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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN A. KONECNIK, Plaintiff and Appellant, v. CITY OF LOS ANGELES, acting by and through its DEPARTMENT OF WATER & POWER, Defendant and Respondent.	B277509 (Los Angeles County Super. Ct. No. BC574057)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzanne G. Bruguera, Judge. Affirmed.

The Law Offices of John A. Schlaff and John A. Schlaff for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Joseph A. Brajevich, General Counsel, Anat Ehrlich, Assistant City Attorney, and Jed M. Silverstrom, Deputy City Attorney for Defendant and Respondent.

INTRODUCTION

In *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311(*Campbell*), our Supreme Court held that a public employee must exhaust internal administrative remedies before filing suit for whistleblower retaliation in violation of Labor Code section 1102.5.[1] Here, appellant John A. Konecnik filed a whistleblower retaliation claim against respondent City of Los Angeles without exhausting his internal administrative remedies. Citing *Campbell*, respondent demurred to the entire action, and the trial court sustained the demurrer. Appellant argues the trial court erred in sustaining the demurrer, contending that a post-*Campbell* amendment to the Labor Code eliminated the requirement to exhaust administrative remedies for whistleblower retaliation claims. Specifically, section 244, subdivision (a), provides that an individual need not exhaust "administrative remedies or procedures" before bringing a civil action under the Labor Code, unless the section under which the action is brought expressly requires it. Appellant's contention was recently addressed and rejected in *Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551 (*Terris*). The *Terris* court concluded that section 244, subdivision (a), eliminated only the requirement to exhaust administrative remedies before the Labor Commissioner.[2] We find *Terris* persuasive and adopt its reasoning. We further find appellant's disability discrimination

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[1] All further statutory citations are to the Labor Code, unless otherwise stated.

[2] The California Supreme Court denied a petition for review in *Terris* on May 23, 2018.

and failure to accommodate claims fail because they are untimely and insufficiently pled. Accordingly, we affirm the judgment.

PROCEDURAL HISTORY

A. *Second Amended Complaint*

On October 23, 2015, appellant filed his second amended complaint (SAC) in Los Angeles Superior Court, alleging three causes of action: (1) whistleblower retaliation under Labor Code section 1102.5, (2) disability discrimination under Government Code section 12940, et seq. (Fair Employment and Housing Act or FEHA), and (3) failure to accommodate under the FEHA.[3] Appellant was employed by the Los Angeles Department of Water and Power (LADWP) as a senior claims representative from January 2009 to February 2014. Appellant alleged that beginning in 2009, he was instructed or pressured by LADWP or City of Los Angeles (City) attorneys, supervisors and agents to inflate claim payments and falsify investigation results, which he regularly and futilely reported to various LADWP and City personnel. Appellant also alleged that the hostile work environment resulted in his medical leave of absence for hypertensive heart disease from September 2012 until his termination (17 months later) for neglect of duty and unexcused absenteeism. The SAC stated: "Plaintiff has complied with and/or exhausted any applicable claims statutes and/or administrative and/or internal remedies and/or grievance procedures, or is excused from complying therewith."

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[3] The original complaint was filed March 2, 2015. It contained no failure to accommodate claim.

B. *Demurrer to SAC*

Respondent filed a demurrer to all causes of action, citing, inter alia, the heightened pleading requirement for statutory liability against public entities. (See *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795) ["'to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity'"].)

On the whistleblower claim, respondent asserted that appellant had failed to plead exhaustion of internal administrative remedies prior to commencing suit, by pursuing a hearing before the Board of Civil Service Commissioners of the City of Los Angeles (CSC Board), pursuant to the City of Los Angeles Charter and Rules of the Board of Civil Service Commissioners.[4] Respondent argued that the newly enacted Labor Code sections 244, subdivision (a) and 98.7, subdivision (g) (amended Labor Code sections), merely clarified that the exhaustion of external administrative remedies enforceable by the Labor Commissioner was not a prerequisite to filing an action under the Labor Code.[5]

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[4] "Within five days of service of the written statement upon any person so discharged . . . the person shall file a written application with the board [of Civil Service Commissioners] in order to require the board to hold a hearing to investigate the grounds for the discharge or suspension. . . ." (City of Los Angeles Charter, § 1016(c).)

