Case No.
S168950

IN THE

SUPREME COURT OF CALIFORNIA

L. RICHARD RUNYON,
Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, *et al.*,
Defendants and Respondents

After a Decision By the Court of Appeal,
Second Appellate District, Division 1
Case No. B195213

OPENING BRIEF ON THE MERITS

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I.

INTRODUCTION

This case involves Government Code section 8547.12(c) and the rights and remedies of that third group of public employees which this Court did not address in its decisions in *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876 and *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)* (2009) 45 Cal.4th 963. *Miklosy* explained that the Whistleblower Protection Act (WPA) distinguished between three groups of public employees. *Miklosy* addressed the first group, University of California employees governed under Government Code section 8547.10(c). *Arbuckle* addressed the second group of employees, state employees suing under Government Code section 8547.8(c) after filing a complaint with the State Personnel Board. The *Runyon* Court of Appeal decision has now addressed the rights and remedies of that third group of public employees, California State University (CSU) employees suing under section 8547.12(c).

In contrast to the holding in *Miklosy*, *Arbuckle* concluded that a civil action for damages was available to this second group of whistleblower plaintiffs because the language of the statute "*expressly authorized a damages action in superior court for whistleblower retaliation*" by the addition of a caveat not contained in section 8547.10(c). (45 Cal.4th at 976.) Accordingly,

Arbuckle found that whistleblower plaintiffs were not collaterally estopped to attack any findings made at the administrative level [in a subsequent damages action], and that the lower court's decision concluding otherwise not only ignores the express statutory authority found in section 8547.8(c), but "*undermines the Act's purpose of protecting whistleblower employees by assuring them the procedural guarantees and independent fact-finding of a superior court damages action.*" (*Arbuckle*, *supra,* 45 Cal.4th at 968.)

Adopting the same flawed reasoning and faulty analysis as the lower court in *Arbuckle*, the *Runyon* Court of Appeal erroneously concluded that all damages actions under section 8547.12 are barred where the complaining employee does not first seek writ review and prevail in such a proceeding, claiming "there is no indication from the statute or its legislative history that an exception to the requirement for a writ of mandate was contemplated when section 8547.12 was enacted." (*Runyon* Slip Op. 14.[1/]) In so holding, the Court of Appeal not only refused to acknowledge the express statutory authority set forth in the last sentence of section 8547.12(c) which specifically permits a direct damages action by whistleblower employees when CSU fails to "*satisfactorily address*" their complaints at the administrative level, but by

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[1/] All references to the "Slip Op." are to the *Runyon* Court of Appeal decision, a copy of is attached to this Opening Brief on the Merits.

imposing the *additional* requirement of writ review, has effectively wiped-out any ability for CSU whistleblowers to ever pursue a damages action in court. (*Cf., Arbuckle, supra*, 45 Cal.4th at 977.)

Specifically, the Court of Appeal failed to apply, much less understand, the incongruities in statutory language and variations in legislative history which exist with regard to sections 8547.8(c), 8547.10(c) and 8547.12(c) – summarily precluding CSU employees from pursuing damages actions based upon an erroneous understanding of the holding in *Miklosy*. Even though *Miklosy* clearly stated that it was not deciding what was meant by the "satisfactorily addressed" language contained in the last sentence of section 8547.12(c), the Court of Appeal in *Runyon* found that "*comments from the Miklosy court*" made it clear that "*a prerequisite for pursuing an action for damages under section 8547.12, subdivision (c) is review and reversal of an adverse administrative decision through a proceeding for writ of mandate.*" (Slip Op. p.16.) In other words, giving "lip service" to the differences in the statutory language, the *Runyon* decision treated section 8547.10(c) and section 8547.12(c) as if they were identical, ignoring legislative history, the principles of statutory construction and the plain language of section 8547.12(c) which permits a direct damages action in court at the conclusion of CSU's administrative process.

Further, the Court of Appeal adopted, without any independent analysis, the reasoning of the only reported case addressing section 8547.12(c), *Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, a case in which Supreme Court review was never requested. Instead of properly analyzing the language, legislative history, and purpose of section 8547.12(c), the Court of Appeal opinion in *Runyon* substitutes *Ohton*'s flawed logic. Among other things, the *Runyon* decision adopts *Ohton*'s "objective good faith" interpretation of section 8547.12(c)'s "*satisfactorily addressed*" (Slip Op. p. 13-14) but, like *Ohton*, fails to explain how any whistleblower [or court reviewing the matter in a writ proceeding] could possibly measure CSU's "good faith" given that CSU's grievance process for resolving whistleblower complaints does not include the right to an evidentiary hearing before a neutral hearing officer, does not provide for discovery, and otherwise denies the employee any opportunity to obtain or create an administrative record. (*Cf., Arbuckle, supra,* 45 Cal.4th at 977.)

In other words, blindly following *Ohton*, the Court of Appeal in *Runyon* found that section 8547.12(c) requires as a *condition precedent* to any damages action that the complainant first establish by way of a writ proceeding that CSU had not "*satisfactorily addressed*" [*i.e.*, did not do a thorough investigation in good faith] the administrative complaint. (Slip Op. 13-15.)

However, like *Ohton*, the *Runyon* decision fails to address how any complainant would ever be able to meet that burden since CSU complainants are not provided any evidentiary hearing or record, precluding effective review by way of a petition for writ of administrative mandate. (Code Civ. Proc. §1094.5.) Indeed, without writ review under Code of Civil Procedure section 1094.5, complainants are left with having to prove that CSU had not "*satisfactorily addressed*" [*i.e.*, did not conduct a thorough investigation in good faith] their administrative complaints under the "arbitrary and capricious" standard, effectively insulating CSU's decisions from attack, so long as they are not facially irrational. (Code Civ. Proc. §1085; *Arbuckle*, *supra*, 45 Cal.4th at 977; see also, *Miklosy, supra,* 44 Cal.4th at 904, fn. 2 [concurring opinion by Justice Werdegar].)

Furthermore, in relying on *Ohton*, the *Runyon* decision completely misapplies the law regarding the principles of collateral estoppel and exhaustion of judicial remedies in holding that CSU employees are required to first seek writ review of decisions regarding their whistleblower complaints even though CSU's process does not give them an opportunity to "actually litigate" their claims. In so holding, *Ohton* and *Runyon* erroneously conflate the distinct concepts of exhaustion of *administrative* remedies [provided by CSU's internal process] and exhaustion of *judicial* remedies, in effect, giving

all CSU decisions collateral estoppel effect without first performing a threshold analysis of whether such decisions are worthy of judi cial deference and depriving whistleblowers like Runyon of due process. (See, *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921; *Arbuckle, supra*, 45 Cal.4th 963, 975-76.)

In short, the decisions in *Runyon* and *Ohton* allow CSU to have it both ways: denying whistleblowers any chance to "actually litigate" their claims during the internal grievance process by conducting its own, closed-door investigations into WPA complaints, without any hearing or record that can otherwise be scrutinized — and then turning around and claiming that whistleblowers are estopped from seeking subsequent civil remedies under the WPA because their complaints were already litigated and decided by CSU.

By its ruling, the Court of Appeal has turned the protections and civil remedies the Legislature provided in section 8547.12(c) on their head, creating strong disincentives for whistleblowers to step forward. The Court of Appeal's misguided interpretation of section 8547.12(c) makes it virtually impossible for whistleblower employees ever to prevail, thrusting them into a

"procedural minefield" so aptly described in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1085-87, and later articulated in *Arbuckle*, *supra*, 45 Cal.4th at 977. Such a result defeats the salutary purposes of the WPA – to encourage whistleblowers to come forward without fear of retribution – a matter of vital concern to all of the people of California.

II.

ISSUES PRESENTED

1. Does the language in Government Code section 8547.12(c), *"Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not* ***satisfactorily addressed*** *the complaint within 18 months,"* permit a California State University employee to proceed with a damages action after an unfavorable decision from the university or must the employee seek judicial review of the unfavorable decision by way of a writ of mandate before bringing a damages action?

2. What does "*satisfactorily addressed*" as used in Government Code Section 8547.12(c) mean?

3. Under Government Code section 8547.12(c), does the collateral estoppel doctrine give binding effect to the findings issued by the California State University after an investigation and in the absence of a hearing?

III.

STATEMENT OF FACTS

L. RICHARD RUNYON ("Runyon") filed this action against the BOARD OF TRUSTEES OF THE CALIFORNIA, erroneously sued as CALIFORNIA STATE UNIVERSITY LONG BEACH ("CSU") and the Dean of its College of Business Administration, LUIS MA CALINGO ("Calingo") (both collectively, referred to herein as "Defendants"), to recover damages for, *inter alia*, illegal retaliation in violation of the California Whistleblower Protection Act (WPA), (Government Code §§ 8547 *et seq.*). (1APP0008-35.)[2/]

A Runyon Was Removed As Chair In 2000 In Retaliation For His Complaints About Calingo's Improper Kickbacks

Runyon is a tenured professor at CSU. Runyon has been a Professor at CSU since 1968. He is an accomplished member of the facility with exemplary performance, repeatedly lauded as the hardest working Department Chair in the College of Business Administration (CBA). (3APP0720-21, 0724; 4APP0756-63.) He was elevated to the position of Chair of the Finance Real

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[2/] The facts in this brief are supported by reference to the Appellant's Appendix, abbreviated as: "[volume]APP[page]," and the Reporter's Transcript, abbreviated as "RT[page]."

Estate and Law Department (FREL) in 1991, and continued to hold that position until December 2000. (3APP0720.)

In 2000, Calingo became the Dean of the CBA. In the Fall of 2000, Calingo awarded a merit increase to Dave Pastrana, Chair of the Dean's Search Committee. On December 6, 2000, during a meeting of the department chairs, Runyon complained to Calingo that the merit increase to Pastrana, could only be construed as a "payoff" for selecting Calingo to the new Dean.[3/] (3APP0722.)

After the meeting, Calingo demanded Runyon's resignation. Calingo told Runyon he could resign or he would be fired. (3APP0723.) Two days later, after being Chair of the FREL for the better part of a decade, Runyon was suddenly removed from his Chair position by Calingo. (3APP0722-25; 4APP0764; 5APP1128-29.) Calingo falsely stated that Runyon had "resigned" from the chair position, when, in fact, Calingo had terminated him. (3APP0723; 4APP0764; 5APP1128-29.)

Runyon challenged his removal as being in direct retaliation for his complaints about the illegal payoff – and CSU later ***admitted*** Runyon's removal was in retaliation for Runyon's complaint about Calingo – and

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[3/] The Court of Appeal decision states that the merit increase was $500. This is true. However, $500 per year amounts to between $15,000 - $20,000. (3APP0722-24.)

Calingo was ordered to restore Runyon to the Chair of the FREL Department in January 2001. (3APP0724-25, 4APP0904-08, 911.)

B. Runyon Was Removed As Chair In 2004 After He Complained About Calingo's "Improper Governmental Activities"

Thereafter, through March 2004, Runyon continued to lodge complaints against Calingo, including waste of taxpayer's money, blatant misuse of government resources and gross incompetence. (3APP0725-33, 0735-38; 4APP0799-801; 5APP1004-07.) Runyon primarily contended that Calingo was an "absentee Dean," and that Calingo engaged in extensive travel overseas at public expense without proper disclosures as to the public purpose or benefit of those trips. (3APP0725-27, 0730-32, 0735-36, 0738-39; 5APP1004-07.)

In late March 2004, Runyon reduced his complaints about Calingo's gross incompetence, waste of taxpayer's money and blatant misuse of government resources to writing. (3APP0735-36; 4APP0788, 0794-801; 5APP1004-07.) He sent a series of memoranda to Calingo with copies to Provost Gary Reichard, and others, including Associate Vice-President of Academic Affairs Kathleen Cohn. (3APP0735-36; 4APP0788, 0799-801; 5APP1004-07.)

On April 7, 2004, Runyon met with Calingo, Vice-President Cohn and Provost Reichard. Despite the fact that Runyon was clearly engaged in

"protected [whistle-blowing] activity,[4]" during that meeting, Runyon was specifically threatened by Provost Reichard that any further criticisms of Calingo would **"no longer be tolerated."** (3APP0736; 5APP11 18-19, 1198.)

On or about April 26, 2004, Calingo asked Runyon to meet with him in his office under the guise of an annual performance review. Calingo demanded Runyon resign his position as Chair, and if he refused, he would be fired. Runyon refused. Then, Calingo declared, "This meeting is over. You are no longer Department Chair." Calingo told Runyon he no longer had confidence in him as Department Chair because he had [allegedly] not met the conditions of his letter of appointment to the Department Chair. Significantly, however, Calingo never provided Runyon any particulars beyond a termination letter dated April 26, 2004, which he then handed Runyon.[5] (3APP0737; 4APP0819.)

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[4] "Protected Disclosure" includes: any "good faith communication that discloses or demonstrates an intention to disclose information that may evidence (i) an improper governmental activity..." (Govt. Code §8547.2(d).)

[5] Calingo's April 26, 2004 letter states that he lost confidence in Runyon and that Runyon had not met the conditions of his letter of appointment dated April 23, 2003. However, no specifics as to why Calingo had lost confidence or how Runyon had not met the conditions of his appointment were stated in the letter. (3APP0737; 4APP0819.)

