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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

PETER HELLER, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.	B271468 (Los Angeles County Super. Ct. No. BC558120)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed.

Schonbrun Seplow Harris & Hoffman, Wilmer J. Harris, and Isabel M. Daniels, for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Barbara A. Fitzgerald, Jason S. Mills, Lisa M. Rodriguez, and Thomas M. Peterson for Defendants and Respondents Regents of the University of California and Laura Parker.

INTRODUCTION

Peter Heller appeals from a judgment of dismissal, following an order granting summary judgment in favor of respondents The Regents of the University of California and Laura Parker. Appellant's complaint alleged that respondents retaliated against him for his whistleblowing activities. The trial court granted respondents' motion for summary judgment, after determining that appellant could not establish a prima facie case of whistleblower retaliation because he could not show he engaged in protected whistleblowing activity. Appellant argues the record shows he did engage in protected activity. We conclude that appellant failed to demonstrate a triable issue of fact as to his whistleblowing activity. Accordingly, we affirm.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. *Appellant's Complaint*

On September 19, 2014, appellant filed a complaint for damages, asserting causes of action for violation of the California Whistleblower Protection Act (CWPA) (Gov. Code, § 8547 et seq.); whistleblower retaliation in violation of Labor Code section 1102.5 et seq.; violation of the Private Attorneys General Act (PAGA) (Lab. Code, § 2699); violation of the California False Claims Act (CFCA) (Gov. Code, § 12653); intentional infliction of emotional distress (IIED); and negligent infliction of emotional distress (NIED). These causes of action allegedly arose from appellant's wrongful termination in retaliation for his whistleblowing activities.

According to the complaint, on June 11, 2009, appellant was hired as the executive director of development at UCLA's School of Theater, Film and Television (TFT). He allegedly

"exceed[ed] the established metrics for his fundraising objectives," including bringing in two significant gifts for the school in 2012. In 2013, appellant engaged in whistleblowing about TFT Dean Teri Schwartz's "waste, fraud, and abuse." With respect to the alleged fraud, appellant protested the publication of "inaccurate statistics" regarding TFT alumni's awards in the school's "brand book," on the TFT website, and on the main UCLA website. The complaint alleged that Dean Schwartz inflated the award numbers by combining nominations and wins. Appellant asked Dean Schwartz to separately state the nominations and wins, but she refused.

With respect to Dean Schwartz's alleged waste and abuse, on May 2, 2013, appellant complained to Vice Chancellor Rhea Turteltaub about the dean's "spendthrift ways, including her insistence on lodging at upscale hotels, flying on substantially more expensive reservations on her preferred British Airways, and extravagant catering." After failing to receive a response, appellant complained to Provost Scott Waugh about Dean Schwartz's "spending and general incompetence." After receiving an unsatisfactory response, appellant called UCLA's whistleblower hotline to report his concerns about Dean Schwartz.

The complaint alleged that appellant suffered retaliation for his whistleblowing. On May 14, 2013, respondent Parker, a UCLA vice chancellor, along with a human resources representative, met with appellant. During the meeting, appellant was given a "performance expectations" letter which falsely claimed that he was "far below" his target number of donor visits. Subsequently, on July 26, 2013, appellant received a letter terminating his employment as of September 12, 2013.

B. *Respondents' Motion for Summary Judgment*

After filing an answer generally denying the allegations in the complaint, on January 29, 2015, respondents the Regents of the University of California and Parker filed a motion for summary judgment. In the motion, respondents argued that appellant's first, second, third and fourth causes of action for whistleblower retaliation failed as a matter of law because, among other grounds, appellant could not make a prima facie showing that he had engaged in protected whistleblowing conduct. With respect to the fifth and sixth causes of action for infliction of emotional distress, respondents asserted that those failed as matter of law because, among other grounds, they were preempted by workers' compensation exclusivity.