[5] Section 98.7 describes the procedures for filing and investigating a complaint before the Labor Commissioner for unlawful discharge or discrimination in violation of any law under the jurisdiction of the Labor Commissioner. At the same

On the disability discrimination claim, respondent argued that only the allegation of unlawful termination was timely, as it was the sole charge contained in the complaint filed with the DFEH two months after appellant's termination. All other allegedly unlawful acts occurred prior to appellant's 17-month leave of absence. There could be no claim of continuing violation, respondent contended, as there was no frequency or similarity of acts. Additionally, appellant failed to allege he could perform the essential functions of the job with or without a reasonable accommodation.

With respect to the failure to accommodate claim -- added to the disability claim for the first time in the SAC -- respondent argued that the claim was time-barred, as it was filed more than one year after the DFEH right-to-sue letter was issued, and did not relate back to the original complaint. Nor was such a claim included in appellant's DFEH complaint. Additionally, appellant had failed to allege he could perform the essential functions of his job with a reasonable accommodation, or that such accommodation existed.

C. *Opposition to Demurrer*

Appellant disputed respondent's interpretation of the amended Labor Code sections, arguing that the plain language of the statutes made clear that the Legislature no longer required exhaustion of any administrative remedies prior to commencing an action under section 1102.5. Appellant did not deny that he

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time the Legislature enacted section 244, subdivision (a), it also added subdivision (g) to section 98.7, which provides: "[I]n the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures."

had failed to exhaust internal remedies prior to filing his section 1102.5 claim. He did assert that, independent of the amended Labor Code sections, he was not required to exhaust administrative remedies based on exceptions for futility and matters of great public importance.

Appellant alleged that respondent was aware of his disability, and that the hostile work environment caused it, but failed to make any changes to facilitate appellant's return to work. Appellant also argued that his failure to accommodate claim was encompassed in his disability discrimination claim, which was timely due to respondent's ongoing misconduct before and up to his termination.

D. *Hearing on Demurrer and Motion for Reconsideration*

On February 10, 2016, the trial court heard argument on the demurrer to the SAC and, on its own motion for reconsideration, continued the matter for further briefing. The narrow issue to be briefed was whether appellant was required to allege exhaustion of internal administrative remedies in his section 1102.5 claim, in light of the sections 244, subdivision (a) and 98.7, subdivision (g) amendments.[6]

Respondent maintained that the legislative history of section 244, subdivision (a), made clear that the amendment was not intended to eliminate *Campbell*'s internal exhaustion requirement, but only to clarify that seeking administrative relief from the Labor Commissioner was not a prerequisite to filing suit under the Labor Code. Appellant argued that the plain language

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[6] Neither party ordered a court reporter for this proceeding, but the court's directive is clear from the parties' supplemental briefing.

of the statute did not require resort to legislative history, but that even if it did, the Legislature intended to dispose of *Campbell*'s internal exhaustion requirement.

E. *Ruling on Motion for Reconsideration*

On May 31, 2016, the trial court issued its ruling sustaining the demurrer, with leave to amend, noting that its "interpretation of exhaustion of administrative remedies is that of the defendant."[7] The judgment of dismissal was entered July 13, 2016.

On September 8, 2016, appellant timely filed a notice of appeal.

DISCUSSION

A. *Standard of Review*

A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e).) In reviewing the sufficiency of the pleading, "'[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Blank v. Kirwan* (1995) 39 Cal.3d 311, 318 (*Kirwan*).) We also consider matters which may be judicially noticed. (*Id.*; Code Civ. Proc., § 430.30, subd. (a).)

