Case No. S168950

SUPREME COURT
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IN THE

SUPREME COURT OF CALIFORNIA

SUPREME COURT COPY

L. RICHARD RUNYON,

Plaintiff & Appellants

vs.

CALIFORNIA STATE UNIVERSITY LONG BEACH,
a State University AND DEAN LUIS MA CALINGO,

Defendant. & Respondants

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

PETITION FOR REVIEW

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I.

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?[1/]

[1/] Related issues are pending in *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)*, S15170 and *Brand v. Regents of the University of California*, S162019.

II.

WHY REVIEW SHOULD BE GRANTED

This case involves Government Code 8547.12(c). As such, this case presents the perfect counterpoint to *Miklosky v Regents of the University of California* (2008) 44 Cal. 4th 876 and the two cases currently pending before this court, *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)*, S15170 and *Brand v. Regents of the University of California*, S162019.

Miklosy explained that the Whistleblower Protection Act (WPA) distinguished between three groups of public employees. *Miklosy* addressed a first group, determining when a civil action for damages was available to University of California employees under Government Code section 8547.10(c). *Brand* also involves Section 8547.10(c) and whether the University of California's administrative decision on an employee's 8547.10(c) complaint is entitled to collateral estoppel effect, and even if not entitled to collateral estoppel effect, must the employee nonetheless exhaust judicial remedies.

State Board of Chiropractic Examiners v. Superior Court (Arbuckle) will address a second group of employees, *i.e.* state employees suing under Government Code section 8547.8(c) after filing a complaint with the State

Personnel Board. *Arbuckle* will presumably specify when a civil action for damages is available to state employees under Government Code section 8547.10(c) and whether findings issued by the State Personnel Board have collateral estoppel effect.

This case presents the unique opportunity for the Court to address the <u>third</u> group of employees, *i.e.*, California State University employees which are governed under Government Code section 8547.12(c) – and the last sentence of section 8547.12(c) containing the phase *"satisfactorily addressed*" which this Court did not address in *Miklosy.*

By its decisions in *Miklosy*, *Brand*, *Arbuckle* and *Runyon*, this Court can provide comprehensive treatment of the WPA such as will prevent lower courts from misapplication of the law, as occurred in *Runyon*. While *Miklosy* seemed to suggest that the unique language of section 8547.8(c) and 8547.10(c) yields different rights and remedies for different types of state employees, it is imperative for this Court to specifically determine *what* those rights and remedies *are* for California State University employees under section 8547.12(c).

As is evident from the Court of Appeal opinion, a copy of which is attached as Exhibit A to this Petition, the decision in *Runyon* presents the harbinger of things to come if this Court does not grant review in this case.

Even though *Miklosy* clearly stated that it was <u>not</u> deciding what was meant by 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 pursing 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 treats section 8547.10(c) and section 8547.12(c) as if they were identical.

Countless other courts are going to do the same, reaching the identical conclusion that the Court of Appeal in *Runyon* did – failing 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 California State University employees from pursuing damages actions based upon an erroneous understanding of the holding in *Miklosy.*

This is particularly true since the only reported case addressing section 8547.12(c) is *Ohton v. Board of Trustees of the California State University* (2007) 148 Cal.App.4th 749, a case in which Supreme Court review was never requested. Indeed, the *Runyon* decision is an outgrowth

of *Ohton*. 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 adopted *Ohton*'s "objective good faith" interpretation of words "*satisfactorily addressed*," to 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*" (Slip Op. p. 13-14) but, like *Ohton*, fails to explain how any whistleblower could possibly know whether there was a thorough investigation conducted in good faith *without* first filing a civil action for damages such that discovery on those issues could be conducted.

In other words, 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] his 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 the CSU's process for resolving whistleblower complaints does not provide for discovery and does not include the right to an evidentiary hearing before a

neutral hearing officer, thus, precluding review by way of a petition for writ of administrative mandate. (C.C.P.§1094.5) Indeed, without writ review under section 1094.5, complainants are left with having to prove that CSU had not "*satisfactorily addressed*" [*i.e.*, did not do a thorough investigation in good faith] his complaint without any discovery under the "arbitrary and capricious" standard, effectively insulating the University's complaint procedure from attack so long as it was not facially irrational. (C.C.P.§1085; *Cf. Miklosy v. Regents of the University of California*, 44 Cal.4th at 905, fn. 2)