1. *Respondents' Factual Allegations*

In support of the motion, respondents set forth the following facts. Appellant and Dean Schwartz previously worked together at Loyola Marymount University. When the dean moved to UCLA, she informed appellant she wanted him to join her. In July 2009, appellant was hired as UCLA's executive director of industry relations for TFT. He reported to Dean Schwartz and June Poust, who was later replaced by Parker in 2011. Appellant's fundraising goal for fiscal years 2010, 2011, and 2012 was $6 million annually. He failed to meet the annual goal during any of those periods. In February 2012, appellant allegedly mishandled a donation of memorabilia. Later that spring, Parker's supervisor, Associate Vice Chancellor Steve Gamer expressed concerns to Parker about appellant's fundraising performance. In August 2012, Parker directed appellant to draft a fundraising plan for fiscal year 2013. After receiving appellant's proposed plan on August 22, 2012, Parker

was dissatisfied because it was devoid of key elements such as staff visit and solicitation goals. On August 29, she asked appellant to revise his plan; he never did.

In February 2013, appellant echoed concerns about certain statistics first published in the TFT "brand book" in 2010, and later republished on the TFT website and on the web "portal" from the main UCLA website. On the web portal, it was stated that TFT alumni included "107 Academy Award winners, more than 250 Emmy winners, 79 Golden Globe winners and 17 Tony Award winners." Several prominent alumni were then listed. On February 7, 2013, Executive Director for Communications Cassandra Hall e-mailed Dean Schwartz and appellant with ideas about updating the information on TFT alumni presented on the TFT website. Hall also stated, "if we are going to list the awards information, we need to break it up between wins and nominations." The next day, appellant sent an e-mail to Dean Schwartz and Hall, agreeing with Hall's proposed update and stating that the award numbers were "inaccurate" because they combined nominations and wins. Appellant expressed concern that a reporter might research "a story on how different film schools have fared at the Academy Awards and see[] the numbers on the UCLA portal page about TFT. It won't take the reporter long to figure out that the statistics are inaccurate. This could lead to embarrassing coverage where TFT is accused of inflating the numbers."

Dean Schwartz promptly responded that she wanted the numbers to be correct. "I had the statistics done when I first arrived and this was what I was given." However, the dean asked Hall to delay changing the current UCLA web portal page because "I went to great lengths to get them to agree to allow me

to do this in the first place, and even to include [the] names [of TFT alumni]." Appellant then sent the dean a private e-mail, noting he had previously expressed his concern about the numbers to avoid "[a]n embarrassing story about inflating our awards numbers." Dean Schwartz responded that she too was concerned about the reputation of the school: "If [Hall] is now coming up with new #'s, as I said, they need to be changed, of course, if they are correct." She later reiterated: "If we need to change any overall statement, on the portal or on our website, about the award #'s and provided [new] #'s are verified, [then] we can do that, without question. I want them to be accurate too. And, I thought they were." Six days later, on February 14, 2013, the award numbers were removed from the digital brand book and websites because, as Hall explained in a declaration, "the numbers constantly change[d]."

Additionally, in February 2013, appellant mishandled a fellowship (funds donated and set aside to pay interns), seeking to have it designated a gift when it could not be a gift under UCLA policy (because interns would be paid to work for the donor). On March 5, 2013, as a result of appellant's mishandling, Parker told appellant he was failing to meet his job expectations. The next day, appellant e-mailed Parker, stating he "would greatly like to improve my performance and learn to be a better and more productive development executive." He stated he would "appreciate a thorough, written performance evaluation." Parker responded, "I will begin the process, consult with the appropriate individuals and schedule time to review with you and your dean." On March 27, 2013, appellant told Parker, Turteltaub and Dean Schwartz that he had applied for deanships outside UCLA and was a finalist for two.