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[7] In its ruling sustaining the demurrer to the first amended complaint (FAC), the trial court noted that appellant had failed to plead exhaustion of internal administrative remedies, as required by *Campbell*. The trial court also agreed that appellant had failed to adequately plead that he could perform the essential functions of his job, or that he was subjected to an adverse employment action because of his disability, noting that appellant's "[c]onclusory allegations are insufficient."

We review a judgment of dismissal entered after an order sustaining a demurrer de novo. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "In reviewing an order sustaining a demurrer, we assume well-pleaded factual allegations to be true and examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action on any legal theory. [Citation.]" (*Kyablue v. Watkins* (2012) 210 Cal.App.4th 1288, 1292.) Because the demurrer was sustained based upon an interpretation of certain provisions of the Labor Code, we must determine whether the trial court's interpretation was correct. "Statutory interpretation is a question of law subject to our independent review." (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524.) "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision. . . . [Citation.]' [Citation.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

B. *Section 1102.5 Whistleblower Retaliation Claim*

Appellant contends the trial court erred in sustaining the demurrer on the ground that he failed to allege that he had exhausted internal grievance procedures prior to filing his section 1102.5 claim. He contends the statutory language in section 244, subdivision (a), explicitly disposes of the *Campbell* internal exhaustion requirement. He further argues that the Legislature

intended to simplify the procedures for employees to seek redress for unlawful employment practices by removing all exhaustion requirements. For reasons set forth below, we affirm the trial court's judgment.

1. *Terris Affirmed Campbell's Validity Post-Section 244, Subdivision (a).*

In February 2018, Division Six of the Second District Court of Appeal addressed the same issue now before this court.[8] *Terris* reconciled the apparent contradiction between *Campbell* and section 244, subdivision (a). It concluded that by disposing of the requirement that an employee exhaust "administrative remedies or procedures" before filing a civil action under section 244, subdivision (a) applied only to remedies sought before the Labor Commissioner. (*Terris*, *supra*, 20 Cal.App.5th at p. 553.)

The facts in *Terris* are analogous. The plaintiff, an employee of the defendant county, appealed the grant of summary judgment in her wrongful termination and employment discrimination action, including a claim for whistleblower retaliation. When the plaintiff was laid off, she failed to follow internal grievance procedures by first filing a complaint with the Equal Employment Opportunity Office (EEO), which could be appealed to the County's Civil Service Commission. The trial court granted summary judgment for the defendant based on the plaintiff's failure to exhaust her administrative remedies. (*Terris*, *supra*, 20 Cal.App.5th at pp. 553-554.)

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[8] *Terris* was decided on February 16, 2018, after appellant's opening brief and respondent's brief had been submitted. The parties discussed *Terris* in appellant's reply brief and the supplemental briefs filed.

Terris reaffirmed the *Campbell* rule that public employees must exhaust internal administrative remedies before filing a court action. (*Terris*, *supra*, 20 Cal.App.5th at p. 555, citing *Campbell, supra,* 35 Cal.4th at p. 321 & *Los Angeles County Employees Assn. v. County of Los Angeles* (1976) 61 Cal.App.3d 926, 934.) The court explicitly recognized that "administrative remedies" include ""internal grievance procedures"" provided by a public entity subject to civil service rules. (*Terris*, *supra,* at pp. 555-556, citing *Palmer v. Regents of University of California* (2003) 107 Cal. App.4th 899, 904 ["'When a . . . public entity establishes an internal grievance mechanism, . . . failure to exhaust those internal remedies precludes any subsequent private civil action.'"].) Because the plaintiff failed to file an EEO complaint as she was required to do, the court affirmed summary judgment and dismissed her whistleblower action. (*Terris*, *supra*, at pp. 555, 560.)