C. Runyon Filed A Grievance With CSU Under the WPA

As a result of his retaliatory removal as Chair, Runyon timely filed a internal grievance with CSU under Executive Order No. 822 (EO822), CSU's internal procedure for addressing whistleblower claims, contending that CSU and Calingo had improperly retaliated against him in violation of the WPA. (4APP0739; 5APP0823-65.) Runyon contended that he was removed as Chair of the FREL Department in retaliation for his complaints about Calingo's "improper governmental activities" [as that term is defined in Government Code §§8547.2(b) and 8547.12[6/]]. (1APP0008-35; 2APP0474.)

In response, CSU initiated an investigation under EO822. (3APP739-40.) EO822 was implemented by CSU to fulfill the requirements of sections 8547.12 of the Government Code (which pertains exclusively to CSU employees), in dealing with whistleblower complaints. (2APP0384-89; 4APP0875-82.) EO822 establishes a procedure for responding to whistleblower complaints by CSU employees who allege they have been retaliated against for having engaged in protected disclosures under the WPA. (2APP0384-89; 4APP0874-82.) Significantly, no hearing is required or

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[6/] "Improper governmental activity" is broadly defined to include misuse of government property, willful omission to perform duty, economically wasteful conduct or gross misconduct, incompetency or inefficiency. (Government Code §8547.2(b).)

provided under EO822. (3APP0874-82, 1096-98, 1116-17; RT 10-13, 23-29, 36; Slip Op. 5.) [7/]

Instead of appointing a neutral investigator, CSU utilized its own employee, its Human Resources Manager Ellen Bui (who later admitted an investigation by her into claims against CSU would have the appearance of bias). (1APP0114-15.) Notably, Bui's investigation consisted of (a) interviewing witnesses she chose to interview who were not under oath and looking at documents she selected to review; (b) taking only handwritten notes

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[7/] Under EO822, the Vice Chancellor of Human Resources is designated to receive and make decisions regarding written complaints of retaliation. At the Vice Chancellor's discretion, the investigation may be conducted by an external investigator. The complainant is obligated to cooperate with the investigator, and in an initial interview with the investigator has the opportunity to present a list of witnesses and documentary evidence in support of the complaint. The investigator must interview the complainant, review any supporting documentation supplied by the complainant and any response to the complaint, interview witnesses, and take any other action the investigator deems appropriate. The investigation must be completed no later than 60 days prior to the expiration of 18 months from the date the complaint was filed. The Vice Chancellor is required to transmit the summary and conclusion of the investigation to the complainant within ten (10) days of the Vice Chancellor's receipt of them from the investigator(s). The complainant may file a written response to the summary and conclusion with the Vice Chancellor within fourteen (14) days of receipt of the summary and conclusion. Thereafter, the Vice Chancellor is required to respond to the complainant with a letter of decision within fourteen (14) days of receipt of the complainant's written response or the expiration of the time limits for the complainant to file a response. The Vice Chancellor's letter of decision constitutes the final CSU decision regarding the complaint. (4APP0874-79, 0902; Slip Op. 5.)

of her interviews; (c) preparing a written Report; and (d) providing Runyon with what was called a "Summary" of her Report - in which "Summary" Bui denied any retaliation by Calingo had occurred. (3APP0713-14, 0716-17, 0739-40; 4APP0867-82; 5APP1042-1062, 1101-02, 1106-07, 1109-1111.)

Runyon was only permitted to see the "Summary," and nothing else was provided to him, despite his request therefore.[8/] (RT10-13, 23-29, 36; 3APP0713, 0739-40; 4APP0896; 5APP1096-98, 1109-11, 1116-17.) Runyon was denied any opportunity to see the investigator Bui's full Report or any of the raw data upon which the "Summary" was supposedly based, including HR manager Bui's notes. Furthermore, Runyon was not permitted to confront or cross-examine witnesses, much less know who was interviewed, and was not permitted any discovery. (3APP0713, 0739; 4APP0896; 5APP1096-98, 1101-02, 1116-17.) Significantly, there was no procedure for any hearing, there was no hearing and there was no hearing transcript. (RT10-13, 23-29, 36; 5APP1096-98, 1116-17.)

After Runyon responded to the "Summary" proffered by CSU, on April 14, 2005, CSU issued its Final Letter of Determination denying Runyon's

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[8/] The Court of Appeal opinion incorrectly states that Runyon filed a response "to *the Report* and Summary of the investigation," even though the evidence was uncontroverted that Runyon was only permitted to see the so-called "Summary." (3APP0713-14; 4APP0867-96; 5APP1097-98, 1117.)

claim. (3APP0739-740; 4APP0883-903.) In the Final Letter of Determination [issued one year after Runyon's April 2004 removal as Chair], Runyon was informed for the first time that he had been removed as Chair based upon the Calingo's "determination that Runyon failed to have an adequate curriculum review process in place by Fall 2003 and would not be able to submit an acceptable written proposal to revise the curriculum by Spring 2004."[9/] (3APP0737, 0740; 4APP0819, 0900; 5APP1120, 1173, 1176-77, 1184-85, 1191-93.)

D. Runyon Filed A Damages Action In Superior Court Pursuant To Government Code Section 8547.12(c) After CSU Failed To "Satisfactorily Address" His Grievance Within 18 Months

Since CSU failed to satisfactorily address Runyon's grievance about the illegal retaliation against him, Runyon filed this whistleblower action for damages pursuant to the WPA, section 8547.12(c) in the court below. (1APP0008-35.)

During discovery in *this* damages action, Runyon was able to challenge CSU's EO822 investigation and findings, something he was prevented from

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9/ In fact, on April 12, 2004 Runyon had addressed in writing the curriculum review in the Department. (3APP0737; 5APP1008-20.) And, on April 14, 2004, when Runyon met with Calingo to discuss the progress of the curriculum review, Calingo expressed no criticism of the curriculum or the curriculum review process. (3APP0737.)

doing at the administrative level. (RT10-13, 23-25, 47-48; 4APP0867-73, 0896-903; 5APP1096-98, 1109-11, 1116-17.) The results of that discovery revealed that investigator Bui had omitted key evidence of Calingo's wrongful conduct from the Summary provided to Runyon. (RT20, 47-48; 3APP0499-506, 0508-09, 0523-26, 0529, 0538, 0559-60, 0581-82, 0600-04, 0607, 0708-09, 0713-14; 4APP0867-73, 0909; 5APP1075, 1109-11, 1118-19, 1121-22, 1124-29, 1131-35, 1137-40, 1143-44, 1196, 1204, 1206-07.) It also demonstrated that CSU completely ignored the numerous contradictions in Calingo's position and CSU's own documentation contradicting Calingo's statements. (3APP0499-506, 0521-30, 0534-42, 0600-04, 0708-09; 4APP0867-73, 0897-903, 0909; 5APP1075, 1096-98, 1101-02, 1109-11, 1118-19, 1121-22, 1124-29, 1131-35, 1137-40, 1143-47, 1149, 1151-64, 1166-70, 1172-73, 1176-82, 1184-85, 1188-93, 1195-1211, 1213-17.)

Among other things, Runyon learned that during the EO822 grievance process, CSU omitted key evidence corroborating Calingo's retaliatory animus, which was neither mentioned in the Summary nor in the Final Letter of Determination – the only "record" provided to Runyon by CSU. (4APP0867-0873, 0897-0903.) For example, absent from the "record" were Calingo's admissions to Bui that his "*cordial*" relationship with Runyon "*soured*" in Spring 2004 *after* Runyon put his complaints in writing, at which

point, Calingo became *insulted* and *angry*. (5APP1121-22, 1134-35.) CSU also omitted evidence obtained by CSU's investigation that Provost Reichard told Bui that Reichard cautioned Calingo not to react because getting rid of Runyon [because of Runyon's criticism of Calingo] was not going to "wash," and that Calingo *had to use* a *different reason*. (5APP1137-1139.) Defendants also did not reveal that Reichard admitted he told Calingo in March 2004 that he did not want it to be made known that Calingo's travel was for "personal reasons," and that Reichard told Calingo to be on campus more. (5APP1075, 1131, 1137.) Defendants also omitted the fact that Vice-President Cohn had admitted to Bui that on April 7, 2004 Reichard told Runyon in Calingo's presence that Runyon's criticisms of Calingo "*would no longer be tolerated*," and that there was no warning ever given to Runyon about his job performance prior to his removal as Chair. (5APP1118-1120.)

Indeed, through discovery in this subsequent civil action, Runyon learned that absent from Bui's "Summary" was any mention that Runyon's complaint about Calingo's travel and travel-related expenses actually triggered an internal audit of Calingo's expenses and an April 2004 finding by CSU that Calingo had regularly engaged in questionable and improper conduct in connection with his travel expenses, including charging to CSU his personal travel and that Calingo had submitted false travel expenses and altered his

travel vouchers – thus, proving that Runyon's complaints were in fact justified. (3APP0603-04, 0616-18; 4APP0867-73, 0897-903 4APP0909-910; 5APP1075, 1109-1110, 1124-27, 1133, 1143-1144, 1146-47, 1159-62, 1196, 1204, 1206-1207.)

Significantly, although CSU had denied that Runyon's complaints had anything to do with his termination as FREL Chair, at her deposition, Bui admitted that Runyon's March 2004 written complaints may have been a **"contributing factor"** in Calingo's decision to remove Runyon as Chair in April 2004. (3APP0499-0506, 0508-0509, 0523-526, 0529, 0535, 0538, 0557-0559, 0581-82, 0600-0604, 0607, 0708-0709; 5APP1128-29.) Yet, Bui failed to mention this in her Summary. (4APP0867-73.)

Even the reasons given in CSU's Final Letter of Determination to justify Runyon's removal (*i.e.*, the failure to have an adequate curriculum review process in place) were shown to be false and pretextual. On cross-examination, Calingo admitted that Runyon had *never* been criticized for the finance curriculum. (5APP1120, 1173, 1176-1177, 1191-92.) Calingo also admitted that three of the other four CBA Departments had similar or nearly identical patterns of curriculum changes and curriculum review processes and that none of the chairs of those departments had ever been written up, censored or removed from office as a result. (5APP1167-68, 1176, 1179-80.)

In fact, the weight of the evidence was that it was a year after Runyon's April 2004 removal, during CSU's grievance process, that Respondents created a justification for Runyon's removal in order to hide their *real* retaliatory motive. (3APP0737, 0740; 4APP0819; 5APP1191-93, 1173, 1184-85.) To that end, Calingo admitted that at the time of Runyon's 2004 removal as Chair, he did not disclose to Runyon the reason for his removal, and that he had been specifically instructed by Provost Reichard not to disclose the reasons to Runyon. (5APP1191-93.)

Moreover, when Runyon presented this and other evidence of retaliation to the trial court, even the trial court described the evidence of retaliation against Runyon as "**DYNAMITE**." (RT47.)

IV.

PROCEDURAL HISTORY

A. The Trial Court Granted Defendants' Summary Judgment Motion

Prior to trial, CSU and Calingo filed a Motion for Summary Judgment/Summary Adjudication, based upon two grounds: (1) Runyon's damages action was barred by his failure to first obtain a reversal of CSU's administrative decision through administrative mandamus review pursuant to Code of Civil Procedure section 1094.5; and (2) there was no adverse action taken against Runyon in retaliation for protected activity as a matter of law.[10/] (1APP0041-63.)

Runyon opposed the motion. Runyon argued that 1094.5 writ review was inapplicable since there had been no hearing and no hearing was required under EO822 [which is required for 1094.5 review] and because Government Code section 8547.12(c) specifically authorized CSU whistleblower employees to file ***directly in court* a claim for damages for retaliation** in the event that he believed that CSU had failed to "*satisfactorily address*" his claims at the

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[10/] In their reply papers, Defendants raised an entirely new ground: that Runyon's claims were barred by his failure to file an ordinary writ pursuant to Code of Civil Procedure section 1085 – which Runyon had no notice of or opportunity to brief. (RT 6-14, 52-57; 6APP1303-17.)

administrative level within 18 months. (RT10-48; 2APP0468-85.) Runyon argued that requiring him to file a writ before filing a lawsuit would directly conflict with the language and purpose of Government Code section 8547.12, subdivisions (c) and (e). (2APP0468-6APP1302.)

After the hearing, the trial court ruled that a damages action brought under Government Code section 8547.12(c) is precluded if CSU renders *any* decision within 18 months, unless the employee first seeks judicial review of that final decision by way of a writ of mandate, and prevails on such writ. (RT3-6, 21-23, 56-57; 6APP1338-40.) The court rejected the construction that section 8547.12(c) created any a direct right to a whistleblower to file a damages action in court after an adverse decision by CSU and refused to accept that the words "satisfactorily addressed" as set forth in section 8547.12(c) means to "the satisfaction of the employee." (RT3-6, 21-23, 56-57; 6APP1340.) Since Runyon did not file any writ prior to filing this suit, the trial court granted summary judgment, entering judgment against Runyon on October 20, 2006. (RT56-57; 6APP1343-45.)

