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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ANNA L. RAMIREZ, Plaintiff and Appellant, v. DEPARTMENT OF HEALTH SERVICES et al., Defendants and Respondents.	C050718 (Super. Ct. No. 05AS00889)

In granting the Department of Health Services's demurrer to state employee Anna Ramirez's whistleblower claim, the trial court lamented: "[T]he statute is screwy . . . there's not much I can do about it except apply it, apply the law. [¶] I think the legislature probably needs to address this and clear it up." We now face the same predicament.

The statute, the California Whistleblower Protection Act (Whistleblower Act; Gov. Code, § 8547 et seq.) allows a whistleblower who is penalized for making a protected disclosure of wrongdoing to bring a civil action for damages (Gov. Code, § 8547.3) after filing a complaint with the State Personnel Board (SPB) and "the [SPB] has issued, or failed to issue,

findings . . .” (Gov. Code, § 8547.8, subd. (c)). The question posed by this appeal is whether the Whistleblower Act, by requiring an injured whistleblower to file a complaint, triggers well-established principles of collateral estoppel precluding a civil action unless the whistleblower obtains a favorable ruling from the SPB or successfully overturns adverse findings through administrative mandamus. A preliminary question posed is whether an “investigation” by the executive officer of the SPB followed by written findings and a decision qualifies as a quasi-judicial hearing for purposes of section 1094.5 of the Code of Civil Procedure.

We conclude (1) that because plaintiff was provided the opportunity to submit evidence, name witnesses, and argue her claim, she was provided with the type of quasi-judicial hearing sufficient to satisfy Code of Civil Procedure section 1094.5 even though the SPB was not required to provide, and she did not request, an evidentiary hearing; and (2) that because the Legislature did not clearly provide that a whistleblower could pursue alternative remedies and did require plaintiff to initiate administrative proceedings, she is collaterally estopped from relitigating the findings that were actually litigated in the quasi-adjudicatory proceedings.

We acknowledge that this result places a substantial burden on the whistleblower who, subject to an expedited investigation and without the benefit of an evidentiary hearing, must convince a court to overturn adverse findings in mandamus proceedings, despite the considerable deference the court must accord those

findings. What the Legislature appeared to be giving -- a civil remedy for retaliatory conduct -- is, in reality, an elusive possibility unless the SPB sustains the complaint. But, as the trial court recognized, in the absence of a clear statute providing alternative remedies, we too must apply this "screwy statute."

FACTS

We take the facts, as we must, from plaintiff's first amended complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The Department of Health Services (DHS) employed plaintiff as an administrator in the Office of Family Planning. In her single cause of action, she alleged that DHS and various named individuals retaliated against her for making a protected disclosure. On August 13, 2004, and January 7, 2005, plaintiff filed a whistleblower complaint with the SPB. On December 23, 2004, and March 30, 2005, the executive officer of the SPB issued findings that she failed to establish unlawful retaliation, and those findings became final on January 22, 2005, and April 29, 2005, respectively. Neither plaintiff nor any of the named defendants requested a hearing, and no hearing was held. Plaintiff alleged she was not required to file a writ of mandate before filing an action for damages. She sought no extraordinary relief before filing her whistleblower complaint.

DISCUSSION

I

The Whistleblower Act embodies a strong public policy to deter and punish those who retaliate against public employees

for reporting wrongdoing. "The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business." (Gov. Code, § 8547.1.)[1] Thus, state employees who retaliate against whistleblowers are subject to fines, imprisonment, disciplinary proceedings, and civil liability, including compensatory damages, punitive damages, and attorney fees. (§ 8547.8, subds. (b), (c).)

To accomplish its stated objectives, the Whistleblower Act provides remedies for the injured whistleblower as well. If the SPB concludes that improper activity has occurred, it "may order any appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant . . . who was the subject of the alleged acts of misconduct prohibited by Section 8547.3." (§ 19683, subd. (c).) Moreover, the SPB must make reports to the Governor and the Legislature. (§ 19683, subd. (f).)

The Whistleblower Act also allows a whistleblower to bring a civil suit for damages. Section 8547.8, subdivision (c)

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

states, in pertinent part: "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 state employee or applicant for state employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party."

