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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 FOUR

LES G. MIKLOSY et al., Plaintiffs and Appellants, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.	A107711 (Alameda County Super. Ct. No. RG04140484)

The trial court sustained the demurrer of respondents the Regents of the University of California, Kim Minuzzo, Larry Lagin and Jerry Krammen to a wrongful termination action filed by two former employees, appellants Les G. Miklosy and Luciana C. Messina. Miklosy and Messina appeal the resulting judgment of dismissal, contending that the trial court erred in sustaining the Regents' demurrer to their first amended complaint because that pleading stated causes of action for wrongful termination in retaliation for whistleblowing, wrongful termination in violation of public policy, and intentional infliction of emotional distress. They also contend that the individual defendants named in their first amended complaint are liable for wrongful termination in violation of public policy. (See Gov. Code,[1] §§ 8547-8547.12.) We affirm the judgment.

[1] All statutory references are to the Government Code unless otherwise indicated.

I. FACTS[2]

Beginning in November 2001, appellant Luciana C. Messina worked as a computer scientist at the Lawrence Livermore National Laboratory, operated by respondent the Regents of the University of California. In February 2002, appellant Les G. Miklosy was employed by the Regents at the same laboratory. Both Miklosy and Messina worked in the National Ignition Facility and—in the course of their work—they discovered engineering and design problems that they brought to the attention of management. In January 2003, Messina asked her superiors to have Miklosy assigned to her project. Miklosy's supervisors began criticizing his work, raising issues that he thought were unwarranted. Both Miklosy and Messina noted safety, mechanical and structural issues that could delay a project that laboratory supervisors hoped would proceed more promptly.

Miklosy and Messina were concerned that, if these issues were ignored, workers could be injured. They were also concerned about the misuse of government property, waste and inefficiency that might arise if the underlying issues were not addressed. On February 14, 2003, they raised these issues at a risk analysis meeting. On February 28, 2003, Miklosy was terminated. Messina learned that her superiors intended to terminate her and she resigned. Her resignation—which Messina asserts was forced on her—took effect on March 7, 2003.

Miklosy and Messina both tried to file employee grievances with the laboratory, but were not allowed to do so. Miklosy was not a full-time, indefinite term employee and Messina had resigned, so both were ruled to be ineligible for any administrative remedy under the laboratory's internal administrative procedures.

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[2] On appeal from a judgment dismissing a complaint after the trial court sustains a demurrer without leave to amend, we assume the truth of all properly pled or implied factual allegations of the complaint. We must also consider any judicially noticed matters. We give the complaint a reasonable interpretation and read it in context. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) As such, the statement of facts assumes the truth of the facts pled in the first amended complaint.

Both met with attorneys for the laboratory and the Regents in May and July 2003. They also filed complaints under the state Whistleblower Protection Act (WPA) in August 2003. In November 2003, an informal review was conducted of their claims that they were terminated in retaliation for whistleblowing. The laboratory ruled that neither Miklosy nor Messina left its employment as a result of retaliation.

In February 2004, Miklosy and Messina filed a complaint for damages against the Regents and three laboratory employees who served in supervisory capacities—Kim Minuzzo, Larry Lagin and Jerry Krammen.[3] Miklosy and Messina alleged causes of action for violation of the WPA, wrongful termination in violation of public policy, wrongful constructive termination in violation of public policy and intentional infliction of emotional distress. They sought compensatory and punitive damages, as well as attorney fees. (See § 8547.10; Lab. Code, § 6310.)

In April 2004, the Regents demurred to the complaint. Both sides asked the trial court to take judicial notice of various documents. In May 2004, the trial court sustained the Regents' demurrer with leave to amend. Four days later, Miklosy and Messina filed their first amended complaint, alleging the same four causes of action against the same defendants. In June 2004, the Regents attacked the first amended complaint on two fronts—demurring to the first amended complaint and moving to strike parts of it.[4] Again, both sides asked the trial court to take judicial notice of certain documents. In July 2004, the trial court sustained the Regents' demurrer to the first amended complaint without leave to amend and dismissed the underlying action. Notice of entry of the dismissal order was given in August 2004.