As *Terris* explained, in amending sections 244, subdivision (a) and 98.7, subdivision (g), the Legislature clarified an area of ongoing confusion among the courts regarding the exhaustion of *external* administrative remedies *before the Labor Commissioner:*

> "Section 244, subdivision (a) provides, in relevant part, 'An individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code. . . .' But the phrase 'administrative remedies' refers to Labor Commissioner claims. The author of Senate Bill No. 666 (2013-2014 Reg. Sess.) said it allows employees to sue 'without having first sought administrative remedies that are enforceable by the Labor Commissioner.' (Historical and Statutory

> Notes, 44 West's Ann. Lab. Code (2018 supp.) § 244, p. 310.). . .
>
> "[¶] . . . [¶]
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> "As explained by the author of Senate Bill No. 666 (2013-2014 Reg. Sess.), section 244, subdivision (a) was enacted to protect the right to sue without first having to exhaust *Labor Commissioner* administrative proceedings. At the same time section 244, subdivision (a) was enacted [citation], the Legislature also amended section 98.7, involving Labor Commissioner claims. [Citation] It added the following provision: '*In the enforcement of this section*, there is no requirement than an individual exhaust administrative remedies or procedures.' [Citation]
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> "By making these changes, the Legislature resolved a specific ongoing legal controversy. Courts had reached conflicting results on whether *Campbell*'s exhaustion requirement meant a plaintiff had to initially file a claim with the Labor Commissioner before filing an action. [Citations] The legislative amendments were specifically related to resolving this problem."
> (*Terris*, *supra,* 20 Cal.App.5th at pp. 556-558.)

Although the amended Labor Code sections eliminated exhaustion requirements before the Labor Commissioner, they did not extinguish an employee's obligation to comply with internal grievance procedures. Absent clear legislative intent, *Terris* refused to overturn *Campbell*'s long-standing internal exhaustion requirement:

> "There is no basis to conclude the Legislature enacted section 244, subdivision (a) to overturn a California Supreme Court decision -- *Campbell*, or to extinguish decades of judicially required administrative exhaustion requirements for county employees who have civil service commission internal administrative remedies. As *Campbell* said, "'[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*.'" [Citation.] Here there is no express legislative declaration that the statute was intended to eliminate the *Campbell* internal administrative remedy exhaustion requirement. . . . [¶]
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> "In *Campbell*, our Supreme Court reviewed its prior decisions and said they represent "'*a respect for internal grievance procedures and the exhaustion requirement where the Legislature has not specifically mandated its own administrative review process*.'" [Citation.] By enacting section 244, subdivision (a), the Legislature did not create such a new administrative review process that applies to all administrative agencies. It eliminated the requirement that a claim must first be [brought] before the Labor Commissioner before filing a civil action."

(*Terris*, *supra,* 20 Cal.App.5th at p. 558, citing *Campbell*, *supra,* 35 Cal.4th at pp. 321, 329.)

As the *Terris* court observed, its holding was consistent with *Satyadi v. West Contra Healthcare Dist.* (2014) 232 Cal.App.4th 1022 (*Satyadi*) in upholding the exhaustion of internal administrative remedies for employees subject to civil

service rules. (*See Terris, supra,* 20 Cal.App.5th at p. 556 ["*Satyadi* holds that an employee does not have to file a *Labor Commissioner* claim before suing her employer. But it also instructs that an employee subject to county civil service 'internal administrative remedies' must exhaust them."].) Although the parties dispute the significance of *Satyadi,* we agree with the *Terris* court's reading of *Satyadi*, which focused on the following language: "'[I]t appears Satyadi *has exhausted her employer's internal administrative remedies*. [Citation] The exhaustion doctrine *therefore* poses no further barrier to her action.'" (*Terris, supra,* 20 Cal.App.5th at p. 556, citing *Satyadi*, *supra,* 232 Cal.App.4th at p. 1033.) The logical inference to be drawn is that a failure to exhaust internal administrative remedies will bar an employee's civil action.