The Legislature has conditioned the right to bring a civil action, however. Section 8547.8 also provides: "[A]ny 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) [of this section], and the board has issued, or failed to issue, findings pursuant to Section 19683." (*Id.* at subd. c.) Section 19683, subdivision (a) directs the "State Personnel Board [to] initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 8547.3 within 10 working days of its submission. The executive officer shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority."

Plaintiff insists the plain language of the Whistleblower Act requires nothing more of her than to file a complaint with the SPB and await its findings or its failure to issue findings within the statutory time frame set forth in section 19683. She reminds us not to ignore the plain meaning of the statute by

either adding words that are not there or ignoring language that is. (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28-29.) She maintains that if we impose on her a duty to request a hearing, and then to challenge the ensuing findings by writ of mandate, we will be engrafting obligations not found in the statute and ignoring the Legislature's simple directive to file a complaint.

Plaintiff's argument misses the mark in two respects. First, plaintiff attributes far too great a significance to the Legislature's silence. Plaintiff's argument is reminiscent of arguments lodged by a university whistleblower and rejected by the Supreme Court in *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 324-329 (*Campbell*). In *Campbell*, as here, the whistleblower argued that the pertinent statutes do not require the exhaustion of administrative remedies, and therefore, the Legislature must have intended to abrogate the exhaustion requirement. (*Id.* at p. 324.) The whistleblower pointed out that the Legislature certainly knew how to incorporate an exhaustion requirement as it did in section 8747.10. Thus, legislative silence on the issue must be deliberate. (*Campbell*, *supra*, 35 Cal.4th at p. 327.)

But according to the Supreme Court, "the express mention in one statute of a fundamental precondition of filing suit against an administrative agency does not abrogate that requirement in every statute that is silent on the matter." (*Campbell*, *supra*, 35 Cal.4th at p. 327.) Or, in other words, "'courts should not presume the Legislature in the 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.'" (*Id.* at p. 329.)

More fundamentally, plaintiff's argument miscomprehends the nature of the exhaustion requirement at issue in this case. DHS does not dispute that plaintiff has exhausted her administrative remedies by filing her complaint with the SPB. Nor does DHS contest plaintiff's statutory right to bring a civil action. DHS's exhaustion argument is different. DHS argues that by failing to challenge the administrative findings by writ of mandamus, the findings must be applied in any subsequent legal action. Thus, according to DHS, plaintiff's action is doomed, not by her failure to exhaust administrative remedies but by her failure to exhaust judicial remedies through a successful petition for writ of mandamus challenging the SPB's findings.

II

Would-be plaintiffs ignore adverse administrative findings at their peril. An ever-burgeoning number of appellate cases reject civil actions predicated on conduct previously litigated in administrative proceedings. The issue presented in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 was "whether an individual who has been expelled or excluded from membership in an association after being afforded a quasi-judicial proceeding may bring an immediate tort action for damages or must first succeed in setting aside the association's decision in a separate mandamus action." (*Id.* at pp. 482-483.) A doctor at one of the petitioning hospitals requested a hearing

after termination of her staff privileges. She was provided a hearing, the judicial review committee upheld the revocation, and the hospital board of directors affirmed the committee's decision. (*Id.* at pp. 471-472.) She then brought a civil action against the hospital. (*Id.* at p. 469.) The Supreme Court, affirming the dismissal of the doctor's tort claim, held: "[W]e believe that 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 hospital's action. [Citation.] Accordingly, we conclude that plaintiff must first succeed in overturning the quasi-judicial action before pursuing her tort claim against defendants." (*Id.* at p. 484.)

The concept of exhaustion of judicial remedies is rooted in the principles embodied in collateral estoppel. The two are integrally intertwined. The question arises as to what effect administrative findings have in subsequent proceedings, including criminal and civil actions. In *People v. Sims* (1982) 32 Cal.3d 468, the Supreme Court held that if an administrative agency, acting in a judicial capacity, resolved disputed factual issues in a proceeding in which the parties had an adequate opportunity to litigate the factual issues, the administrative findings had a collateral estoppel effect in subsequent

litigation. (*Id.* at p. 479.)[2] Exhaustion of judicial remedies became a shorthand means of expressing the collateral estoppel effect and the policy of preserving the efficacy of administrative resolution of grievances.