On May 2, 2013, appellant e-mailed Turteltaub and Lynne Thompson, the director of employee and labor relations at the time, questioning Dean Schwartz's alleged absences, spending, and overall effectiveness. In the e-mail, appellant stated that between January and June 2013, the dean would have taken five major trips out of the office, which precluded crucial face-to-face-meetings with "[h]igh capacity prospects and donors." As to the dean's spending, appellant alleged based on his "understanding," that the dean had spent over $400,000 on branding consultants during her tenure. He further alleged she had spent over $50,000 in travelling expenses for fiscal year 2012, and between $7,500 and $10,000 per year on catered lunches for herself and her staff. Appellant also complained about the dean's "[l]ack of [f]ocus and [c]lear [c]ommunications."

On May 9, 2013, appellant e-mailed Provost Waugh to express his concerns over Dean Schwartz's absences and the lack of followup on his request for a 360-degree performance review. Provost Waugh responded, "I don't believe a meeting with my office would be fruitful at this time. Rather, I encourage you to continue to work with both the Dean and External Affairs on the School's campaign."

On May 14, 2013, Parker presented appellant with a letter of expectations, noting that he had reached only 55 percent of his goal for visits and 33 percent of his goal for solicitations and directing him to improve his efforts. The letter informed appellant that Parker would review his performance again on July 9, 2013.

On May 17, 2013, appellant called UCLA's whistleblower hotline to report his concerns about the dean's spending and "fraud" in using the inaccurate award statistics. Appellant

allegedly called the hotline two more times to voice the same complaints. After being informed that his calls did not contain information sufficiently specific to warrant an investigation, on June 25, 2013, appellant sent an e-mail to Vice Chancellor Kevin Reed and William H. Cormier, the director of the UCLA Administrative Policies & Compliance Unit, detailing his concerns about Dean Schwartz. Appellant asserted that the dean's use of inflated award numbers "not only opens the University to potentially harmful public relations but also constitutes fraud in the solicitation of funds from donors." He alleged that Dean Schwartz committed "economic waste" by exclusively traveling on British Airways on overseas trips, by staying at hotels where UCLA did not receive discounts, using expensive limousine services, and catering lunches for UCLA and TFT faculty and staff. He asserted there was no business rationale for using the more expensive travel options. Appellant further alleged that Dean Schwartz exhibited gross incompetence in handling donors, was grossly inefficient in using branding consultants, and had excessive absences.

In July 2013, after the close of the fiscal year, Parker again reviewed appellant's performance. She determined that although he had visited two additional prospects and solicited two more prospects, appellant had not met his goals for the year. On July 26, 2013, Parker provided appellant with a final notice that his employment would be terminated September 12, 2013. Dean Schwartz was not involved in the decision to terminate appellant's employment.

2. *Respondents' Arguments*

Respondents argued that based on the factual record, appellant could not show he was entitled to protection as a

whistleblower because he failed to make a prima facie showing that he made a "protected disclosure," as that term is defined in the CWPA, or that he engaged in protected whistleblowing activity. Thus, respondents asserted, appellant's first four causes of action, which relied on the existence of a whistleblowing disclosure, failed as a matter of law.

Respondents noted that appellant's discovery responses identified four allegations which he asserted were protected conduct: (1) appellant's complaint about Dean Schwartz's spending; (2) his complaint about the dean's "fraudulent" use of "inaccurate" statistics regarding TFT alumni's industry awards; (3) his complaint concerning the dean's alleged ineffective leadership; and (4) his request for a thorough "360-degree performance review."

With respect to the complaint about Dean Schwartz's spending, respondents asserted that appellant did not disclose anything new. Indeed, appellant had discussed the dean's spending with Parker because "it was urban legend at the school." More important, respondents contended that appellant was merely "commenting" on expenses that the dean had already submitted and that the university had already reviewed and approved. Respondents noted that appellant did not allege that Dean Schwartz filed false expense reports, but rather that the dean's expenditures were excessive. They further noted that UCLA had received complaints about Dean Schwartz's spending on March 4, 2010, September 9, 2010, April 20, 2011 and November 8, 2012. The university investigated these complaints and determined that the dean's travel expenses were in

accordance with UCLA policy or had been approved as valid exceptions to the policy.[1]

As to disclosure of alleged "fraud" regarding the number of award winners, respondents asserted that the actual number of winners and nominations could easily be determined based on publicly and readily available information. Additionally, no evidence was presented that Dean Schwartz purposefully falsified the numbers. Indeed, the dean stated that she wanted the award numbers to be accurate and was willing to change the

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[1] In the May 4, 2010 complaint to UCLA's whistleblower hotline, the caller alleged that Dean Schwartz "goes [on] business trips frequently, and spends excessive money on each trip. She flies first class, stays and dines at five-star hotels."