Appellant did not plead exhaustion of internal administrative remedies before the CSC Board, beyond his conclusory allegation that he had exhausted all "applicable" internal grievance procedures; his failure to do so is a proper basis for demurrer. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156 ["A demurrer may properly be sustained based on the failure to adequately plead exhaustion of administrative remedies"]; see also *Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1379 ["A complaint is also vulnerable to demurrer on administrative exhaustion grounds where the complaint's allegations, documents attached thereto, or judicially noticeable facts indicate that exhaustion has not occurred."].) Indeed, appellant concedes "he did not allege that he had exhausted every internal formal and informal administrative procedure open to him" prior to filing suit, and acknowledges electing not to avail himself of the opportunity to

do so when the court sustained respondent's demurrer to the SAC with leave to amend. Because we agree with the *Terris* court that such exhaustion is a prerequisite to filing suit under section 1102.5, we hold the trial court properly sustained respondent's demurrer to the claim asserted in the SAC.

2. *Neushul and Other Federal Cases are Unavailing.*

Appellant urges this court to follow the contrary interpretation set forth in *Neushul v. Regents of the Univ. of Cal.* (C.D. Cal. 2016) 168 F.Supp.3d 1242. However, *Neushul* did not address the legislative history of the amendments to sections 244 and 98.7, and was vacated following *Terris*. (*Neushul v. The Regents of the Univ. of Cal.*, (Feb. 20, 2018) [2018 U.S. Lexis 27034], citing *Poublon v. C.H. Robinson Co.*, (9th Cir. 2017) 846 F.3d 1251, 1266 ["In the absence of any decision on this issue from the California Supreme Court, we are bound by [the applicable state appellate court decision], as the ruling of the highest state court issued to date."].)

Appellant also urges us to follow two unpublished federal decisions: *Kappelman v. City & County of San Francisco* (N.D. Cal. Oct. 27, 2015, No. 14-cv-04434-MEJ) U.S. Dist. LEXIS 145684 (*Kappelman*), and *Ramirez v. County of Marin* (9th Cir. 2014) 578 Fed. Appx. 673. However, neither case addressed exhaustion of internal administrative remedies. In *Kappelman,* the magistrate judge held that an employee was not required to file a government tort claim prior to asserting a claim for violation of section 6310. In *Ramirez,* the Ninth Circuit remanded the plaintiff's claim under section 6310 for evaluation in light of the newly enacted amendments contained in sections 244, subdivision (a) and 98.7, subdivision (g). (*Ramirez*, at p.

674.) Neither case held the amendments abolished the requirement that a plaintiff exhaust internal administrative remedies.[9] In any event, lower federal court decisions construing California statutes are not binding on this court. (See *Spellman v. Securities Annuities & Ins. Services, Inc.* (1992) 8 Cal.App.4th 452, 459). To the extent appellant asks this court to rely on nonbinding federal authorities, we decline to do so.

3. *The Futility Exception does not Apply.*

Appellant asserts that any further resort to internal grievance procedures would have been futile, because his complaints to various city and LADWP personnel regularly went ignored. We disagree. Futility is a "'narrow exception'" to the doctrine requiring exhaustion of administrative remedies. (See *Sea & Sage Audubon Society, Inc. v. Planning Com. of the City of Anaheim* (1983) 34 Cal.3d 412, 418, italics omitted [futility exception requires that the party invoking the exception """positively state that the [agency] has declared what its ruling will be in a particular case"""].) We reject the implied notion that specific individuals who disregarded appellant's complaints formed a "single seamless web of officials" with the CSC Board. (See *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 682-683.)

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[9] Although the magistrate judge in *Kappelman* opined that the statutory amendments "effectively overrul[ed] *Campbell*," there was no analysis provided, and the statement goes well beyond the holding that the filing of a tort claim is not a prerequisite to suit under section 6310. (*Kappelman*, *supra,* 2015 U.S. Dist. LEXIS 145684 at *23). The court's dictum is neither binding nor persuasive. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 243 ["[A]n opinion is not authority for an issue not considered therein."].)