To use the shorthand concept "failure to exhaust judicial remedies" can be misleading. A failure to exhaust judicial remedies suggests that the failure to bring a mandamus action precludes a subsequent civil action. Not so. An aggrieved employee is not necessarily compelled to petition for a writ of mandamus as a prerequisite to filing a civil action, but he or she must abide by the collateral estoppel effect of the unchallenged administrative findings. The confusion was properly dispelled in *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235 (*Knickerbocker*).

The court in *Knickerbocker* explained the difference between exhaustion of judicial remedies as a condition precedent to filing a civil action and collateral estoppel. "Unless the administrative decision is challenged, it binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action. 'Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding "if (1) the issue necessarily decided at the previous [proceeding]

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[2] The application of collateral estoppel in criminal proceedings is more problematic than we need to address here. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 851-852.)

is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].”’ (*People* v. *Sims*, *supra*, 32 Cal.3d at p. 484, quoting *People* v. *Taylor* (1974) 12 Cal.3d 686, 691; fn. omitted.) Thus, the defendants in this case are partially correct because some of plaintiff’s causes of action involve issues previously litigated and decided adversely to him. Those causes of action are barred by his failure to seek review of the Commission’s determination. But it is because he never overturned the finding of the Commission that there was justification for demotion as a consequence of his actions, and not because he failed to exhaust his administrative remedies. In short, plaintiff is bound by the Commission’s determination and to the extent that his causes of action are inconsistent with that determination, they are fatally flawed. But plaintiff is not required to attack an administrative determination in which he acquiesces. He is no longer an aggrieved party and need not bring a superfluous writ proceeding just to lay a foundation for a later lawsuit. If he is content to accept the results of the review process furnished by the city, nothing compels him to seek writ relief. Exhaustion of judicial relief simply means that if he wishes to attack the administrative determination he must launch that assault in an administrative mandamus proceeding and not in a lawsuit for damages.” (*Knickerbocker*, *supra*, 199 Cal.App.3d at pp. 243-244; see also

Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 81 (conc. opn. of Werdegar, J.).)

At our urging, plaintiff addresses the significance of a recent amendment to the SPB's regulations relevant to whistleblower actions.[3] California Code of Regulations, title 2, section 56.5 now provides, in pertinent part: "(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint. The Notice of Findings shall notify the complainant that his or her administrative remedies have been exhausted and that the complainant may file a civil complaint with the superior court pursuant to Government Code Section 8547.8(c)."

Plaintiff does not suggest the revised regulation can be applied retroactively, but she does argue the SPB's regulation amounts to a construction of the Whistleblower Act, and because the SPB is charged with the administration and interpretation of the statute, it is entitled to great weight; indeed, it should be upheld unless it is clearly erroneous or unauthorized. (*Cole v. City of Oakland Residential Rent Arbitration Bd.* (1992) 3 Cal.App.4th 693, 697-698.) As already mentioned, DHS does not

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[3] On August 14, 2002, the SPB adopted regulations governing whistleblower complaints, effective immediately. Those regulations were substantially amended in March 2006. We will cite to the 2002 regulations as "former rule ___" to distinguish them from current provisions of the California Code of Regulations.

challenge the proposition that plaintiff has exhausted her administrative remedies either factually or legally. Thus, according to DHS, plaintiff's interpretation is accurate as far as it goes.

But the amended regulation, DHS contends, does not address the preclusive effect of the unchallenged administrative findings. DHS, requesting that we take judicial notice of the legislative history of the regulation, observes that the SPB concluded that "[t]he court, not the SPB, is the appropriate entity to determine what preclusive effect, if any, the Notice of Findings shall have in a subsequent civil action."[4] According to DHS, therefore, the amended regulation does not resolve the dispositive issue in this appeal, that is, whether plaintiff is collaterally estopped from bringing a civil action by failing to exhaust her judicial remedies.