B. The Court of Appeal Affirmed The Trial Court's Judgment

Runyon's timely appeal followed. On October 30, 2008, the Court of Appeal issued its decision, affirming the order of the trial court, finding that

before Runyon could bring a damages action pursuant to Government Code Section 8547.12(c), he was first required to overturn the administrative decision in a writ proceeding. (Slip Op. 14-17.)

In reaching this decision, the Court of Appeal rejected the trial court's interpretation of Government Code section 8547.12(c) that CSU's rendering of *any* decision in 18 months would operate as a bar to damages action unless the employee first seeks judicial review of that final decision by way of a writ, and prevails on such writ. (Slip Op. 13.) However, the Court of Appeal also specifically rejected the idea that section 8547.12(c) provides the injured employee with the right to file a damages action in the event that CSU issued a timely decision which did not "satisfy" the employee. (Slip Op. 14.)

Instead, the Court of Appeal found that as long as CSU rendered a timely administrative decision pursuant to EO822, after a "thorough" investigation of the whistleblower claim, conducted in "good faith" that a whistleblower claim had been "satisfactorily addressed" by CSU. (Slip Op. 13.) In such a case, the Court of Appeal found that a damages action would be barred unless the employee first seeks judicial review of that final decision by way of a writ of administrative mandamus, and prevails on such writ. (Slip Op.10-14.) Significantly, however, the Court of Appeal does not explain how CSU's "thorough[ness]" or "good faith" could be determined in the absence

of a complete evidentiary record available to the employee, much less whether and how CSU met this standard in this case [and necessarily, whether CSU met section 8547.12(e)'s specific requirements, including the "*clear and convincing*" burden of proof]. (Slip Op. 13-17.)

C. The Court of Appeal Denied Runyon's Petition For Rehearing

On November 14, 2008, Runyon filed a Petition for Rehearing on the grounds that the Court of Appeal decision contained significant omissions and misstatements of material facts. On November 21, 2008, the Court of Appeal denied the Petition for Rehearing. On January 28, 2009, the California Supreme Court granted Runyon's Petition for Review.

V.

LEGAL DISCUSSION

The California Whistleblower Protection Act (WPA) (Gov.Code, §§8547, *et seq.*) was enacted by the Legislature to protect the right of state employees "to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution."(§8547.1[11/]) The WPA broadly prohibits state employees from directly or indirectly using their official authority to interfere with the right of other state employees to disclose a wide panoply of "improper government activities." (§8547.2(b).) It does so through a series of procedural safeguards and evidentiary burdens designed to protect state employees from reprisals or intimidation when they make such disclosures, resting upon the Legislature's express findings that "public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business." (§8547.1)

The WPA distinguishes between three groups of public employees: (1) state employees; (2) University of California (UC) employees; and (3) California State University (CSU) employees. (*Miklosy, supra*, 44 Cal.4th at 887). Section 8547.8(c) authorizes a state employee who is the victim of

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11/ All further references are to the Government Code unless otherwise indicated.

whistleblower retaliation to bring an action for damages in superior court, but contains the caveat that an action for damages under section 8547.8(c) is not available "unless the injured party has first filed a complaint with the State Personnel Board..., and the board *has issued, or failed to issue, findings.*"

In *State Bd. of Chiropractic Examiners v. Superior Court (Arbuckle)* (2009) 45 Cal.4th 963, this Court specifically addressed this caveat, finding that the express language used in section 8547.8(c) authorizes an independent and direct right to file a damages action once the State Personnel Board issues any findings or fails to issue any findings, and rejected any requirement that the complaining employee first seek writ review of the Board's decision. Indeed, this Court specifically found that an interpretation of section 8547.8(c) requiring a complaining employee to seek writ review before permitting a damages action would undermine the purpose of the WPA of "protecting whistleblower employees by assuring them the procedural guarantees and independent fact-finding of a superior court damages action." (45 Cal.4th at 968.)

Section 8547.10(c) imposes similar liability for retaliation against UC employees. However, the language in the caveat in section 8547.10(c) is very different than that contained in section 8547.8(c). In contrast to the language used in section 8547.8(c), section 8547.10(c) states that a damages action

"shall not be available...unless... the university has failed to reach a [timely] decision."

The availability of a damages action to UC employees under section 8547.10(c) was addressed by this Court in *Miklosy*, *supra*, 44 Cal.4th 876. While *Miklosy* suggested that the unique language of the specific sections of the WPA might yield different rights and remedies for the three different types of public employees seeking to bring a damages action, it held the specific language of 8547.10(c) [applicable only to UC employees] was clear and unambiguous – permitting a damages action only in the event the University of California fails to reach a timely decision. (*Id.* at 898.)

Finally, section 8547.12 governs the rights and remedies provided to CSU whistleblowers, and further defines prohibited retaliation and the procedures to be followed in investigating CSU whistleblower complaints.[12/] Among other things, this section mandates that CSU comply with specific requirements and burdens, which includes among them, placing the burden of

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12/ In 2002, Executive Order 822 (EO822) was issued by CSU to fulfill the requirements of sections 8547.12 and 8547.2(b) of the Government Code to protect those whistleblower employees, like Runyon, who report "improper governmental activities." EO822 purportedly "establishes a procedure for responding to complaints filed with the Office of the Chancellor or CSU campuses by employees or applicants for employment who allege they have been retaliated against for having engaged in protected disclosure under the [WPA]." (2APP0384-389; Slip Op. 5.)

proof on a supervisor to demonstrate by "**clear and convincing evidence**" that the action alleged to be retaliatory "would have occurred for legitimate, independent reasons." (§8547.12(e).)

Section 8547.12(c) authorizes a damages action for CSU whistleblower retaliation and includes the same caveat as sections 8547.8 (governing state employees) and 8547.10 (governing UC employees) requiring employees to exhaust the agency's internal remedies, but section 8547.12, subdivision (c), *adds* a sentence at the very end of the paragraph that does *not* appear in the other provisions. Specifically, section 8547.12(c), provides:

> (c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee...shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the [designated] university officer...and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the trustees. **Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not *satisfactorily addressed* the complaint within 18 months**. (Emphasis added.)

Neither of this Court's decisions in *Miklosy* or *Arbuckle*, substantively addressed what was meant by the last sentence of section 8547.12(c).

Significantly, however, this Court did state that "[t]he addition of the last sentence, and specifically the modifier 'satisfactorily,' raises the possibility that a court might find the state university's decision unsatisfactory (though timely) and on that basis permit a damages action." (*Miklosy, supra*, 44 Cal.4th at 886.)

Here, the substantive meaning of the last sentence of section 8547.12(c) is now an issue squarely before this Court. The Court of Appeal ruled that a damages action brought under section 8547.12(c) is precluded if CSU renders *any* timely decision against the employee on the issue of retaliation, so long as it is was made in good faith, unless the employee first seeks judicial review of that final decision by way of a writ proceeding, and prevails on such writ. (Slip Op. 10-17.) Despite the significant differences in language and legislative history between section 8547.10(c) and 8547.12(c), the Court of Appeal has essentially taken this Court's decision in *Miklosy* – which limits itself to treatment of section 8547.10(c) – to bar all damages actions under section 8547.12(c) where writ review was not sought.

In so holding, the Court of Appeal has not only ignored fundamental principles of statutory construction and the legislative history, but misapplies the law on judicial exhaustion and collateral estoppel. Instead, the Court of Appeal relies on general legal principles for reviewing administrative

decisions and adopts the flawed analysis in *Ohton, supra*, refusing to give any real significance to the presence of the last sentence in section 8547.12(c) – even though that qualifying language is conspicuously absent from section 8547.10(c). (Slip Op. 15-17.) For the reasons set forth herein, the decision of the Court of Appeal is clearly erroneous and should be reversed.

A. The Legislative History Indicates The Intent To Authorize Damage Actions Where CSU's Decisions Are Unsatisfactory To The Injured Party

The WPA (formerly known as the Reporting of Improper Governmental Activities Act) contained a perceived loophole which left CSU employees without the same whistleblower protections previously afforded to other state employees. (See, California Bill Analysis, Senate Floor, 1993-1994 Regular Session, Senate Bill 2097 (May 18, 1994). Accordingly, in 1994, the Legislature added section 8547.12 to the WPA (originally introduced in 1994 as SB 2097), extending whistleblower protections to CSU employees. (*Miklosy, supra*, 44 Cal.4th at 886.)

As portions of the WPA's legislative history reflect, there was concern among some Assembly members that SB 2097 "won't protect whistleblowers," "doesn't protect against retaliation," and provides for a "'weak' in-house grievance procedure." (Office of Child Development & Education, Enrolled

Bill Report on SB 2097 (1994 Reg. Sess.), p. 2, a copy of which is attached to this Opening Brief for the Court's convenience.) At the same time, an organization called the "The University's Plaintiffs Co-op" (UPC) voiced concerns about the WPA and the then current version of SB2097, including "removing loopholes that presently free UC and CSU from liability." (See, Assembly Committee on Public Employees, Retirement And Social Security Report on SB 2097 (1994 Reg. Sess.).) The UPC complained about several "loopholes" in the WPA and proposed (among other things) "an amendment that would have authorized a damages action against the University of California whenever the University's resolution of a whistleblower retaliation complaint was ***unsatisfactory to the injured party***." (*Ibid.*; *Miklosy*, *supra*, 44 Cal.4th at 896 [emphasis added].)

Thus, although the WPA was originally drafted to mirror the UC system of handling whistleblower grievances under section 8547.10(c), to allay those concerns about that whisteblower complaints might not receive fair treatment in CSU's "weak in-house grievance procedure," the language of section 8547.12 (applying to CSU employees) differed from that previously used at section 8547.10 (applying to UC employees) with the addition of the final

sentence of subdivision (c), concluding: "*Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.*" (§8547.12(c) [emphasis added].)

B. The Meaning Of "*Satisfactorily Addressed*" Can Be Gleaned From The Other Parts of The Statutory Scheme

Not all of the language of the WPA is precise. But ultimately, it must be construed in the context of the larger statutory scheme of which it is a part (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 811), and consistently with the objects in view, evils to be remedied, and the public policy enunciated or vindicated. (*Santa Barbara County Taxpayers Assoc. v. County of Santa Barbara* (1987) 194 Cal.App.3d 674, 680 [reasoning that the legislative purpose of a statute can be gleaned from considering its objective and the evils it was designed to prevent].)

Significantly, section 8547.12, subdivision (c) hinges the right of a whistleblower to seek civil remedies provided elsewhere in that same subsection (*i.e.*, "*an action for damages*") until after the whistleblower has first filed a complaint with CSU, and CSU has "failed to reach a *decision* regarding that complaint" within certain time limits. (§ 8547.12(c).) That subsection then qualifies (consistent with concerns expressed in the statute's legislative

history about avoiding a "weak in-house grievance procedure") that "[n]othing in this section is intended to prohibit the injured party from seeking a *remedy* if the university has not *satisfactorily addressed* the complaint within 18 months." (*Ibid.* [emphasis added].)

Thus, although the meaning of the words "satisfactorily addressed" might seem ambiguous at first glance, the meaning of that language can be gleaned from other parts of the statutory scheme. (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960 [when construing statutory provisions, "a word takes meaning from the company it keeps"].) For example, at the very least, the term "decision" anticipates a simple administrative determination as a prerequisite for filing a civil suit. At the very most, that term anticipates an administrative proceeding in which both the whistleblower and an employer have a meaningful opportunity to establish their allegations and defenses to varying standards of proof. (§ 8547.12, subd. (e).) To that end, the opportunity to prove and rebut allegations of retaliation appear to further amplify CSU's obligation under the WPA to "satisfactorily address" a whistleblower's complaint.

Indeed, the "satisfactorily addressed" language – not found in companion section 8547.10, but added to section 8547.12 alone – is notable for several reasons. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-

799["significance should be given, if possible, to every word of an act" and "a construction that renders a word surplusage should be avoided"].) The use of the qualifier *satisfactorily* suggests that the Legislature believed that merely addressing a complaint within 18 months is not enough; it must be addressed *satisfactorily* (*i.e.*, to a certain level of satisfaction). The question then raised is, to *whose* satisfaction?

If it is to the *subjective* satisfaction of the whistleblower, then a whistleblower who believes that the determination made by CSU did not satisfactorily address his or her complaint would not be precluded from seeking other subsequent civil remedies. Alternatively, if the Legislature used the term *satisfactorily* to impute an *objective* standard on the university's duties to investigate and act on a whistleblower's complaint, then there must be a way to measure such an objective good faith standard. In either case, the language the Legislature utilized in the WPA must not only be broadly construed to effectuate its remedial purpose (*Leslie Salt Co. v. San Francisco Bay Conserv. & Devel. Comm.* (1984) 153 Cal.App.3d 605, 614-615), but where it is susceptible to more than one meaning, that language must also be interpreted in a manner that advances the WPA's core objectives.