In the September 9, 2010 written complaint, a former TFT employee alleged that the dean had skirted "the accounting guidelines and rules of the University." The former employee alleged that the dean had spent over $1 million on branding consultants, that she constantly traveled and used "first-class travel, accommodations and limousine[] services."

In the April 20, 2011 written complaint, an anonymous UCLA employee alleged that Dean Schwartz was "spending like crazy" on "five star hotels, on lavish trips, on limousines." "She disappears to New York, London, and other popular destinations for weeks and weeks at a time." The employee also alleged that the dean spent "thousands and thousands of dollars to ensure she has multiple flat screen HD TV's in her office" and "hundreds of thousands of dollars to hire a company . . . to make one of the worst school brochures I have ever seen."

In the November 8, 2012 e-mail complaint, an anonymous person alleged that "Dean Teri Schwartz is known to have spent thousands upon thousands of UCLA dollars on limousine rides, five star hotels, first-class flights, flat screen televisions for her office, and even boarding for her dog while she's on vacation."

numbers if they were not. Finally, there was no showing of harm, as appellant admitted he was unaware of any donor making a gift based on the information.

As to appellant's concerns about the dean's alleged ineffectiveness and his request for a "360-degree performance review," respondents argued that these were not protected disclosures because they did not disclose any violation of a state or federal statute, rule or regulation. Respondents asserted that these complaints reflected mere differences of opinion or internal personnel practices, not protected whistleblowing.

Respondents also contended that the NIED and IIED causes of action were preempted by workers' compensation exclusivity. Moreover, on the merits, respondents asserted that appellant had failed to show that Parker's conduct in terminating his employment was extreme and outrageous.

C. *Appellant's Opposition to Summary Judgment Motion*

Appellant opposed the motion for summary judgment, arguing that he had raised triable issue of fact on all of his causes of action. Appellant argued that the facts showed he was a highly successful development officer. During his employment, he received two merit increases, was promoted to assistant dean of development and industry relations, and was never subject to any disciplinary action.

Appellant argued he engaged in "a litany of protected conduct" that resulted in his wrongful termination. According to appellant, his attempt to have the inaccurate award numbers changed was a report of Dean Schwartz's violation of state and federal criminal statutes, including violation of the Federal Wire Fraud Act (18 U.S.C. § 1343) and Penal Code section 532d, because the "fraudulent" numbers were published on the internet

and used to solicit donations. He contended that he need not show that the dean's fraud was successful; a good faith belief in the attempted fraud was sufficient.

Appellant also argued that his complaints about Dean Schwartz's excessive travel and entertainment expenses constituted protected conduct. He asserted that he had accused the dean of submitting false claims for reimbursement, alleging that she had mischaracterized personal expenses as business expenses. Appellant argued that "both UCLA and Dean Schwartz engaged in tax fraud by treating [her] claims as reimbursable business expenses." He further argued that his complaints about the dean's spending were not previously made by other whistleblowers, noting that his complaints were made before and after their complaints.

Appellant contended the denial of his request for a 360-degree performance review violated state law, specifically the Regents' personnel policies for staff members (PPSM). Appellant stated he had invoked his right to a performance review under PPSM-23, which provided that "'each employee shall be appraised at least annually in writing by the employee's immediate supervisor, or more frequently in accordance with local procedure.'" Appellant asserted that his request for a performance review was made with the intent to "call attention to the Dean's gross mismanagement, waste of governmental resources, and fraud." Finally, appellant summarily asserted that his complaint about Dean Schwartz's "willful neglect of her duty and general unfitness for her position" was protected conduct.