We agree. If, as plaintiff would like, the statute and the amended regulation were divorced from a complicated body of case law on the binding effect of administrative findings in subsequent litigation, we could accept the plain reading of the statute, bolstered by the regulation, and conclude a whistleblower need not be encumbered by the administrative findings of the SPB in her civil action under the Whistleblower Act. We are not, however, at liberty to pretend the thorny problems posed by collateral estoppel do not exist. As a

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[4] We grant DHS's request to take judicial notice, filed May 26, 2006.

result, even if we were to accord great weight to the SPB's construction of section 8547.8's administrative exhaustion requirement, we conclude that the plain language of the statute simply does not resolve the more difficult dilemma posed by collateral estoppel.

III

A writ of administrative mandate is available only in cases where by law a hearing is required. "Where the writ is issued 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, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . ." (Code. Civ. Proc., § 1094.5, subd. (a).) Plaintiff contends the "investigation" conducted by the executive officer does not constitute a hearing for purposes of section 1094.5. Nor was a hearing required under the pertinent statutes or regulations. Pursuant to former rule 56.3, plaintiff had the opportunity to petition for a hearing but the SPB was not compelled to provide one. In the absence of a trial-like evidentiary hearing, plaintiff concludes the executive officer's findings do not preclude a civil action. A formidable body of case law suggests otherwise.

The crux of the problem in this case lies in the multiple meanings of "hearing." DHS equates the "investigation" conducted by the executive officer with a "hearing" required by

law for purposes of Code of Civil Procedure section 1094.5, a somewhat odd notion since a complaining party is accorded the opportunity to request a hearing after completion of the investigation. But DHS argues that the investigation had all the attributes of a "documentary hearing" and such a hearing suffices under section 1094.5.

It is true that "[a] trial-type hearing is not necessary to satisfy the hearing requirement of section 1094.5 of the Code of Civil Procedure, so long as the agency is required to accept and consider evidence before making its decision." (*Las Virgenes Educators Assn. v. Las Virgenes Unified School Dist.* (2001) 86 Cal.App.4th 1, 6-7.) Purely documentary proceedings can satisfy the hearing requirement. (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391-1392 (*Friends of the Old Trees*).)

Here the "investigation" was much more than the name suggests. Under the then-applicable rules, plaintiff was required to file a written statement under penalty of perjury of the whistleblower report and the alleged retaliation therefor, with supporting documentation and a list of witnesses. (Former rule 56.1, subd. (d).) DHS was required to file a written response with similar detail, and plaintiff could file a written reply. (Former rule 56.2, subds. (e)-(f).)

The SPB appeals division could continue investigation of the complaint after the responses, "with or without a hearing[.]" (Former rule 56.2, subd. (g).) Within 60 days (unless the time was tolled or waived) the executive officer

issued a notice of findings. (Former rule 56.2, subd. (i).) "In those cases where the Executive Officer concludes that the complainant failed to prove the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall, except in those instances where the findings address jurisdictional and/or procedural matters, specifically address each allegation contained within the complaint." (Former rule 56.2, subd. (j).) If questions of fact remained, the executive officer could "assign the case to an evidentiary hearing" before an administrative law judge. (Former rule 56.2, subd. (*l*).)

Plaintiff could have filed a petition for hearing before the SPB if "the Notice of Findings concludes no retaliation occurred[.]" (Former rule 56.3, subd. (a).) That petition had to be filed within 30 days of service of the notice of findings and specify the factual basis for the petition. (Former rule 56.3, subds. (b)-(c).)

Once the notice of findings went unchallenged 30 days after service, it became the decision of the SPB and carried all of the force thereof. (Former rule 56.5.) The SPB is a statewide agency entrusted by the California Constitution to administer the civil service system. (Cal. Const., art. VII, § 3; see *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 52-53; *Gonzalez v. State Personnel Bd.* (1995) 33 Cal.App.4th 422, 428.) Thus, the unchallenged findings became the decision of the body entrusted by the California Constitution to adjudicate matters within its purview, including claims of retaliation.