1. "Satisfactorily Addressed" Must Mean To The Satisfaction of the Whistleblower Because No Other Reading Of The Statute Makes Sense

There is only one reported case which has attempted to define the meaning of the phase "*satisfactorily addressed*" as used in Government Code section 8547.12(c). That treatment is found in *Ohton*, *supra*, 148 Cal.App.4th 749. *Ohton* is the case upon which the Court of Appeal heavily relied when it imposed a completely unworkable "objective good faith" meaning to the qualifying language in section 8547.12(c).

While *Ohton* refused to accept CSU's assertion that all that CSU had to do was reach a decision — *any* decision — within 18 months to bar a later civil action for damages, *Ohton* also rejected any notion that an injured party had the right to file a damages action just because he or she was not "satisfied" with CSU's resolution of the grievance within the 18-month timeframe. (*Ohton, supra*, 148 Cal.App.4th at 764-65.) In other words, *Ohton* also refused to accept that the qualifying words "satisfactorily addressed" used in the last sentence of section 8547.12(c) meant to the *subjective* satisfaction of the whistleblower, adopting instead an undefined *objective* standard of "objective good faith" – that so long as CSU acted in "good faith" in handling the grievance, the grievance had been "satisfactorily addressed" within the

meaning of section 8547.12(c). (*Id.* at 765.)[13/] While *Ohton* was correct in its rejection of CSU's approach, it is also abundantly clear that the *objective* standard born in *Ohton,* and adopted by the Court of Appeal in *Runyon,* is also wrong.[14/]

Ironically, the Court of Appeal gave as the reason it was adopting *Ohton* and rejecting "*to the satisfaction of the whistleblower*" standard urged by Runyon was because it "*would provide no standard for determining when filing an action for damages would be appropriate.*" (Slip Op. 14.) However, the Court of Appeal failed to understand that *Ohton's* "objective good faith" standard is completely impractical because there is no way to determine whether CSU had acted in "good faith" given the lack of any hearing or evidentiary record available to the employee at the conclusion of the administrative process.

Not only did the Court of Appeal fail to explain how such a "objective good faith" standard would work in practice, but it failed to analyze whether CSU had at least met that criterion [and necessarily, whether CSU met section

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13/ Significantly, in reaching this conclusion, *Ohton* noted that the term "satisfactorily addressed" has not been previously interpreted and its application has "proved troublesome to both the parties and the trial court." (*Id.* at 770.)

14/ "We find the *Ohton* court's analysis of the proper interpretation of 'satisfactorily addressed' in section 8547.12, subdivision (c) persuasive and adopt it as our own." (Slip Op. 13.)

8547.12(e)'s specific requirements and "*clear and convincing*" burden of proof] in its handling of *Runyon's* grievance. In fact, the Court of Appeal seemed blind to the abundant evidence of CSU's bad faith at the administrative level[15/] and oblivious to the fact that under this vague standard, no CSU claimant would ever be able to prevail under it given that the only means of writ review apparently available to any CSU employee would be the "arbitrary and capricious" standard [under C.C.P. §1085] since CSU's grievance process does not provide for any hearing. (*Cf. Miklosy, supra*, 44 Cal.4th at 904, fn. 2; *Arbuckle, supra*, 45 Cal.4th at 977; Slip Op. 5.)

Quite simply, an *objective* good faith standard is not workable because CSU's EO822 grievance process does not afford any method by which any court could *objectively* measure whether CSU has acted in good faith in fulfilling its duties under the WPA. More particularly, at the time of the issuance of CSU's Final Decision, the only "record" available to a complainant (and to a court reviewing its process) are:

15/ See, Section III above. For example, in the court below CSU failed to refute or address any of the abundant evidence of CSU's bad faith (see Appellant's Reply Brief at pp. 24-26), thus the Court of Appeal should have deemed CSU to have conceded such issues. (See, *California Ins. Guar. Ass'n. v. Workers' Comp. Appeals Bd.* (2005) 128 Cal.App.4th 307, 316, fn. 2; *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 634 fn.17.)

(1) the Complainant's written Grievance;

(2) the "Summary" of their closed-door secret investigation (which CSU is allowed to sanitize[16/]) as opposed to the raw data or the investigator's full report upon which the "Summary" is supposedly based;

(3) Complainant's written response to CSU's sanitized "Summary"; and

(4) CSU's Final Decision. (2APP0384-89; 3APP0714-16; 5APP1096-98, 1100.)

Significantly, at the conclusion of CSU's internal grievance process, there is no other record which can be scrutinized since the complainant is denied access to review any of the investigatory files and witness statements, is prohibited from calling or confronting witnesses, and is otherwise kept "in the dark" as to the adequacy or the real results of CSU's secret investigation of itself. (3APP0714-16; 5APP1096-98,1100, 1109-11, 1116-19, 1121-41.)

16/ CSU apparently has a pattern of doctoring the "Summary" of its whistleblower investigations. CSU not only did so here, but they did so in the *Ohton* matter. (*Ohton, supra*, 148 Cal.App.4th at 762-63.) (3APP0499-05, 0508-09, 0523-26, 0535, 0538, 0557-59, 0581-82, 0600-04, 0607, 0708-09; 4APP0867-73, 0897-903, 0909 0961-62, 0920, 0930, 0934; 5APP1109-10, 1118-19, 1121-22, 1124-29, 1131, 1134-35, 1137-39, 1143-44, 1196, 1206-07.)

In other words, a complainant is deprived of any ability to "go behind" CSU's one-dimensional Summary and Final Determination in order to critique the investigation or its findings. (*Cf. Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 126-29 [prohibiting reliance on an investigation where discovery was not permitted regarding its adequacy].)

The lack of any administrative record to review [in order to measure CSU's good faith] is something which the *Ohton* court [and subsequently, the Court of Appeal in *Runyon*] completely ignored when it adopted its undefined "objective" rule for determining whether a grievance under section 8547.12(c) has been "satisfactorily addressed" by CSU. Clearly, because CSU's EO822 grievance process does not provide for the creation of any record which can be evaluated, the "satisfactorily addressed" provision simply cannot be measured by an *objective* standard at the conclusion of the administrative process. Accordingly, the *Ohton* standard cannot be correct.

2. The Court of Appeal's Interpretation of Section 8547.12, subdivision (c) Renders Its Last Sentence Meaningless Surplusage

If, as the Court of Appeal has declared, that all the Legislature meant by the words "satisfactorily addressed" was that CSU render a timely decision after a "good faith" investigation of the whistleblower claim, the last sentence

of section 8547.12(c) would be completely meaningless since the WPA already implies an obligation for CSU to act in good faith.

It cannot reasonably be assumed that the Legislature anticipated or would condone that the use of a bad faith investigation under any provision of the WPA would satisfy either the letter of the WPA or the policies it seeks to advance (*i.e,* encouraging employees to report illegal or improper acts, affording protection when they do so, and providing disincentives to those who would retaliate against them). Nor can it be assumed that the remedial purpose of the statute could be furthered where all a state agency is required to do to avoid civil liability is to conclude a timely bad faith or sham investigation.

In other words, whether it be pursuant to section 8547.8, section 8547.10 or section 8547.12, there is clearly an obligation on the part of the State Personnel Board, the University of California, and the California State University to conduct all of its administrative investigations in good faith, otherwise the WPA's policies could be easily subverted. (*Cf. Miklosy*, *supra*, 44 Cal.4th at 890, fn.4.)

> "We do not mean to suggest that there are no limits that apply in this context. The University must provide a viable mechanism for fairly evaluating whistleblower complaints, and the University's consideration of a complaint cannot be so perfunctory or arbitrary as to violate the due process guarantee of the state or federal Constitutions..." (*Id.*)

Thus, even under section 8547.10(c), where this Court has made clear that the statute affords the complaining employee no right to bring a damages action if the University of California renders a timely decision, there is still an undeniable obligation on the part of the University of California to refrain from acting in an arbitrary manner. (*Id.*) Stated another way, even under section 8547.10(c), the University of California is not permitted to act in bad faith even though the last sentence of section 8547.12(c) containing the words "satisfactorily addressed" is conspicuously absent from section 8547.10(c).

Similarly, the word "*remedy*" referred to in the last sentence of section 8547.12(c) must also be given meaning. Logically, it cannot merely refer to a writ proceeding, since under *Miklosy*, section 8547.10(c) [which does not contain the last sentence of section 8547.12(c)] nevertheless allows a claimant to file a writ to challenge the university's decisions where they are so arbitrary so as to violate due process. (*Miklosy*, *supra*, 44 Cal.4th at 890, fn.4.)

Consequently, it can be reasonably concluded that the "satisfactorily addressed" language must mean more than just the "good faith" interpretation ascribed to it by the Court of Appeal, and the "*remedy*" referred to in the last sentence in section 8547.12(c) must mean more than a writ proceeding. It has to be assumed that the Legislature consciously chose to add the last sentence of section 8547.12(c) [missing from section 8547.10(c)] and used the phrase

"*satisfactorily addressed*" instead of the phrase "*responded to*" with a specific Legislative intent. (*People v. Athar* (2005) 36 Cal.4th 396, 409.)

> "[W]hen the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent."] (*Id*; see also, *Miklosy*, *supra*, 44 Cal.4th at 896.)

It is a black letter principle of statutory interpretation that "a construction making some words surplusage is to be avoided." (*Dyna-Med, Inc. v. Fair Employment and Hous. Comm'n* (1987) 43 Cal.3d 1379, 1387.) Furthermore, a statute should be interpreted so as to effectuate its apparent purpose..."significance should be given, if possible, to every word of an act" and "a construction that renders a word surplusage should be avoided." (*Delaney, supra,* 50 Cal.3d at 798-99.)

The language the Legislature utilized must not only be broadly construed to effectuate that remedial purpose (*Leslie Salt Co.*, *supra*, 153 Cal.App.3d 605, 615), but where it is susceptible to more than one meaning, that language must also be interpreted in a manner that advances the WPA's core objectives. It cannot be disputed that the WPA evinces a strong legislative intent to eliminate retaliation by expanding the rights and protections of potential whistleblowers, compelling employers to prove by *clear and convincing* evidence that their actions are otherwise legitimate and

justified. (See, Govt. Code §§8547.1 and 8547.12(e).) That being the case, there can also be no doubt that any interpretation of the statute which *merely* imposes upon CSU an obligation to conduct its administrative process in good faith – an obligation which it already has – and which only permits writ review – renders the last sentence of section 8547.12(c) superfluous.

3. *Ohton* Is Based Upon The Flawed Notion That The Administrative Process Serves No Purpose If It Is Not Binding

Ohton's rationale for its "objective" interpretation of section 8547.12(c), which standard was unconditionedly adopted by the Court of Appeal in *Runyon*, seems to be borne out of the mistaken notion that a *"to the satisfaction of the whistleblower"* approach "would render the statutory and administrative proceedings mandated by section 8547.12 and EO822 nugatory; a complainant need only assert that he is unhappy with the decision in order to overturn it." (*Ohton*, *supra*, 148 Cal.App.4th at 765; Slip Op. 13-14.) However, this is exactly the same faulty reasoning this Court rejected in *Arbuckle*, and, likewise, should reject here. (*Arbuckle*, *supra*, 45 Cal.4th at 976.)

In *Arbuckle*, this Court held that under section 8547.8(c) [which is for all practical purposes similar to 8547.12(c)'s caveat], a whistleblower complainant had a right to file a damages action in superior court

immediately after receiving the State Personnel Board's adverse findings. (*Arbuckle*, *supra*, 45 Cal.4th at 971.) In so holding, this Court rejected the assertion that permitting a damages action when a whistleblower was unhappy with the administrative decision would render the administrative proceeding "meaningless" and a "waste of time," citing to the beneficial effect that such administrative proceedings can have in "promoting settlement" and "be[ing] an effective way of resolving minor disputes." (*Id.*, at 976-77.)

Both *Ohton* and the courts below ignored the beneficial purpose that an administrative process serves of permitting CSU to correct its error and resolve the dispute internally. (*Ibid.*) Indeed, to permit an employee to sue if he is dissatisfied with the administrative decision hardly makes the administrative process an "empty" procedure. As this Court long ago observed in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476, such an exhaustion requirement "serves the salutary function of eliminating or mitigating damages," allowing an organization the first opportunity to quickly determine that it has committed error, and "to minimize, and sometimes eliminate, any monetary injury to the plaintiff." A construction of section 8547.12(c) consistent with the Court's rationale in *Arbuckle* and *Westlake* gives CSU a meaningful opportunity to quickly and thoroughly conduct an internal investigation into the alleged whistleblower retaliation, with the very

real incentive of correcting misconduct, minimizing damages and avoiding liability under the WPA. (*See also*, *Schifando, supra,* 31 Cal.4th 1074, 1083 [exhaustion of internal grievance process "affords the board an additional opportunity to consider the matter before the complainant resorts to litigation. [] It also serves to 'fix[] a time limit and formalities necessary as a basis for court action'"].)