The *Runyon* decision erroneously concludes that until review and reversal of an adverse administrative decision is had by way of a writ of mandate, any damages action is barred. Again, relying on *Ohton*, the *Runyon* decision completely misapplies the law regarding the principles of collateral estoppel and exhaustion of judicial remedies in holding that California State University employees are required to first seek writ review of decisions regarding their whistleblower complaints even though the CSU 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 the CSU's internal process] and exhaustion of *judicial* remedies, in effect, giving all CSU

decisions collateral estoppel effect without first performing threshold analysis of whether such decisions are worthy of judicial deference and depriving whistleblowers like Runyon of due process. (*E.g.*, *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921)

Without a doubt, unless this Court acts now to clarify the law, countless other courts will do exactly what the Court of Appeal in *Runyon* did – adopt the flawed analysis in *Ohton* as to what section 8547.12(c)'s "*satisfactorily addressed*" language means and then conclude that CSU administrative decisions are binding on whistleblowers even though they never had an opportunity to litigate their claims. Such a result will defeat 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.

III.

BACKGROUND

L. RICHARD RUNYON ("Runyon") filed this action against CALIFORNIA STATE UNIVERSITY LONG BEACH ("the University" or "CSU") and the Dean of its College of Business Administration, LUIS MA CALINGO ("Calingo") (both collectively, referred to herein as

"Respondents"), to recover damages for, *inter alia*, illegal retaliation in violation of Government Code section 8547.12. (1APP0008-35.)[2]

Runyon is a tenured professor at CSU. He contends that he was removed as Chair of the Finance, Real Estate and Law Department of the College of Business Administration because of his complaints about Calingo's "improper governmental activities" [as that term is defined in Government Code §§8547.2(b) and 8547.12[3]]. (1APP0008-35; 2APP0474.)

As a result of his retaliatory removal as Chair, Runyon timely filed a internal grievance with CSU contending that Calingo had improperly retaliated against him in violation of Government Code section 8547.12(c). (4APP0739; 5APP0823-65.)

In response, CSU initiated an investigation under EO822, the procedure implemented by CSU to respond to complaints made under the WPA. (4APP0875-0882.) Instead of appointing a neutral investigator, CSU utilized its own employee, its Human Resources Manager Ellen Bui

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[2] All 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]."

[3] "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).)

(who later admitted an investigation by her into claims against CSU would have the appearance of bias). (1APP0114-15.)

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

Yet, Runyon was only permitted to see the "Summary," and nothing else was provided to him, despite his request therefore. (RT10-13, 23-29, 36; 3APP0713, 0739-40; 4APP0896; 5APP1096-98, 1109-11, 1116-17.) He was denied any opportunity to see the investigator's full Report or any of the raw data upon which the "Summary" was supposedly based, including HR manager Bui's notes. Furthermore, he 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.) Runyon would only later

learn through discovery in this subsequent damages action that the CSU investigation was a biased "white-wash," aimed at exculpating CSU from any liability by, among other things, intentionally omitting evidence of wrongdoing by Calingo from the Summary provided to Runyon. (RT20, 47-48; 3APP0499-506, 0508-09, 0523-26, 0529, 0535, 0538, 0557, 0559, 0581-82, 0600-04, 0607, 0708-09, 0713-14; 4APP0867-73, 0909; 5APP1075, 1109-10, 1118-19, 1124-29, 1121-22, 1131, 1133-35, 1137-39, 1143-44, 1196, 1204, 1206-07.)

After Runyon responded to the "Summary" proffered by CSU, on April 14, 2005, CSU issued its Final Letter of Determination denying Runyon's claim. (3APP0739-740; 4APP0883-903.)

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 case, Runyon was able to challenge CSU's EO822 investigation and findings, something he was prevented from doing at the administrative level. (RT10-13, 23-25, 47-48; 4APP0867-73, 0896-903; 5APP1096-98, 1109-11, 1116-17; 6APP01713-15, 1739-40.) The results of that discovery were startling, revealing a massive cover-up by

CSU during the EO822 process, including that HR Manager Bui had doctored the so-called "Summary" to conceal clear and convincing evidence of Calingo's retaliatory motives. It also demonstrated that CSU completely ignored the numerous contradictions in Calingo's position and CSU's own documentation contradicting Calingo's statements, among other things. (3APP0499-506, 0521-30, 0534-74, 0600-04, 0708-09; 4APP0867-73, 0896-903, 0909-10; 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.) Significantly, although CSU denied that Calingo's removal of Runyon as Chair had anything to do with Runyon's complaints, during discovery, CSU officials admitted that Runyon's complaints were a "**contributing factor.**" (5APP1110-11, 1128-29, 1173, 1178-79, 1184-85, 1192, 1201-02.) Indeed, when Runyon presented this evidence to the trial court, even the court described the evidence of retaliation against Runyon as "**DYNAMITE**." (*Id.*; RT47.)