There is no logical inference to be drawn, based on the actions of specific individuals, that the entire CSC Board was predisposed to rule against appellant. "[Appellant's] own speculative, subjective feelings about the matter do not allow him to unilaterally ignore avenues of review." (*Id*. at p. 683). Thus, appellant's noncompliance with CSC grievance procedures was not excused based on futility.

4. *No Public Interest Exception Excused Appellant's Failure to Exhaust Internal Administrative Remedies.*

Appellant also asserts an exception to the exhaustion of internal administrative remedies based on purported matters of great public importance, but provides no meaningful analysis or legal authority on point. *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, cited by appellant, did not recognize a matter of public importance as an exception to the exhaustion of internal administrative remedies. Instead, it considered the public interest in the context of an agency's alleged lack of subject matter jurisdiction as grounds for excusal. In *Coachella Valley,* there was significant public interest in obtaining an immediate judicial ruling concerning the applicable statute of limitations on an unfair practice charge filed by a labor union. (*Id*. at pp. 1077, 1081-1082.) Appellant has alleged no such importance or urgency here. Thus, no public interest exception excused appellant from complying with CSC grievance procedures.

C. *Disability Discrimination Claim*

1. *Appellant Failed to Exhaust his Administrative Remedies for Alleged Discriminatory Acts Other than his Termination.*

Before bringing a FEHA action for an alleged unlawful practice, a plaintiff must file an administrative charge with the DFEH, setting forth "the particulars thereof," within one year from the date of the alleged unlawful practice. (Gov. Code, § 12960, subds. (b), (d).) To exhaust administrative remedies "'as to a particular act made unlawful by the [FEHA], the claimant must specify *that* act in the administrative complaint, even if the complaint does specify other cognizable wrongful acts.'" (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*).) A claim will be barred by the nonexhaustion of administrative remedies if it was "neither like nor reasonably related to" the DFEH claim, nor "likely to be uncovered in the course of a DFEH investigation." (*Id.* at p. 1617 [retaliation claim barred where only racial discrimination was alleged in DFEH complaint]; *Wills v. Superior Court* (2011) 195 Cal.App.4th 143 (*Wills*) [claims for retaliation, hostile work environment harassment, failure to prevent harassment, failure to accommodate, and failure to engage in interactive process were barred where only discrimination based on family and medical leave was alleged in DFEH complaint].)

Appellant's DFEH complaint, filed two months after his termination, asserted that while he was on temporary disability for heart problems and hypertension, respondent terminated his employment, in violation of the FEHA.[10] The allegations in his

[10] Appellant's DFEH complaint alleged: "Claimant was diagnosed with heart problems and hypertension, and was put on

SAC -- that he was subject to harassment and retaliation based on whistleblowing activity -- do not appear in the DFEH complaint. Because appellant's DFEH complaint alleged only a discriminatory termination, all other unrelated discriminatory acts preceding this 17-month medical leave culminating in his termination are barred by the exhaustion doctrine. Thus, appellant exhausted his administrative remedies only as to his discriminatory termination.

2. *Appellant did not Timely Allege a Continuing Violation.*

Appellant argues that the alleged discriminatory acts preceding his medical leave were part of an ongoing course of conduct that culminated in his termination, which extended the period to file a DFEH complaint to one year after his termination. As noted, his DFEH complaint contains no such claim. However, even had appellant included his whistleblower claims as part of his DFEH complaint, they would be time-barred, as they were not part of a continuing violation. The FEHA statute of limitations ordinarily bars recovery for acts occurring more than one year before the filing of the DFEH complaint. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402; Gov. Code, § 12960, subd. (d).) When, however, an unlawful course of conduct begins outside the limitations period and continues to a date within the limitations period, "the continuing violation doctrine comes into play." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812.) Under this doctrine, an employer may be

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temporary disability by his treating physicians. Claimant is still on temporary disability. However, the City of Los Angeles terminated his employment, in part, due to his disability in violation of the FEHA."

liable for conduct outside the limitations period if the employer's unlawful actions: (1) are sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of "permanence," so that the employee is on notice that "further efforts at informal conciliation [with the employer] to obtain reasonable accommodation or end harassment will be futile." (*Id.* at p. 823)