The Court of Appeal's belief that a subjective interpretation of the term "satisfactorily" would render the administrative decision meaningless is further undercut by the fact that a *de novo* process after an adverse administrative decision is common place in the law. (*Arbuckle, supra*, 45 Cal.4th at 976-77.) *Arbuckle* makes clear that not only does another portion of the WPA [*i.e.*, section 8547.8(c)] allow complainants to file *de novo* damages actions in superior court after a adverse administrative decision, but the Legislature has permitted this in many other situations as well.[17/] (*Ibid.*) Thus, *Arbuckle* sanctions exactly what *Ohton* stated would be unfathomable for the Legislature

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17/ This Court also cited several instances in which the Legislature has required or permitted disputing parties to complete a nonbinding adjudicative process before proceeding with a damages action in superior court, including nonbinding arbitration under the mandatory fee arbitration act (see Bus. & Prof. Code §6204, subd. (a)), nonbinding judicial arbitration (see Code of Civ. Proc. §1141.20), and superior court appeals of Labor Commissioner wage disputes which are heard *de novo* (see, Lab. Code §§ 98, 98.1, 98.2). (*Arbuckle*, *supra*, 45 Cal.4th at 976-77.)

to have intended by the phrase "satisfactorily addressed," *i.e.*, direct court access by an unsatisfied complainant after complying with the internal grievance procedure. Certainly, since direct court access is available to whistleblowers under section 8547.8(c), it is logical to conclude that section 8547.12(c) permits the same type of direct court access to CSU employees at the conclusion of CSU's grievance procedure.

C. No Writ Proceeding Is Required As a Prerequisite To Filing A Damages Action

1. Since Runyon Never Litigated His Claims, The Principles of Judicial Exhaustion And Collateral Estoppel Do Not Apply

Misunderstanding the holding in *Miklosy* and the law regarding the principles of judicial exhaustion and collateral estoppel, and relying upon a case which this Court has now disapproved[18], the *Runyon* decision erroneously concludes that until review and reversal of CSU's adverse administrative decision is had by way of a writ of mandate, any damages action under section 8547.12(c) is barred. (Slip Op. 14-17.) In short, the Court of Appeal held that CSU's administrative decision is "binding" on the complaining employee,

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[18] The Court of Appeal decision relies on *California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal.App.4th 174, which this Court disapproved in *Arbuckle*. (*Arbuckle, supra*, 45 Cal.4th at 978, fn. 5.)

giving it collateral estoppel effect in any later civil action, including a damages action under section 8547.12(c), unless such decision is overturned in a mandate proceeding. (*Id.*) In doing this, the *Runyon* Court of Appeal improvidently elevated CSU's "findings to the same status as a final civil judgment rendered after a full hearing" – when such findings are clearly not entitled to such judicial deference. (*Cf. Arbuckle*, *supra*, 45 Cal.4th 972-978.) For the same reasons which this Court so eloquently articulated in *Arbuckle*, the Court of Appeal's conclusion cannot stand.

While it is true that as a general principle judicial economy is served by giving collateral estoppel effect to appropriate administrative findings and to require employees to challenge administrative decisions by writ of mandamus, this is not a case where there was no opportunity to litigate the claims at the administrative level. (See *U.S. v. Utah Construction and Mining Co.* (1966) 384 U.S. 394, 422 [A final decision in an administrative proceeding cannot have collateral estoppel effect unless the procedure offered "an adequate opportunity to litigate"]; *Pacific Lumber Co. v. State Water Resources Control Bd., supra,* 37 Cal.4th at 944 [collateral estoppel was not created when the parties were not given the opportunity to call and cross-examine witnesses during the administrative proceeding].)

The doctrine of judicial exhaustion is premised on the concept of collateral estoppel:

> "The underpinnings of this rule of exhaustion of judicial remedies...are buried in the doctrine of res judicata or that portion of it known as collateral estoppel...." (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 241.)

Thus, "while administrative exhaustion is a fundamental rule of procedure," "[j]udicial exhaustion is a species of res judicata." (*Ibid.*) Under the doctrine of judicial exhaustion, "collateral estoppel bars the relitigating of issues which were previously resolved in an administrative hearing by an agency acting in a judicial capacity." (*Id.* at p. 242.)[19/]

This Court has previously explained that "unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." (*Johnson*, *supra*, 24 Cal.4th 61, 69-70.) Pursuing a mandate action is referred to in this context as "[e]xhaustion of judicial remedies" and "is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality

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[19/] *See, Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70 where this Court explains that exhaustion of administrative remedies is merely a "jurisdictional prerequisite" to a later civil action, whereas exhaustion of judicial remedies gives binding effect to an administrative agency's quasi-judicial decision in which claims were actually litigated.

due to the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action.'" (*Id.* at p. 70, citations omitted; italics omitted.)

However, not all administrative proceedings give rise to collateral estoppel. To be binding in a later court action, the administrative proceeding must possess "the requisite judicial character." (*Arbuckle*, *supra*, 45 Cal.4th at 976.) "Collateral estoppel may be applied to decisions made by administrative agencies '[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" (*People v. Sims* (1982) 32 Cal.3d 468, 479 (superceded by statute on), quoting *United States v. Utah Constr. Co.*, *supra,* 384 U.S. 394, 422, italics omitted.)

Significantly, when the proceeding lacks a quasi-judicial quality, collateral estoppel does not arise. (See, *e.g.*, *Westlake*, *supra*, 17 Cal.3d 465, 478.) Thus, as this Court has explained:

> "For an administrative decision to have collateral estoppel effect, it and its prior proceedings must possess a judicial character...Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision." (*Pacific Lumber, supra,* 37 Cal.4th at 944 [citations omitted].)

Accord, Payne v. Anaheim Memorial Medical Center, Inc. (2005) 130 Cal.App.4th 729, 740-741 [concluding that an internal grievance process which merely offers the right to complain but not to present evidence and testimony, or to challenge adverse witnesses, "simply does not constitute an adequate 'remedy'" worthy of judicial deference]; *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342-343 [finding that an administrative procedure which "provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate..."].)

Here, CSU's procedure did not have a judicial character necessary to have collateral estoppel effect. Runyon was never given the opportunity to litigate his claims at the administrative level. (2APP0385; 3APP0499-501, 0706-08, 0713-16; 5APP1096-98, 1100, 1114-19, 1121, 1126-28, 1131-41.) Among other things, no hearing was held, testimony from all of the witnesses was not taken under oath, the parties were not able to subpoena, call, examine, or cross-examine witnesses, and there was no record of the proceedings. (Slip Op. 5; RT 10-13, 23-29, 26; 3APP0713, 0739; 4APP0896; 5APP1096-98, 1101-02, 1116-17.) The entire investigation took place in some sort of "Star Chamber" which denied Runyon access or knowledge as to what issues and evidence were being offered by third party witnesses, much less whether or not

such issues and evidence are really being investigated by CSU. (3APP0713-14; 4APP0867-97; 5APP097-98, 1117.) There was no sufficient documentation of which witnesses were interviewed by CSU's investigator and what those witnesses actually said, or exactly what documentary evidence was gathered or considered. (*Id.*) In fact, it was only through discovery in *this* damages action that Runyon learned the entire CSU process was corrupt, from the appointment of an admittedly biased investigator to the exculpatory Final Determination based on the investigator's Summary which fraudulently concealed key evidence of CSU's retaliation against Runyon. (2APP0385-89; 4APP0499-501, 0713-16; 5APP1096-98, 1100, 1114-19, 1121, 1126-27, 1131-41.)

Since Runyon never had an opportunity to litigate his claims at the administrative level, CSU's decision is unworthy of judicial deference. (2APP0385-89; 3APP0499-501, 0706-08, 0713-16; 5APP1096-98, 1100, 1114-19, 1121, 1126-28, 1131-41.) Accordingly, since CSU's findings are not binding, review by writ of mandate cannot be required to overturn CSU's decision. Yet, *Runyon* and *Ohton* unfairly bind CSU employees to CSU's decisions – where there was no opportunity for them to litigate there claims at the administrative level or ever.

In short, the decisions in *Runyon* and *Ohton* allow CSU to have it both ways: denying whistleblowers any chance to "actually litigate" their claims during the internal grievance process, and then turning around and claiming that whistleblowers are estopped from seeking subsequent civil remedies under the WPA because their complaints were already litigated and decided by CSU. This is exactly the same type of "shield and sword" scenario prohibited by *Wellpoint, supra*, 59 Cal.App.4th at 126-29 (prohibiting reliance on an investigation where discovery was not permitted regarding its adequacy).

In the absence of the opportunity for a whistleblower to actually litigate his whistleblower claim, *res judicata* deference to CSU's investigation and determination of such claims is wholly unjustified. Since such decisions are unworthy of judicial deference, the rationale for requiring writ review of CSU's administrative decisions just does not exist. Accordingly, the Court of Appeal decision in *Runyon* must be reversed.

2. Government Code Section 8547.12(c) Specifically Permits a Damages Action After An Unfavorable CSU Decision Without First Obtaining Writ Review

Despite the significant differences in language and legislative history between section 8547.10(c) and 8547.12(c), the *Runyon* decision by the Court of Appeal has essentially taken this Court's decision in *Miklosy* – which limits

itself to treatment of section 8547.10(c) – to preclude all damages actions under section 8547.12(c) where writ review was not sought. (Slip Op. 15-17.)

Unlike Government Code section 8547.10(c), section 8547.12(c), provides for a direct action to court for damages at the conclusion of CSU's internal grievance process without first obtaining writ review. Specifically, section 8547.12(c) contains important language missing from section 8547.10(c), affording a CSU whistleblower employee the right to file a direct civil action if CSU has not *satisfactorily addressed* the claim within 18 months. On its face, there is only one prerequisite to the filing of a civil action for damages: *i.e.*, that the injured employee first file a complaint with CSU which CSU has failed to "satisfactorily address" within 18 months. (§ 8547.12(c).) Nothing further is required from the employee prior to filing a civil action for damages because section 8547.12(c) *itself* says so.

Nowhere in section 8547.12(c) does it state that an employee must seek writ review of CSU's decision before filing a damages action. (*Cf.*, *Arbuckle*, *supra,* 45 Cal.4th at 971.) Yet, the Court of Appeal read into the statutory scheme the additional requirement that the complaining employee prevail in writ proceeding in superior court to set aside CSU's adverse findings prior to filing a civil action for damages, and expressly rejected any notion that section 8547.12(c) had any direct right of action to file a damages action after

completing the administrative process. (Slip Op. 17, fn.9 ["...we necessarily reject...[that] a whistleblower dissatisfied with the result of the resolution of his or her retaliation claim has a direct right of action for damages as an *exception* to the general rule of requiring review of administrative decisions by writ of mandate.") By its treatment of section 8547.12(c), the Court of Appeal has essentially read out of the statute the qualifying language of section 8547.12(c) which *itself* creates the statutory exception to any requirement for writ review for claims brought under section 8547.12(c).

Statutory exceptions to requiring writ review of administrative decisions have been acknowledged and applied in a number of cases. (See *e.g.*, *Antebi v. Occidental College* (2006) 141 Cal.App.4th 1542, 1547 [statute upon which the claim was based provided an exception to the general rule of mandamus review because the language of the statute permitted a civil action in court]; *Lachman v. Cabrillo Pac. Univ.* (1981) 123 Cal.App.3d 941 [where statute provides for a cause of action in a court of law to one sustaining damage, statute indicates an intent that the right granted be adjudicated in a civil court]; see also, *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 ["Yet the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma (citations omitted)].")

Most recently, this Court made clear that writ review is not required in cases where a plaintiff is specifically authorized by statute to file a civil action *directly with the court*, notwithstanding the general rule requiring writ review of an adverse administrative decision. (*Arbuckle*, *supra*, 45 Cal.4th 975-76.):

> "[In section 8547.8(c),] the Legislature expressly authorized a damages action in superior court for whistleblower retaliation..., and in doing so it expressly acknowledged the existence of the parallel administrative remedy. It did not require that the board's findings be set aside by way of a mandate action; rather it gave as the only precondition to the damages action authorized in section 8547.8(c), that a complaint be filed with the board and that the board 'issue[ ], or fail[ ] to issue findings.' (Ibid.) The bareness of this statutory language suggests that the Legislature did not intend the State Personnel Board's findings to have preclusive effect against the complaining employee." (*Id.* at 976.)

This Court went on to explain that "where there is specific statutory language suggesting that adverse [administrative] findings" *not* be binding in a later damages action, that the principles of collateral estoppel with regard to such administrative proceedings simply do not apply. (45 Cal.4th 976-77, citing, *University of Tennessee v. Elliot* (1986) 478 U.S.788, 795-796 [certain statutory language in Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*) indicated Congress's intent that state administrative findings *not* be binding in title VII actions].)

Here, there is specific statutory authorization that the Legislature did not intend CSU's administrative proceedings to be binding in subsequent damages actions brought under section 8547.12. That statutory authorization is expressly found in the last sentence added to section 8547.12(c): "*Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.*" Thus, this Court's decision in *Arbuckle* and the U.S. Supreme Court's decision in *Elliot* [permitting damages actions after administrative decisions pursuant to statutory authorization] seem to be the more relevant precedent, rather than the cases upon which the Court of Appeal here relied, in deciding whether the principles of collateral estoppel barred Runyon's damages action. As this Court recently explained in *Arbuckle*, *supra*, 45 Cal.4th at 976, in discussing the limitations on administrative collateral estoppel,

> "[A] court may not give preclusive effect to the decision in a prior proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged." (*Pacific Lumber*, *supra*, 38 Cal.4th at p.945, quoting *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 326.)