Prior to trial, CSU and Calingo filed a Motion for Summary Judgment/Summary Adjudication, based upon two grounds:

(1) Runyon's claims were barred by his failure to file an administrative writ pursuant to Code of Civil Procedure section 1094.5 after CSU failed to resolve his complaints at the administrative level before filing this court action; and

(2) there was no adverse action taken against Runyon in retaliation for protected activity. (1APP0041-63.)

Runyon opposed the motion made on the only two grounds stated. (2APP0468-6APP1302.) Runyon argued that 1094.5 writ review was inapplicable here since there had been no hearing 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 CSU has failed to satisfactorily resolve his claims at the administrative level. (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).

In its reply papers, CSU and Calingo raised for the first time 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 nor an opportunity to brief. (RT 6-14, 52-57; 6APP1303-17.)

After the hearing, the trial court ruled that a civil 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 administrative mandamus, and prevails on such writ. (RT3-6, 21-23, 56-57; 6APP1340.) The court also found that the language in section 8547.12(c) does not provide a direct right to a whistleblower to file a damages action in court. (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.) 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) A copy of the Court of Appeal opinion is attached hereto as Exhibit A.

On November 14, 2008, Runyon filed a Petition for Rehearing on the grounds that the Opinion of the Court of Appeal contained significant omissions and misstatements of material facts. On November 21, 2008, the Court of Appeal denied the Petition for Rehearing.

IV.

LEGAL DISCUSSION

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

Unlike Government Code Section 8547.10(c), section 8547.12(c) provides for a direct action to court for damages at the conclusion of the CSU's internal grievance process without first obtaining writ review. 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 he or she is not "*satisfied*" by the CSU's attempt at resolving the claim. According to the plain language of section 8547.12(c), 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 address to the employee's satisfaction within 18 months:

> (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.)

Nothing further is required from the employee prior to filing a civil action for damages because section 8547.12(c) *itself* says so.

Despite the significant differences in language and legislative history between section 8547.10(c) and 8547.12(c), *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.

Relying on general principles for reviewing administrative decisions and the flawed analysis in *Ohton v. Superior Court* (2007) 148 Cal.App.4th 749, the Court of Appeal refused to give any real significance to the presence of the last sentence in section 8547.12(c) – even though this qualifying language is conspicuously absent from section 8547.10(c). (Slip Op. 15-17) 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).[4/]

[4/] 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; *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]; *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)].")

1. **Because The WPA Contains Its Own Exhaustion Requirement, Writ Review Is Not Required And Would Deprive Whistleblowers Of The Procedural Safeguards, Evidentiary Burdens and Substantial Remedies Guaranteed By The WPA**

In *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 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* makes it clear that where a statutory scheme contains its own exhaustion prerequisite, a plaintiff is not required to file an internal grievance with the City and then seek writ review before filing a civil lawsuit under FEHA. (*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 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 v. City of Los Angeles, supra*, 31 Cal. 4th at 1085-87.) 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.*)

The rationale of *Schifando* clearly applies here. Without a doubt, FEHA and the WPA serve the same noble purpose, *i.e.*, to further the strong public policy to punish retaliation against whistleblowers.[5] Like FEHA, the 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.[6] Like 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 reading of the statute makes any sense. Indeed, if writ review were required under section 8547.12(c), the procedural quagmire contemplated in *Schifando* would also occur here. 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 CSU's grievance

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

[6] 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..."

process lacks any due process safeguards and fails to comply with specific requirements and burdens found in the WPA. (*Cf. Schifando,* Cal.4th at 1086, fn. 3.) In other words, 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 impossible.