The continuing violation doctrine does not apply here because the alleged unlawful conduct preceding appellant's termination was unrelated to his stated disability. The SAC alleges that appellant complained to and was harassed, intimidated, threatened or retaliated against by specific individuals because of his whistleblowing activity, not his disability. Appellant fails to plead an ongoing violation of discriminatory conduct because the unlawful acts alleged prior to April 2013 (based on whistleblowing) are not sufficiently similar in kind to the discriminatory termination (based on disability). Neither does appellant establish that the alleged unlawful acts occurred with reasonable frequency, because there was a 17-month period that separated them from the alleged disability-based termination. Finally, to the extent appellant alleges the acts of harassment caused his disability, they had acquired the requisite degree of permanence when he went out on medical leave. In short, appellant fails to assert a cognizable claim for pretermination disability discrimination because the alleged unlawful acts prior to his termination are time-barred.

3. *Appellant has not Sufficiently Pled his Termination-Based Discrimination Claim.*

To withstand demurrer, appellant must sufficiently plead all elements of a disability discrimination cause of action:

(1) plaintiff was a member of a protected class; (2) plaintiff was adequately performing the essential functions of his position; (3) plaintiff suffered an adverse employment action; and (4) circumstances suggest a discriminatory motive. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.)

Considering only the discriminatory termination which was timely pled, appellant fails to allege the necessary discriminatory motive in his disability discrimination claim. Appellant's bare assertion that respondent acknowledged his disability and knew it was caused by an allegedly hostile work environment does not establish a discriminatory motive for his termination based on disability. There must be a causal link between the protected activity (appellant's medical leave) and the ultimate employment decision. (See *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 (*Scotch*)). "'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer.'" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247, citing *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 [plaintiff was required to show that the employee who discharged him knew of his disability to prove discriminatory intent].) No facts alleged in the SAC support a reasonable inference that the decisionmakers who terminated appellant's employment after a 17-month absence were aware of his disability, let alone that they terminated him *because of* his disability.

Additionally, appellant has not sufficiently pled that he was qualified to perform the essential functions of his job at the time of his termination. Regular on-site attendance on a predictable basis is an essential job function for most positions. (See *Samper v. Providence St. Vincent Medical Center* (2012) 675

F.3d 1233, 1237-1238 ["It is a 'rather common-sense idea . . . that if one is not able to be at work, one cannot be a qualified individual.' (Citation.)"].) According to the allegations of the SAC, appellant went out on medical leave in September 2012 and was still on leave when terminated 17 months later. Appellant's conclusory allegation that he "remained qualified for his position and at all times prior to his departure had performed competently" is insufficient to establish that he was a qualified individual capable of performing his essential job functions under the FEHA. (See *Kirwan, supra,* 39 Cal.3d at p. 318 ["'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'"].) Thus, appellant fails to adequately plead his disability discrimination claim.

D. *Failure to Accommodate Claim*

1. *Appellant Failed to Exhaust his Administrative Remedies.*

As explained above, appellant's DFEH complaint addressed only his termination. Accordingly, he did not exhaust his administrative remedies as to his FEHA failure to accommodate claim. (See *Okoli, supra,* 36 Cal.App.4th at p. 1613 [to exhaust administrative remedies, claimant must specify particular unlawful act under FEHA in DFEH complaint].) A claim will be barred by the nonexhaustion of administrative remedies if it was "neither like nor reasonably related to" the DFEH claim, nor "likely to be uncovered in the course of a DFEH investigation." (*Id.* at p. 1617). "Although a claim for failure to accommodate might surface when DFEH investigates a discrimination claim based on that same disability," the facts must still give rise to the

likelihood of an accommodation claim. (*Wills*, *supra*, 195 Cal.App.4th at pp. 157-158 [finding no inference of failure to accommodate from DFEH claim alleging only discrimination, when investigation would reveal that termination was for misconduct and not disability].) Appellant's failure to accommodate claim -- added to the disability claim for the first time in the SAC -- is conspicuously absent from his DFEH claim, and is neither like nor reasonably related to the disability-based discriminatory termination claim.