In short, writ review is not required in cases where a plaintiff is specifically authorized by statute to file a civil action *directly with the court.*

Since Runyon's WPA claim was brought under section 8547.12(c), which itself provides for a direct action to court for damages at the conclusion of CSU's internal grievance process, judicial review by mandamus was simply not required. The Court of Appeal's decision concluding otherwise is erroneous.

D. Requiring Writ Review of CSU's Decision Would Deprive Whistleblowers Of The Procedural Safeguards, Evidentiary Burdens and Substantial Remedies Guaranteed By The WPA

Just as this Court stated in *Arbuckle* under the analogous section 8547.8, to bind a whistleblower to CSU's findings in a damages action under section 8547.12(c) "would unduly restrict that remedy" because it would be virtually impossible to ever overturn that administrative decision in a writ proceeding. (*Arbuckle*, *supra*, 45 Cal.4th at 977-78.)

As explained in *Arbuckle*, "[w]rit review under Code of Civil Procedure section 1094.5 is limited to the record compiled by the administrative agency, and the agency's findings of fact must be upheld if supported by 'substantial evidence.'" (*Id.* at 977.) "Writ review under Code of Civil Procedure section 1085 is even more deferential; the agency's findings must be upheld unless arbitrary, capricious, or entirely lacking evidentiary support." (*Id.*,[citing

Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 34-35, fn.2].)

Given the lack of any adequate evidentiary record and the burdens of proof stilted in favor of the administrative agency in any writ proceeding, *Arbuckle* perceptively recognized that "under either [sic] standard of review it would be very difficult for a complaining employee to have the board's adverse factual findings overturned," therefore leaving "*the employee without the benefit of the damages remedy* set forth in Government Code section 8547.8(c)" "in nearly every case." (*Ibid.;* emphasis added.) *Arbuckle* concluded, that in such cases the whistleblower employee's only remedy would be the documentary hearing before the State Personnel Board's executive officer and that,

> "Nothing in Government Code section 8547.8(c), suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed, and such a narrow interpretation of the damages remedy would hardly serve the Legislature's purpose of protecting the right of state employees 'to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.' (§ 8547.1)" (*Id.* at 977-78.)

By analogy, this Court's decision in *Schifando, supra*, 31 Cal.4th 1074, is also instructive. In that case, this Court examined whether public employees had to exhaust their employer's internal remedies and seek mandamus review

before asserting a claim under the Fair Employment and Housing Act (FEHA), Government Code section 12900, et seq. *Schifando* held that where a statutory scheme contains its own exhaustion prerequisite, a plaintiff is not required to file an internal grievance and then seek writ review before filing a civil lawsuit under FEHA.[20/] (*Id.* at 1085, 1092.) *Schifando* explained that because FEHA was enacted to give all employees the maximum opportunity to vindicate their civil rights against discrimination — in other words, to supplement other claims and remedies an employee may have — it would frustrate the intent of the Legislature to require public employees to first exhaust remedies which are not contained in FEHA's statutory scheme. (*Id.* at 1085-86.)

In reaching its decision, *Schifando* described the "procedural minefield" that would occur if a plaintiff were required to file an internal grievance and obtain writ review as a prerequisite to litigating a FEHA claim in court: A court reviewing a petition for writ of administrative mandamus following the

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[20/] *Schifando* allows a plaintiff to completely bypass the internal grievance process, but seems to suggest that an employee who "elects" to pursue a grievance may have to seek writ review. (31 Cal.4th at 1087.) The trial court attempted to distinguish *Schifando* on this basis. (6APP1341.) However, this narrow reading of *Schifando* misses the point and ignores the fact that Runyon did not "elect" to file a grievance. He was required by the WPA, section 8547.12, to do so as a prerequisite to the filing of a court action. Thus, unlike *Schifando*, *Runyon* had no choice but comply with CSU's administrative process. Since section 8547.12(c) expressly permits a direct damages action at the conclusion of the grievance process, Runyon, unlike the plaintiff in Schifando, had no obligation to seek writ review.

city's decision would give deference to the city's finding, noting that aggrieved employees would not have had the chance to develop their cases (through adequate discovery, presentation of evidence, and cross-examination, rights not guaranteed at the internal administrative level). (*Schifando, supra*, 31 Cal.4th at 1085-1087.) Of particular concern in *Schifando* was that the internal grievance procedure did not afford employees the same procedures, remedies and protections that are available under FEHA. (*Id.* at 1084-1086.) In other words, there was no neutral fact finder in the internal grievance process since the City was both the party accused of wrongdoing and the investigating agency. (*Id.*) The Court recognized that such administrative decision, to which deference is required to be given in a writ proceeding, would be borne out of a process that failed to provide adequate discovery, presentation of evidence, or cross-examination (since such rights are not guaranteed at the administrative level) – putting it at odds with FEHA's strong public policy to "*give employees the maximum opportunity to vindicate their civil rights.*" (*Id.* at 1085-87.)

The rationale of *Schifando* clearly applies here. Without a doubt, the FEHA and the WPA serve the same noble purpose, *i.e.*, to further the strong public policy to punish retaliation against whistleblowers.[21/] Like FEHA, the

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[21/] FEHA specifically prohibits retaliation. (See, *e.g.*, Government Code 12940(h).)

WPA was meant to supplement, and not to supplant the other rights and remedies afforded public employees, in order to give employees the maximum opportunity to vindicate their civil rights against retaliation.[22/] Like the FEHA, section 8547.12(c) of the WPA contains its own exhaustion prerequisite which requires a plaintiff to exhaust CSU's internal remedies before filing an damages action. Contrary to the *Runyon* decision, section 8547.12(c) contains no other exhaustion requirement, judicial or otherwise, before a damages action is authorized.

No other interpretation of the statute is justifiable. Indeed, if writ review of an adverse decision were required under section 8547.12(c), the procedural quagmire contemplated in *Schifando* would occur here, and "in nearly every case" "would leave the employee without the benefit of the damages remedy [available under the WPA]." (*Arbuckle, supra,* 45 Cal.4th at 977.) A process that requires a claimant to first prevail in a writ proceeding before filing a civil action *would* have the effect of supplanting WPA's procedural safeguards, evidentiary burdens and substantial remedies, since such grievance process lacks "the procedural guarantees and independent fact-finding of a superior court damages action" found in the WPA. (*Cf. Arbuckle*,

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[22/] Section 8547.12(f) states: "Nothing in this article shall be deemed to diminish the rights privileges, or remedies of any employee under any other federal or state law or under any employment contract..."

supra, 45 Cal.4th at 968; *Schifando*, *supra*, 31 Cal.4th at 1086, fn. 3.) In other words, as articulated in *Arbuckle,* requiring an employee suing under the WPA to first seek writ review, would virtually guarantee that no employee would ever be able to avail himself of the remedies afforded under section 8547.12(c) because the procedural advantages CSU has during the administrative process would make overturning its decision virtually impossible. (*Arbuckle, supra*, 45 Cal.4th at 977.)

Thus, under the *Runyon* decision, claimants who wish to appeal CSU's decision must seek writ review in order to avoid being bound by the factual finding made by CSU about itself, but have no ability to overturn those findings because CSU conveniently failed to include in its findings the evidence of its own retaliatory animus.[23/] Yet, this procedural labyrinth, in which aggrieved employees are incapable of ever prevailing, is apparently the mechanism countenanced by the Court of Appeal. (Slip Op. 14-17.) Clearly, the same common-sense logic used by this Court in *Arbuckle* applies here. The res judicata effect of such a failed writ would bar any claim in court under

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[23/] The most fundamental part of due process is the right to litigate claims before a neutral body, disinterested in the controversy. Because the Legislature recognized that whistleblower complaints might not receive fair treatment in CSU's "weak in-house grievance procedure," the language of section 8547.12(c) added the final sentence of subdivision (c), guaranteeing aggrieved employees the right to resort directly to the courts in the event CSU failed to "satisfactorily address" their claims.

section 8547.12(c), utterly depriving claimants of the statutory remedies and procedures the Legislature guaranteed under the WPA and "would produce sweeping consequences the Legislature could not have intended." (*Arbuckle, supra*, 45 Cal.4th at 978.)

VI.

CONCLUSION

For the foregoing reasons, this Court should reverse the *Runyon* Court of Appeal decision and disapprove *Ohton*.

DATED: April 29, 2009

Respectfully submitted,

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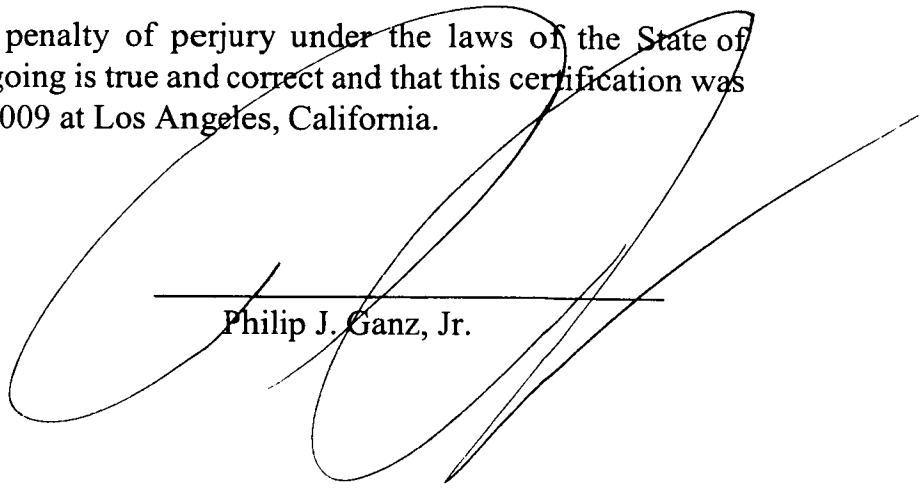
WORD CERTIFICATION AND RULE 8.520 DECLARATION

I, PHILIP J. GANZ, JR. certify that the foregoing Opening Brief On The Merits is less than 14,000 words based on our firm's computer's WordPerfect program.

I certify that the number of words in this Opening Brief On The Merits is 13,490 according to our firm's word processing program document summary.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this certification was executed on April 29, 2009 at Los Angeles, California.



Philip J. Ganz, Jr.

SLIP OP.

Filed 10/30/08 Runyon v. Bd. of Trustees, Cal. State Univ. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

L. RICHARD RUNYON, Plaintiff and Appellant, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY et al., Defendants and Respondents.	B195213 (Los Angeles County Super. Ct. No. BC340560)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed.

Ganz & Gorsline, Philip J. Ganz, Jr. and Laurie Susan Gorsline for Plaintiff and Appellant.

Goldman, Magdalin & Krikes and Robert W. Conti for Defendants and Respondents.

A tenured university professor claimed he was removed as chair of a department in retaliation for his whistleblower activities. The university investigated his complaint and found the professor's claim of retaliation without merit. The professor filed suit against the university and the dean of the department seeking damages for the alleged unlawful retaliation. The trial court entered summary judgment in favor of the university and dean, finding the professor's action for damages barred because he had failed to exhaust his judicial remedies by first seeking writ relief to overturn the administrative decision. We affirm.

BACKGROUND

Appellant, Richard L. Runyon, has been a professor at respondent California State University Long Beach (CSU) since 1968. In 1991 Runyon was elevated to the position of Chair of the Finance, Real Estate and Law Department of the College of Business Administration.

Respondent, Luis Ma Calingo, became the dean of the College of Business Administration in 2000. In the fall of 2000 Dean Calingo awarded merit increases to the College of Business Administration professors, including Runyon. At a December 2000 meeting of department chairs Runyon complained that Calingo's approval of the $500 merit increase to the chair of the search committee was an illegal payoff for selecting Calingo to be the new dean. Calingo and Runyon met after the meeting. According to Runyon, Calingo told him he could either resign his chair or Calingo would fire him. According to Calingo, Runyon told him he would rather resign than to accept the improper payoff. Calingo understood Runyon's comment to be a verbal resignation from the chair position. Calingo declared the chair position vacant on December 8, 2000. Runyon complained to Calingo's superiors who advised Calingo to rescind the termination and Calingo reinstated Runyon as chair in January 2001.

Runyon voiced numerous other complaints about Calingo beginning shortly after Calingo's arrival at CSU. Runyon believed many of Calingo's decisions or policies affecting the College of Business Administration were either wasteful or illegal. Runyon complained that:

(1) Calingo only spent between three to four days on campus. Calingo commuted to CSU from his home in Fresno and often left the campus on Thursday afternoon or early Friday.

(2) Calingo missed numerous CSU related events which had historically required the dean's presence.

(3) Calingo made frequent trips to Asia largely at CSU expense, trips which did not have an apparent benefit to CSU's College of Business Administration.

(4) Calingo failed to intervene, investigate or punish a professor who got into altercations with personnel in the Finance Department.

(5) Calingo countermanded Runyon's order and permitted professors in Runyon's department to attend a conference in Mexico, despite a budget shortfall, and despite the questionable relevance of the conference to the professors' discipline.