Appellant contended the NIED and IED claims were not preempted by workers' compensation exclusivity because those

causes of action were based on conduct not normally part of the employment relationship, specifically, conduct in violation of express statutory provisions (such as the CWPA) and violations of criminal statutes. Additionally, appellant argued that a violation of state statutes is sufficient to establish the outrageous conduct element of an IIED claim.

D. *Respondents' Reply*

Respondents argued that appellant could not revive his causes of action by alleging new facts and claims. Appellant's complaint did not allege that his request for a performance review constituted protected conduct, and thus any such claim was forfeited. As to appellant's claim that Dean Schwartz engaged in illegal activity when she submitted excessive spending claims, respondents contended that appellant never communicated to anyone that the dean had engaged in illegal behavior or had filed a false claim. For example, in his May 2, 2013 e-mail to Turteltaub, appellant expressed his "understanding" as to how much Dean Schwartz was spending on traveling and catering. He never asserted that the dean's expenses were personal, rather than business-related. As to the use of allegedly inaccurate award numbers, respondents argued that appellant never suggested the use of those numbers constituted criminal conduct. Moreover, the undisputed evidence showed that in response to appellant's concerns, Dean Schwartz expressly stated she was willing to change the numbers.

Respondents also disputed that appellant was a highly successful development officer. They argued that the undisputed evidence showed he failed to meet his annual fundraising goals. Moreover, the alleged "'merit increases'" were actually cost-of-living increases and the "'promotion'" was a mere change in title

without any additional salary or reclassification. Finally, respondents contended that the PAGA, NIED and IIED claims failed for the same reasons set forth in their summary judgment motion, and that appellant's arguments to the contrary were not supported by California law.

E. *Trial Court's Ruling*

On March 18, 2016, the trial court granted respondents' motion for summary judgment. It determined that appellant had failed to make a prima facie showing that he had made protected disclosures or engaged in protected whistleblowing activity. With respect to appellant's complaints about Dean Schwartz's spending, the court found that appellant was "commenting on business expenses that Dean Schwartz submitted to UCLA Travel Services, which were public information and which had been reviewed by the University. [Appellant] does not claim that the Dean submitted false reports, and her spending had previously been investigated and approved." With respect to the award numbers on the UCLA website, the court found no whistleblowing because the information contained on the website was publicly available and "nothing . . . suggest[s] that [appellant] believed Dean Schwartz was purposefully falsifying information." Finally, with respect to appellant's complaints about Dean Schwartz's alleged absenteeism and lack of leadership and his request for a "360-degree performance review," the court found that "'debatable differences of opinion[] concerning policy matters are not protected disclosure[s].'" Thus, the court ruled, appellant could not prevail on his whistleblowing retaliation causes of action under the CWPA, Labor Code section 1102.5, and the CFCA. Furthermore, the derivative PAGA action failed because the underlying Labor Code section 1102.5 claim

failed. Similarly, the NIED and IIED claims failed because to the extent they were not preempted by workers' compensation exclusivity, they were based on the same alleged protected conduct, which the court found had not been shown.

Judgment in favor of respondents and against appellant was entered the same day. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in granting respondents' motion for summary judgment. "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element *X*." (*Id.* at p. 853.)

"'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2)

determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.) Following a grant of summary judgment, we review the record de novo for the existence of triable issues, and consider the evidence submitted in connection with the motion, with the exception of evidence to which objections were made and sustained. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) Furthermore, our review is governed by a fundamental principle of appellate procedure, namely, that "'[a] judgment or order of the lower court is presumed correct,'" and thus, "'error must be affirmatively shown.'" (*Denham v. Superior Cour*t (1970) 2 Cal.3d 557, 564 quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239, italics omitted.) Under this principle, appellant bears the burden of establishing error on appeal, even though respondents had the burden of proving its right to summary judgment before the trial court. (*Frank and Freedus v. Allstate Ins. Co*. (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in appellant's briefs. (*Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 125-126.)