The executive officer filed a 39-page notice of findings on December 23, 2004. He outlined in painstaking detail plaintiff's version of events occurring over 18 months, followed by an equally thorough description of her supervisors' response to her allegations. After a thoughtful analysis of each of plaintiff's allegations of retaliation, the executive officer concluded: "Complainant failed to present sufficient information to establish that she had been retaliated against for having engaged in protected activities under the [Whistleblower Act]. None of the alleged retaliation resulted in a materially adverse change in the conditions of complainant's employment, or Respondents established legitimate, non-retaliatory reasons for having engaged in the complained of conduct.

"Although it appears evident that there existed a decided personality conflict between Complainant, Camacho, and Lyman, insufficient information was presented to establish, by a preponderance of the evidence, that either Camacho or Lyman bore a retaliatory animus toward Complainant as a result of Complainant raising concerns about the CFHC contract."

The notice of findings states plaintiff could "petition for hearing" before the SPB "no later than 30 days" after service; "[i]f no party files a petition for hearing within 30 days following service of this Notice of Findings, this recommendation shall become the final decision of the State Personnel Board."

Thus, it appears the investigation became a contested proceeding based on opposing evidentiary submissions. The executive officer served as a neutral adjudicator and was required to and did consider the parties' documentary evidence as well as arguments. "[S]o long as the agency is required by law to accept and consider evidence from interested parties before making its decision," the proceedings, even if entirely documentary, satisfy the hearing requirement of Code of Civil Procedure section 1094.5. (*Friends of the Old Trees*, *supra*, 52 Cal.App.4th at pp. 1391-1392; *Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal.App.3d 326, 334.)

Since, as we have concluded, the SPB's decision was made as the result of a proceeding in which evidence was required to be given and considered by the executive officer, its validity can be challenged by writ of mandate. Here plaintiff chose not to request an evidentiary hearing before the SPB adopted the findings of the executive officer and chose not to challenge the adverse findings by way of a writ. As a result, those findings cannot be relitigated in a whistleblower civil action and the trial court properly granted DHS's demurrer without leave to amend.

IV

Plaintiff argues, however, that the Whistleblower Act provides an alternative remedy to her administrative remedies before the SPB. In the same way the Fair Employment and Housing Act (FEHA; § 12900 et seq.) allows a claimant to file a civil lawsuit without exhausting other administrative remedies,

including proceedings before the SPB, plaintiff contends she should be allowed to bypass writ proceedings and prosecute her whistleblower action. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 (*Schifando*); *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422 (*State Personnel Bd.*).) Her analogy fails because of what the Legislature expressly stated in FEHA and did not state in the Whistleblower Act.

"[T]he purpose of the Civil Service Act is to ensure that appointments to state office are made not on the basis of patronage, but on the basis of merit, in order to preserve the economy and efficiency of state service; and that by contrast, the purpose of the FEHA is to provide effective remedies for the vindication of constitutionally recognized civil rights and to eliminate discriminatory practices that violate those rights. . . . [T]he FEHA creates areas of overlapping jurisdiction between the Board and other agencies." (*State Personnel Bd.*, *supra*, 39 Cal.3d at p. 439.) In enacting FEHA, the legislative intent is bold and blatant. "The Legislature intended the FEHA's administrative system 'to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of [the act], exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state . . . .' (§ 12993, subd. (c).)" (*Schifando*, *supra*, 31 Cal.4th at p. 1082.)

State employees have the right to bring a civil action based upon prohibited discriminatory conduct under FEHA after obtaining a "right to sue" letter or following the Fair Employment and Housing Commission's prosecution of an accusation. (*Schifando*, *supra*, 31 Cal.4th at p. 1082.) They are not required, however, to exhaust their remedies before the SPB and are entitled to pursue remedies in whichever forum they choose. (*Ruiz v. Department of Corrections* (2000) 77 Cal.App.4th 891, 897 (*Ruiz*).) "'The Legislature's intent was to give public employees the same tools in the battle against employment discrimination that are available to private employees. The FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination . . . .' [Citation.]" (*Ibid*.) "'[The Legislature intended] to create new rights within the FEHA statutory scheme while leaving existing rights intact. . . .' (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 135 . . . .)" (*Ruiz*, at p. 898.)