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[3] For convenience, this statement of facts refers to all respondents as "the Regents."

[4] Apparently, the trial court did not rule on the motion to strike, which became moot once the underlying action was dismissed.

II. WHISTLEBLOWING

First, Miklosy and Messina contend that they stated a cause of action for wrongful termination in retaliation for whistleblowing in their first amended complaint. They urge us to read the WPA to apply to employees of the University of California, entitling them to bring this civil action for damages. They reason that the trial court erred by sustaining without leave to amend the Regents' demurrer to this cause of action. (See §§ 8547-8547.12.)

The WPA contains three separate provisions setting out the procedural prerequisites for a civil action for damages brought by a state employee against one who retaliates against him or her for making a protected disclosure.[5] Under these provisions an employee of a state agency, of the University of California or of the California State University system must comply with similar but somewhat different requirements in order to be entitled to file a civil action for damages, including punitive damages and attorney fees. (See §§ 8547.8, subd. (c), 8547.10, subd. (c), 8547.12, subd. (c); *Campbell, supra,* 35 Cal.4th at p. 327; *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 908, 909 fn. 10 (*Palmer*).)

The procedural distinctions can be significant. For example, an employee of a state agency cannot bring an action for damages unless he or she first files a complaint with the State Personnel Board and that board issues findings or fails to issue findings within required time limits on the retaliation complaint. (See § 8547.8, subd. (c); see § 19683.) By contrast, an employee of the University of California cannot bring an action for damages unless he or she first files a complaint with a specified university officer and the university *fails to reach a decision* within

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[5] A protected disclosure is any good faith communication disclosing or demonstrating an intent to disclose information about improper governmental activities or any condition threatening public or employee health or safety. (§ 8547.2, subd. (d); *Campbell v. Regents of the University of Cal.* (2005) 35 Cal.4th 311, 327 [UC employee], cert. den. (Oct. 11, 2005, No. 05-233) ___ U.S. ___, 74 U.S.L. Week 3226, 3229 (*Campbell*).)

required time limits. (§ 8547.10, subd. (c); *Campbell, supra,* 35 Cal.4th at p. 327; *Palmer, supra,* 107 Cal.App.4th at p. 908.)[6]

In the trial court, Miklosy and Messina argued that does not preclude their wrongful termination action, but serves merely as an exhaustion of administrative remedies provision. (See § 8547.10, subd. (c).) The trial court found that the statute—denying university employees the right to sue if the university reached an adverse decision on a retaliation complaint—undercut the WPA. Miklosy and Messina argued against interpreting the statute to mean precisely what it said, but the trial court found that the Legislature—not the judiciary—was the proper forum for correction, if that body intended a different result than the plain wording of the challenged statute states. Accordingly, it sustained the demurrer as to all four causes of action without leave to amend.

On appeal from a trial court's ruling on a demurrer, we consider all facts pled—including those evidentiary facts found in recitals of exhibits attached to the complaint—as true. (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 375; see fn. 2, *ante*.) On the legal question of whether the complaint stated a cause of action, we apply our independent judgment, not being bound by the trial court's ruling on this matter. (*Satten v. Webb, supra,* 99 Cal.App.4th at pp. 374-375.) Issues of statutory construction and ascertainment of legislative intent are also questions of law for us to decide anew on appeal. (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 753; see *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604,

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[6] Likewise, an employee of the California State University system cannot bring an action for damages unless the university officer *fails to reach a decision* on the employee's retaliation complaint within required time limits. (§ 8547.12, subd. (c).) However, the provision applying to California State University employees specifically states that it is not intended to prohibit the injured party from seeking a remedy if the California State University system does not satisfactorily address the retaliation complaint in a timely manner. (§ 8547.12, subd. (c).) No such language appears in the comparable statute applying to University of California employees such as Miklosy and Messina. (See § 8547.10, subd. (c).)

