12653 and 1102.5, both of which provide damages and other remedies for employees who are retaliated against for disclosing information to a government or law enforcement agency

regarding false claims or violations of law.[3] Appellant claims that in light of the wording of the two statutes, there is no requirement for exhaustion before a lawsuit based on the statutes may be brought.

Appellant relies on language in both statutes authorizing an aggrieved employee to seek legal remedies. Section 12653, subdivision (c) spells out the types of relief to which an aggrieved employee may be entitled—such as damages, reinstatement, and back pay—and concludes, "An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision." Section 1102.5 prevents an employer from retaliating against an employee for whistle-blowing; a companion statute, Labor Code section 1105, provides that "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter."

Appellant argues that because this statutory language omits any specific reference to a requirement of exhaustion of administrative remedies, the Legislature must have intended for the injured worker to forego such remedies and proceed directly to court. We disagree. Every statute authorizing or confirming a right to seek legal redress does not have to contain a specific mention of the exhaustion requirement, which is fundamental to administrative law. The statutory authorization of a right to file a lawsuit actually works against appellant's argument. By authorizing legal action, the Legislature contemplates the necessary (and jurisdictional) precondition to that action—the exhaustion of administrative remedies.

Appellant presents no direct authority in favor of her position. Rather, she points to language in a separate component of the False Claims Act, Government Code section 12652, which involves lawsuits by the Attorney General or by a qui tam plaintiff against persons who have improperly spent state funds. Government Code section 12652, subdivision (d)(4) refers to the requirement that a qui tam plaintiff exhaust administrative

[3] We discuss the two statutes generally collectively. For our purposes, it is not necessary to discus their provisions at any length or distinguish between their specific terms.

remedies before filing suit. Appellant argues that by mentioning exhaustion in one statute, but not mentioning exhaustion in another (i.e., section 12653) the Legislature necessarily intended to eliminate the exhaustion requirement with regard to the silent statute.

The express mention in one particular statute of a fundamental precondition of bringing suit against an administrative agency does not implicitly abrogate that requirement in every statute silent on the matter. Many statutes authorize legal action but do not expressly mention the exhaustion requirement—no more than they expressly mention fundamental requirements such as standing, ripeness, or lack of mootness. And as the Regents observe, the exhaustion requirement is not statute-specific, but flows from appellant's status as an employee seeking damages from her employer—an administrative agency which has provided an administrative remedy which must be exhausted before any type of judicial relief is sought. (See *Morton v. Superior Court, supra,* 9 Cal.App.3d at p. 982; see also *Westlake, supra,* 17 Cal.3d at pp. 469, 474-477.) Indeed, as a "constitutionally created agency" the Regents exercise "quasi-adjudicatory powers over personnel matters involving university employees. [Citation.]" (*Edgren, supra,* 158 Cal.App.3d at p. 522, fn. 1.)[4]

Appellant also argues, apparently for the first time on appeal, that the trial court's ruling deprives her of equal protection of the laws. As we understand her argument, appellant claims that (1) section 12653 does not require exhaustion of administrative remedies, but (2) the trial court in essence ruled that it does require exhaustion in the case

[4] There is one case which held that an employee did not have to exhaust the administrative remedies provided by her employer, but that case is distinguishable. In *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1284-1285 (*Watson*), the court held that a state employee did not have to exhaust her administrative civil service remedies because she had the right to avail herself of alternative administrative remedies available under California's Fair Employment and Housing Act. (Gov. Code, § 12940 et seq.) That is not the case here—and in any case the employee in *Watson* still had to exhaust whichever remedy she chose. Appellant has failed to exhaust.

of University of California (UC) employees, thereby (3) treating UC employees differently from non-UC employees suing under the statute.

The first premise of the argument, that section 12653 does not require exhaustion, is false, as explained above. Moreover, all employees of the Regents are treated in the same way with the same exhaustion of remedies requirement. Employees of a constitutionally created entity are not the same as employees in the private sector. There is no equal protection violation here.

Finally, appellant contends that even if exhaustion is required, the Regents are estopped from relying on the exhaustion doctrine because they failed to adequately inform appellant of her need to file an internal grievance under the Policy and Procedures and that her failure to do so would preclude suit.

This argument is also without merit. First, appellant has not met the heavy burden of obtaining estoppel against a public agency. (See *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 990.)

Second, the Regents *did* inform appellant, by the Zuzovsky letter, of the need to file a grievance under the Policy and Procedures. Appellant's claim that the letter and the Policy and Procedures are unclear is belied by the unambiguous language quoted above. Appellant's claim that the letter and Policy and Procedures were misleading, especially to a layperson, is disingenuous—especially since appellant was represented by counsel.[5] Even if the Regents gave appellant incorrect or misleading advice on matters of law, appellant would not be entitled to successfully urge estoppel to avoid the requirement of exhaustion. (See *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449-1450.)

[5] Appellant suggests the Policy and Procedures appear to apply only to internal whistle-blowing reports, not reports to an outside agency. But the Policy and Procedures protects from retaliation a UC employee reporting law violations to "public officials designated to receive reports of improper activity"—and that would include agents of the FBI.

Third, as we read *Westlake* the Regents only needed to inform appellant of the grievance procedure. Any failure to inform appellant of the *legal consequences* of the failure to grieve—i.e., preclusion of suit—does not relieve appellant of the fundamental requirement of exhaustion of administrative remedies. Appellant cites no authority to the contrary.

III. DISPOSITION

The judgment of dismissal is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

_____
Margulies, J.