The Whistleblower Act lacks the clarity of FEHA. As the Supreme Court reminded us in *Campbell*, "'[C]ourts should not presume the Legislature in the 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.'" (*Campbell*, *supra*, 35 Cal.4th at p. 329.) Here the legislative intent is murky at best. The Legislature did not intend to provide aggrieved

whistleblowers with a free pass to the courthouse without first filing a complaint with the SPB. (§ 8547.8.) But once the complaint is filed, did the Legislature intend to allow a civil action as an alternative remedy to the administrative proceedings? In other words, did the Legislature intend for any adverse findings by the SPB to be meaningless?

Because, as we explained at length above, long-established principles of law require courts to give efficacy to administrative decisions, we cannot presume the Legislature intended to upset venerable principles of collateral estoppel without saying so. FEHA plainly gives employees alternative and, perhaps, cumulative remedies. But the Whistleblower Act does not mimic FEHA. Rather, it requires the whistleblower to initiate administrative proceedings before the SPB, and having instigated those proceedings, there is nothing in the Whistleblower Act to exempt whistleblowers from abiding by entrenched principles of collateral estoppel. If, as plaintiff argues, 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.

V

That is not to say we are oblivious to the burdens the Legislature appears to have placed on an injured whistleblower on the one hand that are at odds with the rights it has conferred under the Whistleblower Act on the other hand. Both the SPB and the Legislature continue to attempt to tinker with

the Whistleblower Act and the implementing regulations to clarify the whistleblower's rights and when he or she has exhausted the administrative remedies. (Sen. Bill No. 165 (2005-2006 Reg. Sess.) as introduced Feb. 8, 2005; Cal. Code Regs., tit. 2, rule 56.5 (Mar. 8, 2006).) But we must apply the Whistleblower Act as it is, not the Whistleblower Act that might be written under either new legislation or new rules.

The administrative proceedings demonstrate infirmities similar to those described in *Schifando* and *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708 (*Williams*). Pursuant to former rule 56.2, subdivision (c)(1)-(3), within 10 working days the SPB must notify the complaining party of its decision to either dismiss the complaint, refer the case for investigation, or schedule the case for a hearing before an administrative law judge. The executive officer must conclude the investigation, including the questioning of witnesses, inspection of documents, and visit of state facilities, and issue a notice of findings within 60 days (unless the time is tolled or waived.) (Former rule 56.5.) As a result a complaining party has a very abbreviated time period to have his or her complaint resolved under the SPB procedures and might not have adequate time to prepare a case.

The court in *Williams* recognized that the disadvantages suffered by the complaining party during the administrative proceedings will compromise his or her chances of prevailing in mandamus. "Although [the administrative agency's] procedures provide a hearing and an opportunity to present evidence, . . .

an aggrieved public employee might not have a chance to adequately prepare his or her case in the administrative process. This would further impact any chance of succeeding in the administrative proceedings. Thereafter, a court reviewing the matter in a mandamus action would give deference to the agency's or entity's decision. Even under the deferential independent judgment rule, the public employee is at a disadvantage in an administrative mandamus action because the trial court must afford the administrative agency's findings a strong presumption of correctness. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-817 [85 Cal.Rptr.2d 696, 977 P.2d 693].) If the reviewing court upheld the administrative findings, its determination on those issues would potentially have a preclusive effect (or collateral estoppel effect) on any subsequent FEHA action." (*Williams*, *supra*, 121 Cal.App.4th at pp. 727-728.)

Williams, like *Schifando* and *Ruiz*, involved FEHA claims and all were predicated on the fundamental principle that the Legislature expressly intended to provide additional and expansive remedies to employees for discriminatory conduct. FEHA, unlike the Whistleblower Act, does not require the aggrieved employee to first file a complaint with the SPB or to exhaust any procedure other than FEHA. But the Whistleblower Act does compel the injured party to first file a complaint. Without exempting whistleblowers from pursuing the administrative proceedings it requires them to commence, we must apply traditional principles of collateral estoppel, and despite

the distinct infirmities present in the administrative proceedings, we conclude that any adverse findings rendered by the SPB have a preclusive effect in subsequent civil litigation unless challenged by a writ of administrative mandamus.

The judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P.J.

BUTZ, J.