More specifically, in the internal grievance process, CSU is both the party accused of wrongdoing and the party charged with investigating the wrongdoing. (2APP0385-89.) Furthermore, CSU's internal process permits no hearing, no discovery, no cross-examination and does not require it to disclose relevant evidence developed during the investigation to the grievant. (RT 10-13; 2APP0385-89; 3APP0713, 0739; 4APP0896; 5APP1096-98, 1101-02) Thus, because there is no mechanism by which Runyon could obtain the investigator's notes, or her report, much less conduct discovery or cross-examination of witnesses (since those rights are not guaranteed at the internal administrative level)], CSU was able to conceal key evidence damaging to CSU's position. (RT 20, 47-48; 3APP0499-506, 0508-09, 0523-26, 0529, 0538, 0557, 0559, 0581-82, 0600-

04, 0607, 0708-09, 0713-14; 4APP0867-73, 0909; 5APP1075,1096-98, 1109-11, 1116-19, 1121-22, 1124-29, 1134-44, 1196, 1204, 1206-07.)

Since the record on a writ proceeding would consist of CSU's sanitized version of the investigation, to require writ review, not only would this mean that CSU employees would have to struggle with the deference normally afforded administrative decisions, but they would be put in a position of having to seek writ review without any adequate ability to challenge the University's decision, much less be able to prevail there.[7] Thus, 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

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[7] The same arguments for not requiring writ review of CSU's decision with regard to administrative mandamus review under C.C.P. section 1094.5 (including the procedural quagmire described in *Schifando v. City of Los Angeles, supra,* 31 Cal.4th at 1085-87) would be equally, if not more applicable in an ordinary writ proceeding under C.C.P. section 1085. Indeed, in a traditional writ proceeding, the inquiry of a court reviewing such writ would be even more restrictive than administrative mandamus, in that it would be limited to an inquiry as to whether the administrative decision was arbitrary, capricious or entirely lacking in evidentiary support. (*See, e.g., Miklosy v. Regents of the University of California, supra*, 44 Cal.4th at 905, fn. 2.) Practically speaking, this means that the court reviewing the C.C.P. section 1085 writ petition would give even more deference to the findings made by CSU, which findings would be even more impossible to overturn, completely thwarting the purpose and intent of the WPA.

retaliatory animus.[8] Yet, this is the logic that is found in *Ohton*, which was wholly adopted by the Court of Appeal in *Runyon.* (Slip Op. 14-17)

The res judicata effect of such a failed writ would bar any claim in court under section 8547.12(c), utterly depriving a claimant like Runyon of the statutory remedies and procedures the Legislature guaranteed under the WPA.

In short, to uphold the trial court decision is to effectively render section 8547.12(c) impotent since it is hardly likely that CSU will ever render an administrative decision against itself or provide to any employee as part of the internal EO822 process the evidence necessary to overturn its decisions.

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[8] The most fundamental part of due process is the right to litigate claims before a neutral body, disinterested in the controversy. Perhaps because the Legislature knew that CSU occupied the roles of both party accused and the judge, it guaranteed the aggrieved employee the right to resort directly to the courts in the event CSU failed to "satisfactorily address" their claims.

B. "Satisfactorily Addressed" Has To Mean To The Satisfaction of the Whistleblower Because No Other Reading Of The Statute Makes Any Sense

There is only one reported case which has addressed what the phase "*satisfactorily addressed*" as used in Government Code Section 8547.12(c) means.[9] That treatment is found in *Ohton v. Board of Trustees of the California State University*. (148 Cal.App.4th 749.) *Ohton* is the case upon which the Court of Appeal in *Runyon* relied when it imposed a completely unworkable "objective good faith" meaning to the qualifying language in section 8547.12(c) and completely ignored the fact that by imposing such a 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 any hearing. (*Cf. Miklosy v. Regents of the University of California, supra*, 44 Cal.4th at 905, fn. 2)

Ohton refused to accept the approach advanced by CSU that all that CSU had to do was reach a decision — *any* decision — within 18 months to bar a later civil action for damages. (148 Cal.App.4th at 764.) However,

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[9] This Court's *Miklosy* opinion specifically declined to express a view on the substantive content of the term "*satisfactorily*." (*Miklosy v. Regents of the University of California, supra*, 44 Cal.App.4th at 886.)

Ohton also rejected the notion that "satisfactorily addressed" meant to the *subjective* satisfaction of the whistleblower, adopting instead an undefined *objective* standard of good faith. (*Id.* at 765.)[10] 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.