611.) Applying this standard of review to the matter before us, we find that the trial court properly sustained the demurrer to the cause of action for wrongful termination in violation of the WPA.

The statute, as written, plainly states that a civil action may not be filed unless the University of California fails to reach a timely decision on its employee's retaliation complaint. (§ 8547.10, subd. (c).) On the retaliation complaints filed by Miklosy and Messina, the university official *did reach a decision*—albeit one that was adverse to them. In a 7-0 decision determined after the trial court issued its ruling in our case, the California Supreme Court explained the application of this statute: "[T]he statute permits aggrieved university employees to file a damages action provided they have followed the administrative procedures and filed an administrative complaint before filing their lawsuit. (§ 8547.10, subd. (a).) . . . [T]he employee may not proceed with a court action against the university unless that institution has failed to reach an administrative decision on the action within specified time limits. (§ 8547.10, subd. (c).) In such a case, the employee may file a lawsuit for damages even though the administrative complaint is pending. *If, by contrast, the university has reached a decision on the administrative action, the statute does not authorize any statutory damages action.*" (*Campbell, supra,* 35 Cal.4th at p. 327, italics added [dicta].)

Months ago, our highest state court considered the language challenged in this appeal without any suggestion that the application of the plain meaning of the statute would be improper. Miklosy and Messina argue that the language cited in *Campbell* is dicta. That is true, but even dicta—coming as it does in a recent unanimous decision of the California Supreme Court—has some persuasive authority. The *Campbell* dicta persuades us that our state's high court is satisfied of the meaning we should give to this provision.

Despite this, Miklosy and Messina contend that construction of section 8547.10, subdivision (c) improperly renders its provisions ineffective and is contrary to a stated legislative objective. (See *People v. Pieters* (1991) 52 Cal.3d 894, 901.)

The rules of statutory construction are well settled. When construing a statute, our overriding goal is to ascertain the Legislature's intent. We look first to the words of the statute themselves for this purpose. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157.) Typically, we interpret statutory language according to the ordinary and popular meaning of words. (*People v. Eddy* (1872) 43 Cal. 331, 336-337; see *In re Rojas* (1979) 23 Cal.3d 152, 155.) If the statutory language is clear and unambiguous, we must apply its plain meaning. (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.) We may not disregard the plain meaning of a statute, nor may we go beyond the meaning of the words used when they are clear and unambiguous. We may not speculate that the Legislature meant something other than what it said, nor may we rewrite a statute to make express an intention that did not itself express in the language of that provision. (See *McAlexander v. Siskiyou Joint Community College* (1990) 222 Cal.App.3d 768, 775; see also Code Civ. Proc., § 1858.) The California Supreme Court instructs us that unless there is some ambiguity in the statutory language, we cannot apply statutory rules of construction, but must apply the terms of the statute as written. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179; *Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578.)

Guided as we must be by these general principles, we cannot reach the conclusion that Miklosy and Messina would have us reach. The language of subdivision (c) of section 8547.10 is clear. Miklosy and Messina argue that the plain meaning of these words is contrary to the Legislature's intent, urging us that an examination of the extrinsic evidence of the legislative history of this provision would establish that it was not intended to bar their civil action as a literal reading of the statute requires. However, when the language of the statute is clear on its face, we may not consider extrinsic evidence to determine the intent of the Legislature. (*People v. Stanfield, supra,* 32 Cal.App.4th at p. 1157.) The unambiguous language of the statute is presumed to mean what it says. (See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1081, cert. den. *sub nom. Dannenberg v. Brown* (Oct. 3, 2005, No. 04-

10299) ___ U.S. ___, 74 U.S.L. Week 3204; *People v. Herman* (2002) 97 Cal.App.4th 1369, 1380-1381.) Under these circumstances, we are compelled to apply that plain meaning of the statutory language as written.[7]

In this matter, Miklosy and Messina filed the required retaliation complaints. They do not contest that the university reached a decision on those complaints within the time required. Thus, applying the express terms of subdivision (c) of section 8547.10, we conclude they had no right to bring a civil action for damages under the WPA. As there is no reasonable possibility that they could cure the defect in their first amended complaint, the trial court did not abuse its discretion by denying them leave to amend. (See *Hendy v. Losse* (1991) 54 Cal.3d 723, 742; see also Code Civ. Proc., § 472c; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967, 970-971.) As such, the trial court properly sustained the Regents' demurrer to their first amended complaint without leave to amend.