(6) Calingo permitted the College of Business Administration to incur an operating deficit of $400,000 in the 2003/2004 academic year, allegedly because of Calingo's mismanagement.

(7) Calingo refused to reimburse Runyon's department from College of Business Administration funds for the salaries of two professors who requested sick leave for catastrophic health problems.

(8) Calingo offered a new hire a tenured full professor position over the negative vote of the department's tenured faculty.

(9) Calingo undermined him as chair by refusing to accept his recommendation to add a basic finance class to the MBA program.

Four professors in Runyon's department began complaining openly about Runyon's management and leadership skills, in part because Runyon's directives conflicted with Calingo's position. In March 2004, Runyon sent Calingo a series of

memoranda, with copies to the provost, senior vice president and others, detailing his complaints about Calingo and Calingo's management of the College of Business Administration. On April 7, 2004 Runyon met with the provost and vice president and they apparently warned him further public criticism of Calingo would not be tolerated.

In 2003, Calingo had reappointed Runyon to another three-year term as chair of the Finance, Real Estate and Law Department. In his letter of appointment, Calingo charged Runyon with the task of developing curriculum changes, stating, "As regards your leadership of the Department, I expect you to lead the Department in designing curriculum improvements that will result in changes in the Finance Option's curriculum requirements (including the design of new courses, as appropriate), thereby ensuring that the Finance program is attuned to the needs of the marketplace. I would like to see these processes commence no later than the Fall 2003 semester so that curriculum change proposals could be submitted to the Undergraduate Curriculum Committee by the end of Spring 2004."

At Runyon's annual performance review on April 26, 2004 Runyon met with Calingo to review his proposed curriculum, and the adequacy of the processes Runyon had employed to vet his proposed curriculum. Calingo expressed dissatisfaction with Runyon's performance and asked him to step down as chair of the Finance, Real Estate and Law Department, stating he had lost confidence in Runyon's ability to chair the department. Calingo's stated reason was that Runyon had failed to meet the conditions of his letter of appointment to the chair position. Runyon refused to resign his chair voluntarily and Calingo terminated his chairmanship.

Runyon believed Calingo's stated reason of inadequate curriculum review was merely a pretext for the dean's actual motive of retaliation for his earlier whistleblower activities. Runyon filed a whistleblower complaint under Executive Order No. 822, CSU's internal procedures for addressing whistleblower claims, alleging CSU and Calingo had retaliated against him for his whistleblower activities in violation of the California Whistleblower Protection Act. (Gov. Code, § 8547 et seq., further unmarked statutory references are to the Government Code.)

Executive Order No. 822 establishes a procedure for responding to whistleblower complaints by CSU employees who allege they have been retaliated against for having engaged in protected disclosures under the California Whistleblower Protection Act. Executive Order No. 822 implements section 8547.12 of the California Whistleblower Protection Act (pertaining exclusively to employees of CSU) and its purpose "is to provide a timely and effective procedure for the resolution of such complaints."[1] No hearing is required or provided under Executive Order No. 822.

Runyon's whistleblower complaint detailed his concerns about Calingo's and CSU's "improper governmental activities,"[2] summarized above. Runyon's complaint

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[1] "Under [Executive Order No.] 822, the vice chancellor of human resources is designated to receive and make decisions regarding written complaints of retaliation. At the vice chancellor's discretion, the investigation may be conducted by an external investigator. The complainant is obligated to cooperate with the investigator, and in an initial interview with the investigator has the opportunity to present a list of witnesses and documentary evidence in support of the complaint. The investigator must interview the complainant, review any supporting documentation supplied by the complainant and any response to the complaint supplied by the campus or employees alleged to have taken retaliatory action, interview witnesses, and take any other action the investigator deems appropriate. The investigation must be completed no later than 60 days prior to the expiration of 18 months from the date the complaint was filed. 'The vice chancellor for human resources shall transmit the summary and conclusion of the investigation to the complainant within ten (10) days of the vice chancellor's receipt of them from the investigator(s). The complainant may file a written response to the summary and conclusion with the vice chancellor within fourteen (14) days of receipt of the summary and conclusion.' Thereafter, 'The vice chancellor of human resources shall respond to the complainant with a letter of decision within fourteen (14) days of receipt of the complainant's written response or the expiration of the time limits for the complainant to file a response. . . . This letter of decision will constitute the final CSU decision regarding the complaint, pursuant to [] section 8547.12(c).'" (*Ohton v. Board of Trustees of the California State University* (2007) 148 Cal.App.4th 749, 754, fn. 3.)

[2] Section 8547.2 defines "improper governmental activity" very broadly and includes theft of government property, willful omission to perform one's duty, and economically wasteful or inefficient activities. (§ 8547.2, subd. (b).)

alleged he had been retaliated against for having made these "protected disclosures"[3] and specified three actions which he claimed had been retaliatory: (1) Calingo's removal of him as chair of the Finance, Real Estate and Law Department without first asking the department faculty for a vote of confidence; (2) Calingo's denial of his request to transfer $50,000 to the Student Managed Investment Fund Account; and (3) Calingo's refusal to let Runyon keep his old telephone number after he was no longer chair of the department.

CSU began an investigation of Runyon's complaint in accordance with Executive Order No. 822. Ellen Bui, CSU's Manager of Human Resources, conducted the investigation. Over a four-month period, Bui interviewed 13 witnesses, interviewed Runyon three times, corresponded with Runyon and his counsel, and reviewed reports. She finalized her investigation by preparing a 19-page report which concluded that while Runyon suffered an adverse employment action by being removed as chair of the department, the decision to remove him as chair was based on a legitimate business decision unrelated to any retaliatory motive.

Runyon filed a 14-page response to the report and summary of the investigation. Thereafter, CSU issued a timely letter of determination. In this letter, the vice chancellor reviewed the investigator's findings, Runyon's response, and drew her own conclusions. The vice chancellor ultimately found that Runyon had made a protected disclosure when he reported to the provost his concerns about the dean's attendance and that he had suffered an adverse employment action when Calingo removed him as chair. However, the vice chancellor agreed with the human resource manager that the investigation showed "there was no causal connection between [Runyon's] protected disclosure and the dean's decision to remove [him] from the chair position." Accordingly, CSU denied Runyon's complaint.

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[3] A "protected disclosure" "means any good faith communication that discloses . . . information that may evidence (1) an improper governmental activity . . . ." (§ 8547.2, subd. (d).)

Runyon filed an action for damages against CSU and Calingo claiming unlawful retaliation under the California Whistleblower Act. (§ 8547.12.)[4]

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[4] Section 8547.12 applies exclusively to CSU employees and provides:

"(a) A California State University employee, including an officer or faculty member, or applicant for employment may file a written complaint with his or her supervisor or manager, or with any other university officer designated for that purpose by the trustees, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having made a protected disclosure, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint shall be filed within 12 months of the most recent act of reprisal complained about.

"(b) Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a California State University employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for up to a period of one year. Any university employee, including an officer or faculty member, who intentionally engages in that conduct shall also be subject to discipline by the university.

"(c) In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the trustees. Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.

"(d) This section is not intended to prevent a manager or supervisor from taking, directing others to take, recommending, or approving any personnel action, or from taking or failing to take a personnel action with respect to any university employee, including an officer or faculty member, or applicant for employment if the manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure.

"(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of the evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or

CSU and Calingo filed a motion for summary judgment. They argued Runyon's action was barred because (1) a precondition to filing a valid suit for damages was reversal of the adverse quasi-judicial decision through administrative mandamus review under Code of Civil Procedure section 1094.5,[5] and (2) Runyon's evidence he was retaliated against because of his whistleblower activities was insufficient as a matter of law.

Runyon filed opposition. He argued there were triable issues of material fact whether his removal as chair was based on retaliatory motives. He also argued he was not required to seek relief through administrative mandamus because (1) section 8547.12,

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prospective employee, the burden of proof shall be on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, manager, or appointing power fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

"(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or state law or under any employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action."

Runyon's complaint also alleged a violation of Labor Code section 1102.5, another whistleblower statute designed to protect employees in private industry.

[5] This argument put Runyon on notice one of the grounds for CSU's summary judgment motion was that Runyon's failure to first seek and obtain a writ of mandate reversing CSU's final determination barred his action for damages. CSU's failure to identify the applicable writ in this factual context did not negate the fact Runyon received notice that one of CSU's arguments was that his failure to exhaust any judicial remedy before filing suit provided it a complete defense to the action. (Code Civ. Proc., § 437c, subd. (a); compare *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545 [only the grounds specified in the notice of motion may be considered by the trial court]; with *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125 [the purpose of stating the grounds for relief in a notice of motion is to cause the moving party to "'sufficiently define the issues for the information and attention of the adverse party and the court'"].)

subdivision (c) permitted a CSU employee to file suit directly if the employee believed CSU had not "satisfactorily addressed" the complaint, (2) administrative mandate under Code of Civil Procedure section 1094.5 was inapplicable because Executive Order No. 822 does not require a hearing,[6] and (3) a writ proceeding would have been futile because of the deference usually accorded administrative decisions and because of the lack of an adequate record for the court to review. Runyon pointed out it was not until he conducted discovery in his civil action that CSU provided Runyon the investigator's raw notes—the evidence he needed to establish his claims.

In their response, CSU and Calingo argued that even if an evidentiary hearing was not required or provided, Runyon was nevertheless required to exhaust his judicial remedies before filing suit by seeking instead an ordinary writ of mandate under Code of Civil Procedure section 1085.

After hearing extensive argument on the motion the trial court ruled an action for damages under section 8547.12, subdivision (c) was precluded if CSU conducted an investigation in good faith and rendered a timely decision, unless the employee first sought judicial review of CSU's final decision by way of a writ of mandate and succeeded in having the decision reversed. Because Runyon did not pursue any type of writ relief the court concluded his action for damages was barred. The court also rejected Runyon's challenges to the writ review requirement claiming that (1) he was exempt from the writ requirement because his complaint was not "satisfactorily addressed" by CSU, (2) CSU's procedures for reviewing complaints was inadequate, and (3) pursuing writ relief was futile with an inadequately developed evidentiary record. The court entered judgment in favor of CSU and Calingo and Runyon appealed.

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[6] Code of Civil Procedure section 1094.5 pertains to a writ "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, . . . " (Code Civ. Proc., § 1094.5, subd. (a).)

DISCUSSION

Standard of Review

A motion for summary judgment must be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

"'"A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . ."'" (*Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1132.)

We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; Code Civ. Proc., § 437c, subd. (c).)

"Satisfactorily Addressed"

The California Whistleblower Protection Act (§ 8547 et seq.) prohibits retaliation against state employees who "report waste, fraud, abuse of authority, violation of law, or threat to public health . . . ." (§ 8547.1.) The Act authorizes "an action for damages" to redress acts of retaliation. (§§ 8547.8, subd. (c) [state employees], 8547.10, subd. (c) [University of California employees], 8547.12, subd. (c) [California State University employees].) These three statutes have similar purposes but have somewhat different criteria for pursuing an action for damages.

For state employees, section 8547.8, subdivision (c) specifies, "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."[7]

For University of California employees, section 8547.10, subdivision (c) states, "any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer . . . , and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents." The Supreme Court recently interpreted this statutory language to "mean[] what it says," namely, "a civil action for damages against the University is available only when the plaintiff employee has first filed a complaint with the University and the University has failed to reach a timely decision on the complaint." (*Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876, 898 (*Miklosy*).) The *Miklosy* court acknowledged a damages action in state court might afford a more favorable forum, greater procedural protections, and better further the purposes of the whistleblower act, but concluded the "appropriateness of granting these procedural protections to University whistleblowers is a matter of policy that is not for this court to determine." (*Miklosy, supra*, 44 Cal.4th at p. 890.)

In the case of retaliation against a CSU employee, the preconditions for filing a civil action are similar, but with one notable exception. Section 8547.12, subdivision (c) provides "any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer . . . , and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the trustees. *Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.*" (Italics added.) This last sentence does not appear in the

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[7] Whether a prerequisite for an action for damages is that the state employee must receive a favorable decision from the board, or must first seek judicial review of an unfavorable decision from the board, are issues currently under review by the Supreme Court. (See, e.g., *Board of Chiropractic Examiners v. Superior Court,* review granted April 9, 2007, S151705.)

other provisions. In noting the difference, the *Miklosy* Court opined that "[t]he addition of the last sentence, and specifically the modifier 'satisfactorily,' rais[ed] the possibility that a court might find the state university's decision unsatisfactory (though timely) and on that basis permit a damages action. (*Ohton v. Board of Trustees of the California State University* (2007) 148 Cal.App.4th 749, 765.)" (*Miklosy, supra*, 44 Cal.4th at p. 886.) However, the *Miklosy* Court expressed no view "on the substantive content, if any, of the term 'satisfactorily' in section 8547.12, subdivision (c)." (*Ibid.*)

Runyon contends the phrase "satisfactorily addressed" suggests the Legislature believed that merely addressing a complaint within 18 months was not enough, but that it also must be "addressed to the satisfaction of the employee." Thus, Runyon asserts this clause authorized him to bring his damages action because, from his perspective, CSU did not "satisfactorily address[]" his complaint. (§ 8547.12, subd. (c).) CSU, in contrast, argues the correct interpretation of the phrase "satisfactorily addressed" means CSU rendered a final decision within the prescribed 18 months.