Quite simply, an *objective* good faith standard is simply 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. At the time of the issuance of the CSU's Final Decision under its grievance process, the only "record" available to a complainant (and to a court reviewing its process) are:

(1) the Complainant's written Grievance;

(2) the "Summary" of their closed-door secret investigation (which CSU is allowed to sanitize[11]) as opposed to the raw

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[10] 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.)

[11] CSU apparently has a pattern of doctoring the "Summary" of its whistleblower investigations. CSU not only did so here, but they did so in (continued...)

data or the investigator's report upon which the "Summary" is supposedly based;

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

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

Significantly, at the conclusion of the CSU 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.) 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.

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[11](...continued)
the *Ohton* matter. (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.)

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 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 cannot be measured by an *objective* standard.

Indeed, it has to be assumed that the Legislature consciously chose the phrase "*satisfactorily addressed*" instead of the phrase "*responded to*" for a reason. 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. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-99.)

Applied here, even if susceptible to more than one meaning, the language of the statute 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 *imposes upon the whistleblower* an obligation to establish that CSU acted in bad faith in the grievance process is just plain wrong.

C. Since Runyon Never Litigated His Claims, The Principles of Judicial Exhaustion And Collateral Do Not Apply And No Writ Proceeding Is Required As a Prerequisite To Filing a Damages Action

Misunderstanding the holding in *Miklosy* and the law regarding the principle of judicial exhaustion, the *Runyon* decision erroneously concludes that until review and reversal of an 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) 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 the 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]).[12/]

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.)

[12/] Related issues are now pending before this Court in *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)*, S15170 and *Brand v. Regents of the University of California*, S162019.

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 v. City of Loma Linda* (2000) 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 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. "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), quoting *United States v. Utah Constr. Co.* (1966) 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 Community Hosp. v.*

Superior Court (1976) 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 Co. v. State Water Resources Control Bd., supra,* 37 Cal.4th at 944; citation 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. Stated another way, 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)

Since Runyon never had an opportunity to litigate his claims at the administrative level, CSU's decision could not possibly be binding. Accordingly, review by writ of mandate cannot be required to overturn CSU's decision. Yet, the decision in *Runyon*, which adopts *Ohton*, unfairly binds an employee to a decision where there was no opportunity for him to litigate his claims at the administrative level or ever, frustrating the legislative intent of the WPA and creating a procedural labyrinth in which aggrieved employees would likely be incapable of ever prevailing.

Unless this Court acts, 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 whistleblower complaints, choosing alone the evidence and testimony it will accept and review, deciding factual issues (such as credibility of witnesses) and legal issues (such as its own liability) without any hearing or record that can otherwise be reviewed — 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 Health Networks v. Superior Court*, *supra*, 59 Cal.App.4th at 126-29 (prohibiting reliance on an investigation where discovery was not permitted regarding its adequacy).

In short, 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. The fact that such decisions are unworthy of judicial deference, the primary rationale for requiring writ review of CSU's administrative decisions is completely absent. Neither *Ohton*, nor the *Runyon* decision recognized, much less considered, these important legal issues Because other courts are likely to read *Miklosy* and *Ohton* the same way the *Runyon* court did, this Court should intervene by granting review.

V.

CONCLUSION

For the foregoing reasons, this Petition for Review should be granted.

DATED: December 9, 2008

Respectfully submitted,

PHILIP J. GANZ, JR.
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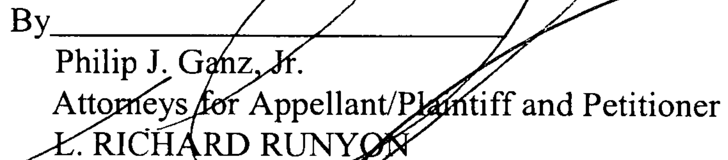

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EXHIBIT A

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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.

[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.

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 December 9, 2008, I served the foregoing **PETITION FOR REVIEW** by placing true copies thereof enclosed in sealed envelopes and addressed as follows:

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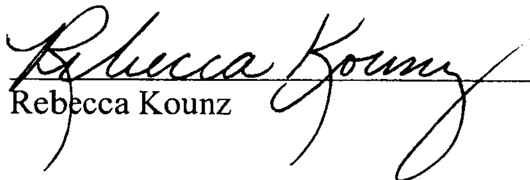

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