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[7] Quoting the Legislative Counsel's Digest of a chaptered law, Miklosy and Messina contend that a recent amendment to the Government Code expresses the Legislature's intent to permit employees of the University of California to file a civil damages action after the Regents deny their internal complaint. (See Stats. 2001, ch. 883, No. 13 West's Cal. Legis. Service, p. 5575.) We disagree. An examination of the text of the chaptered law itself reveals that the 2001 amendment to section 8547.8 applying to state agency employees has the effect that Miklosy and Messina suggest, but it made no change to section 8547.10 setting out the procedures required of University of California employees before a civil action may be filed. (See Stats. 2001, ch. 883, § 3, No. 13 West's Cal. Legis. Service, pp. 5576-5577.) The chaptered law also added a new article requiring state agencies—including, for purpose of this article, the University of California—to notify its employees of the whistleblower protection available to them. (See §§ 8548-8548.5; see also Stats. 2001, ch. 883, § 4, No. 13 West's Cal. Legis. Service, pp. 5577-5578.) The definition in section 8548 including the University of California as a state agency applies only in article 3.5, not in article 3 where section 8547.10 is found. (See §§ 8547.10, 8548.) Thus, even if we were to find that the challenged language in subdivision (c) of section 8547.10 was ambiguous, we would not find this legislative intent argument to be persuasive.

III. OTHER CAUSES OF ACTION

Miklosy and Messina also contend that the trial court erred by sustaining without leave to amend the Regents' demurrer to their other causes of action pled in their first amended complaint. They argue that they stated causes of action for wrongful termination in violation of public policy and for intentional infliction of emotional distress. They urge us to reinstate these causes of action in their first amended complaint.

Again, we find that the trial court properly sustained the Regents' demurrer to these causes of action in the first amended complaint. Section 8547.10 is the only statutory authorization for a civil damages action based on retaliation against a university employee for reporting improper activity. There is no common law cause of action for wrongful termination available to a university employee. (*Palmer, supra,* 107 Cal.App.4th at p. 909.) Thus, the trial court properly sustained the Regents' demurrer to this cause of action in the first amended complaint.

Applying the same reasoning, we find that Miklosy and Messina also had no right to file a cause of action for intentional infliction of emotional distress against the Regents based on the same events underlying their WPA claim for wrongful termination. As there is no reasonable possibility that Miklosy and Messina could cure the defect in their first amended complaint by further amendment, we also find that the trial court properly sustained the Regents' demurrer without leave to amend. (See *Hendy v. Losse, supra,* 54 Cal.3d at p. 742; see also Code Civ. Proc., § 472c; *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 967, 970-971.)

IV. INDIVIDUAL DEFENDANTS

Finally, Miklosy and Messina contend that the individual defendants named in their first amended complaint—Kim Minuzzo, Larry Lagin and Jerry Krammen—are liable for wrongful termination in violation of public policy. The WPA has been construed as allowing a University of California employee to sue his or her supervisor as well as the Regents as employer. (*Palmer, supra,* 107 Cal.App.4th at p. 909 fn. 10.) However, in circumstances such as those before us, when Miklosy

and Messina are barred from bringing a civil action at all, a fortiori they may not bring such an action against their supervisors. (See § 8547.10, subd. (c).)

The judgment is affirmed.

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Reardon, Acting P.J.

We concur:

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Sepulveda, J.

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Rivera, J.