The Court of Appeal addressed these very arguments in *Ohton v. Board of Trustees of the California State University, supra,* 148 Cal.App.4th 749 (*Ohton*). In *Ohton,* a football coach contended he was retaliated against after he reported violations of the National Collegiate Athletic Association rules and other improprieties during an official CSU audit. (*Id.* at pp. 754-755.) He filed a complaint with CSU under Executive Order No. 822 and CSU hired outside counsel to investigate his complaint, which was denied. (*Id.* at pp. 756-761.) Ohton filed a civil action for damages against CSU under section 8547.12, subdivision (c). Like Runyon, he did not challenge CSU's final determination by filing a petition for writ of mandate. (*Id.* at p. 762.) CSU moved for summary judgment, claiming (1) it had timely addressed Ohton's complaint and (2) Ohton's action was barred by his failure to exhaust his judicial and administrative remedies. (*Ibid.*) The trial court granted the motion on the ground CSU had timely addressed Ohton's complaint. (*Id.* at p. 763.)

On appeal, CSU argued Ohton's action for damages was barred because it had timely addressed his complaint by reaching a final decision within the statutorily required 18 months. In *Ohton*, as here, CSU asserted the term "satisfactorily addressed" in section 8547.12, subdivision (c) should be interpreted as simply requiring that the complaint be addressed through its internal procedures under Executive Order No. 822 and a decision reached within 18 months. The court rejected this interpretation, reasoning it would read the words "satisfactorily addressed" out of the statute. (*Ohton, supra*, 148 Cal.App.4th at p. 764.)

The court also rejected Ohton's argument, identical to Runyon's in this case, that the phrase "satisfactorily addressed" meant "to the subjective satisfaction of the whistleblower." "Ohton's subjective interpretation of 'satisfactorily addressed' can be rejected out of hand. Such an approach would render the statutory and administrative proceedings mandated by section 8547.12 and EO 822 nugatory; a complainant need only assert that he is unhappy with the decision in order to overturn it. We find no indication that the Legislature intended such a farfetched standard." (*Ohton, supra*, 148 Cal.App.4th at p. 765.) The court concluded Ohton's alternative "objective good faith" interpretation of the phrase "satisfactorily addressed" was "closer to the mark." The words "satisfactorily addressed" "imput[ed] a clear obligation on CSU to act in objective good faith in fulfilling its duties under the [California Whistleblower Protection Act]." (*Ibid.*)

We find the *Ohton* court's analysis of the proper interpretation of "satisfactorily addressed" in section 8547.12, subdivision (c) persuasive and adopt it as our own. "Satisfactorily addressed" has to mean more than simply "timely rendered," as CSU argues, or the phrase would be eliminated from the statute. At minimum, the phrase must mean a thorough investigation of whistleblower claims of retaliation, conducted in good faith, consistent with the spirit and purpose of the California Whistleblower Protection Act.

We also reject the subjective interpretation of "satisfactorily addressed" that Runyon urges. His interpretation would provide no standard for determining when filing an action for damages would be appropriate. We do not believe the Legislature would have included these words if they lacked any substance and their meaning depended on the particular whistleblower's view of the outcome of the administrative proceedings. Accordingly, as in *Ohton*, we reject Runyon's claim "satisfactorily addressed" in section 8547.12, subdivision (c) means a whistleblower is entitled to file an action for damages whenever the outcome of the administrative proceedings is not to the whistleblower's satisfaction.

Exhaustion of Judicial Remedies

Runyon contends he was entitled to proceed directly to an action for damages because CSU's internal proceeding was a sham, it failed to provide him with minimal due process, and as such, failed to "satisfactorily address[]" his complaint of retaliation for his whistleblower activities. Runyon's assertion is not supported by existing authority.

Notably, the whistleblower in *Ohton* made the same arguments Runyon makes in this court. The *Ohton* court rejected these arguments and concluded review and reversal of an adverse decision by writ of mandate was a precondition for filing a suit for damages under section 8547.12, subdivision (c). The *Ohton* court explained, "We reject Ohton's contention that he was not required to challenge the CSU proceeding and final decision by filing a petition for writ of mandate. There is no indication from the statute or its legislative history that an exception to the requirement for a writ of mandate was contemplated when section 8547.12 was enacted. CSU correctly notes 'courts should not presume the Legislature in enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication.' [Citation.] Abandonment of the mandamus requirement is not implied by the granting of a civil remedy because the statute requires the complainant to establish that CSU has not 'satisfactorily addressed' his complaint as a condition precedent to sue for damages." (*Ohton, supra,* 148 Cal.App.4th at p. 767.)

The conclusion a prerequisite for filing a suit for damages under section 8547.12, subdivision (c) is review and reversal of an adverse administrative decision by securing a writ of mandate is reinforced by numerous decisions in analogous situations. (See, e.g., *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 71 [when employees have availed themselves of the administrative remedies a statute affords, and have received an adverse quasi-judicial finding, that finding is binding on subsequent discrimination claims under the FEHA unless set aside through a timely mandamus petition]; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 ["so long as such a quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the [defendants'] action. . . . Accordingly, we conclude that plaintiff must first succeed in overturning the quasi-judicial action before pursuing her tort claim against defendants"]; *California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal.App.4th 174, 185 ["If the Legislature intends to allow whistleblowers to abort the administrative proceedings by filing a civil action without first overturning adverse findings through a writ of mandate, it will have to make its intentions explicit"]; *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1724 ["Important public policy interests are served by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions"]; *McGill v. Regents of the University of California* (1996) 44 Cal.App.4th 1776, 1785 ["Judicial review of most public agency decisions is obtained by a proceeding for a writ of ordinary or administrative mandate"]; *Bunnett v. Regents of the University of California* (1995) 35 Cal.App.4th 843, 848 ["The proper method of obtaining judicial review of most public agency decisions is by instituting a proceeding for a writ of mandate"].)

Any doubt whether Runyon was required to secure a ruling in a writ proceeding that CSU had not "satisfactorily addressed" his complaint as a precondition to filing his action for damages has been dispelled by the Supreme Court in *Miklosy*. In *Miklosy*, as noted, the Supreme Court determined a damages action was precluded when the University of California timely decided a whistleblower retaliation complaint in its favor. In so holding, the court pointed out even this narrow construction of the statute "did not

leave the University's decision completely unreviewable [because] an action for a writ of mandate provides limited review . . . ." (*Miklosy, supra*, 44 Cal.4th at p. 890.) The concurring opinion in *Miklosy* similarly observed that review by mandate would be available to reverse adverse determinations of whistleblower retaliation claims. The concurring opinion commented, "[b]ecause the University's process for resolving whistleblower retaliation complaints does not include the right to an evidentiary hearing before a neutral hearing officer, substantial-evidence review by petition for writ of administrative mandate is not available. (See Code Civ. Proc., § 1094.5.) On petition for ordinary mandate (*id.*, § 1085), the agency decision is reviewed on the much laxer and more limited arbitrary-and-capricious standard (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-35, fn. 2; *Valnes v. Santa Monica Rent Control Bd.* (1990) 221 Cal.App.3d 1116, 1119), effectively insulating University decisions so long as they are timely made under regular procedures and are not facially irrational." (*Miklosy, supra*, 44 Cal.4th. at p. 904, fn. 2, conc. opn. of Werdegar.)

More importantly to this case, the *Miklosy* Court stated that a *court* might find that CSU had not "satisfactorily addressed" a whistleblower's complaint and *permit* a damages action on that basis. (*Miklosy, supra*, 44 Cal.4th at p. 886 ["the modifier 'satisfactorily,' raises the possibility that a court might find the state university's decision unsatisfactory (though timely) and on that basis permit a damages action"].)[8] These comments from the *Miklosy* court reinforce the view a prerequisite for pursuing an action for damages under section 8547.12, subdivision (c) is review and reversal of an adverse administrative decision through a proceeding for writ of mandate.

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[8] A whistleblower's complaint might not be "satisfactorily addressed" if, in a given instance, CSU's "mechanism for fairly evaluating whistleblower retaliation complaints" was not viable, or if CSU's "consideration of a complaint [was so] perfunctory or arbitrary as to violate the due process guarantee of the state or federal Constitutions." (*Miklosy, supra*, 44 Cal.4th at p. 890, fn. 4.)

Throughout these proceedings Runyon has steadfastly asserted he was entitled to bring an action for damages because his complaint was not "satisfactorily addressed" and thus writ review of the adverse decision was not required,[9] or would have been futile because of the absence of a developed evidentiary record, and the extreme deference trial courts usually afford administrative decisions in mandamus proceedings. These shortcomings might well describe ordinary mandate review. However, to excuse the requirement of exhausting judicial remedies by first obtaining a writ of mandate as a prerequisite to filing an action for damages would run counter to a substantial body of law precluding an action for damages unless the challenged adverse administrative decision is first overturned in a mandate proceeding. In this case, we conclude Runyon's failure to successfully establish through a writ proceeding that his claim had not been "satisfactorily addressed" operated as a bar to his action for damages. (*Ohton, supra*, 148 Cal.App.4th at p. 769.) CSU was thus entitled to judgment as a matter of law and the trial court did not err in granting summary judgment in its favor.

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[9] Because we reject Runyon's subjective interpretation of the phrase "satisfactorily addressed," we necessarily reject his claim this language means a whistleblower dissatisfied with the result of the resolution of his or her retaliation claim has a direct right of action for damages as an *exception* to the general rule of requiring review of administrative decisions by writ of mandate. (Compare, *Antebi v. Occidental College* (2006) 141 Cal.App.4th 1542, 1547 [Education Code section 94367 authorizes a direct action for injunctive or declaratory relief to prevent enforcement of any rule which subjects a student to disciplinary sanctions based solely on the student's exercise of First Amendment rights]; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1079-1080, 1085 [it would frustrate the Legislature's intent to fight workplace discrimination to require an employee to exhaust the city charter's internal administrative remedy, in addition to receipt of a FEHA right to sue letter, before filing suit under FEHA].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

HASTINGS, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OFFICE OF CHILD DEVELOPMENT AND EDUCATION

Type of Analysis: **Enrolled Bill Report**

Bill Number: SB 2097 **Author:** Hayden

Date Amended: 1994 **Sponsor:**

Subject: CSU: improper governmental activities

Summary: This bill would establish a grievance procedure for employees of the CSU to use when the feel they have been retaliated against for disclosing "improper governmental activities."

Recommendation: I recommend that you SIGN SB 2097.

Last year, AB 787 (Campbell), a similar bill, was vetoed on the grounds that it would inappropriately permit non-civil service CSU employees to appeal to the civil services appeal board, the State Personnel Board. In his veto message, the Governor suggested that a more effective solution would be to give CSU the same authority for "whistleblower" protection as is provided to UC.

This bill addresses the Governor's veto message; therefore, it would be appropriate to sign it.

Contents of the Bill: Current law provides for the reporting of improper governmental activity. For executive branch and UC employees, current law also provides a process through which these employees can file complaints when they believe they have been retaliated against because they reported an improper activity. The State Personnel Board administers this reporting and review process for state employees of the executive branch.

This bill establishes a grievance procedure for an employee of CSU when he or she alleges retaliation for disclosing improper governmental activities. The employee

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RECOMMENDATION: SIGN

DATE: 9-12-94

MAUREEN DIMARCO
Secretary of Child Development and Education

may file a compliant with his or her supervisor or manager, or with any other university office designated for that purpose by the trustees.

The complaint must be filed within 12 months of the most recent act of reprisal complained about. Any person who intentionally engages in an act of reprisal shall be subject to discipline by the University, and subject to a fine of up to $10,000 and imprisonment in the county jail for up to one year.

The person who engages in reprisal shall also be liable for damages in an action brought by the injured party. Punitive damages may be awarded by the court when the acts of the offending party are proven to be malicious. However, action for damages would not be available to the injured party unless the injured party has first filed a complaint with the univeristy and the univeristy has failed to reach a decision reagarding the compliant within 18 months.

Fiscal Impact: None.

Support: No letters on file.

Neutral: California State University
Department of Finance

Oppose: No letiers on file.

Voting Record: **Senate Floor: 30-0** **Assembly Floor: 49-27**

Republican "No" votes on the Assembly floor reflect the view that this bill won't protect whistleblowers, that it is a "weak" in-house grievance procedure, and it doesn't protect against retaliation.

PROOF OF SERVICE VIA MAIL

I am employed in the County of Los Angeles, am over the age of 18 and not a party to the within action. My business address is 11620 Wilshire Blvd., Suite 340, Los Angeles, CA 90025.

On April 29, 2009, I served the foregoing **OPENING BRIEF ON THE MERITS** by placing true copies thereof enclosed in sealed envelopes and addressed as follows:

SEE ATTACHED SERVICE LIST

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 29, 2009 at Los Angeles, California.

Rebecca Kounz

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