2. *The Claim does not Relate Back to the Original Complaint.*

A failure to accommodate claim must be brought within one year of the date the DFEH right-to-sue letter issues, or here, by April 9, 2015. (Gov. Code, § 12965, subd. (b).) Appellant's failure to accommodate claim was outside the statute of limitations period because the SAC in which the claim was first alleged was filed in October 2015 and does not relate back to the original complaint. Under the relation back doctrine, when a timely complaint is amended to elaborate the facts, but the gravamen of the complaint remains the same, the amended complaint relates back to the original pleading. (See *Barrington v. A.H. Robins Co.* (1985) 39 Cal.3d 146, 150-151 (*Barrington*).) The amended complaint must: (1) rest on the same general set of facts; (2) seek recovery for the same injury; and (3) refer to the same incident in the original complaint. (*Id.* at p. 151.) The important factor is whether the defendant was provided fair notice. The doctrine "'focuses on *factual similarity* rather than rights or obligations arising from the facts, and permits added causes of action to relate back to the initial complaint so long as they arise factually from the *same injury*. (Citations.)'" (*Dudley v. Department of*

Transportation (2001) 90 Cal.App.4th 255, 266, italics added.) In adding his failure to accommodate claim to the SAC, appellant relied on entirely new facts involving new parties, viz., medical personnel who allegedly determined that the hostile work environment was detrimental to his health, and unnamed "defendants" who allegedly were aware of this but refused to accommodate him. Appellant's alleged injury for this claim goes beyond the disability-based termination that is the basis of his disability discrimination claim. Likewise, the alleged incidents in his failure to accommodate claim are distinct from his termination. Accordingly, the relation back doctrine does not apply, and appellant's failure to accommodate claim is untimely.[11]

3. *Appellant has not Sufficiently Pled his Accommodation Claim.*

As with a discrimination claim, a plaintiff alleging a failure to accommodate must establish that he had the ability to perform the essential functions of his job with reasonable accommodation. (See *Scotch, supra,* 173 Cal.App.4th at pp. 1010-1011 [setting forth the elements of a failure to accommodate claim: (1) the

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[11] Appellant argues that in demurring to the FAC, respondent's counsel recognized that appellant's discrimination claim encompassed a failure to accommodate claim. At the hearing on the demurrer, respondent's counsel stated: "plaintiff seems to be claiming that we had some obligation to let him stay out forever, just an indefinite period, as an accommodation." We do not view these comments as establishing that respondent was on notice of the failure to accommodate claim asserted in the SAC. (See *Barrington, supra,* 39 Cal.3d at pp. 150-151.) The accommodation respondent's counsel identified in the FAC (an extended leave of absence) was not the accommodation to which appellant claimed entitlement in the SAC (a change in the allegedly hostile work environment).

plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's known disability]; Gov. Code, § 12940, subd. (m).) Generally, the burden is on the employee to request an accommodation. (*Avila, supra,* 165 Cal.App.4th at pp. 1252-1253 [finding that "the employee must request an accommodation" and employer must be "on notice that plaintiff required accommodation"].)

Aside from its untimeliness, appellant's failure to accommodate claim fails because appellant does not sufficiently plead the elements of his claim. Appellant does not allege that he was capable of returning to work during his 17-month leave of absence, nor that he requested a reasonable accommodation that would have allowed him to perform the essential functions of his job. A finite leave of absence to recuperate or heal may be a reasonable accommodation under the FEHA, where it appears likely that the employee can return to work after the leave. (See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.) But a "'[r]easonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected.'" (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226-227.) Thus, appellant fails to allege a cognizable claim for failure to accommodate.

The trial court properly sustained the demurrer to the SAC.

DISPOSITION

The judgment of the trial court is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.