Here, appellant's complaint alleged that he received a poor performance review and was wrongfully terminated in retaliation for his whistleblowing activities. The complaint alleged that respondents' retaliatory acts violated the CWPA (first cause of action), section 1102.5 of the Labor Code (second cause of action), and the CFCA (fourth cause of action). It further alleged a derivative PAGA claim based on the Labor Code violation (third cause of action), and claims for NIED and IIED based on the same retaliatory acts (fifth and sixth causes of action).

In granting summary judgment, the trial court concluded that respondents has demonstrated appellant could not make a prima facie showing that he had engaged in protected whistleblowing activity under the CFCA, Labor Code section 1102.5, or the CWPA. We start by examining the requirements of each statute. To establish a prima facie case for retaliation under the CFCA, a plaintiff must show: "'(1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity.'" (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 455-456, quoting *Mendiondo v. Centinela Hospital Medical Center* (9th Cir. 2008) 521 F.3d 1097, 1103.) Activity protected under the CFCA includes reporting that a person has submitted a false claim for payment to a governmental entity. (See *McVeigh v. Recology San Francisco*, *supra*, at p. 458 [CFCA is violated when a person "'[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval'"].)

Section 1102.5, subdivision (b) of the Labor Code prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency, where "the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." To establish a prima facie case of retaliation under Labor Code section 1102.5, a plaintiff must show that he disclosed a violation or noncompliance of a state or federal statute, rule or regulation; that he was thereafter subjected to adverse employment action by his employer; and there was a

causal link between the disclosure and the adverse employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.)

Finally, under Government Code section 8547.10 of the CWPA, employees of the University of California are protected against retaliation for making "protected disclosure[s]." A "[p]rotected disclosure" includes "a good faith communication . . . that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity . . . ." (Gov. Code, § 8547.2, subd. (e).) An "[i]mproper governmental activity" is "an activity . . . by an employee . . . that (1) is in violation of any state or federal law or regulation, including, but not limited to, . . . fraudulent claims, fraud, . . . misuse of government property, or willful omission to perform duty, . . . or (3) is economically wasteful, involves gross misconduct, incompetency, or inefficiency." (Gov. Code, § 8547.2, subd. (c).) Thus, to establish a prima facie case for violation of the CWPA, appellant must show he made a protected disclosure, i.e., a good faith communication that disclosed that Dean Schwartz had engaged in improper government activity.

Appellant contends that he engaged in protected whistleblowing activity when: (1) he complained about Dean Schwartz's spending; (2) he complained that the award numbers published in the school's brand book and on the website were "inaccurate" and "fraudulent"; (3) he complained about Dean Schwartz's general incompetence, poor leadership and absenteeism; and (4) he requested a "360-degree performance review." We address these contentions in turn.

1. *Complaints about Dean Schwartz's Spending*

With respect to Dean Schwartz's spending, the complaint identifies the following alleged protected conduct: (1) in a May 2, 2013 e-mail to Turteltaub, appellant complained about "Dean Schwartz's spendthrift ways, including her insistence on lodging at upscale hotels, flying on substantially more expensive reservations on her preferred British Airways, and extravagant catering"; (2) in a May 9, 2013 e-mail to Provost Waugh, appellant "reiterated his complaints of the Dean's spending"; and (3) in a May 17, 2013 call to UCLA's whistleblower hotline, appellant reported "circumstances described above."[2]

The trial court determined that appellant's complaints about Dean Schwartz's spending did not constitute protected whistleblowing activity. We agree. With respect to the CFCA, the trial court found -- and our review confirms -- that appellant never reported that Dean Schwartz filed false claims for reimbursement. Appellant neither used the term "false claim" nor referred to the CFCA. He did not allege that the dean filed claims for travel she did not undertake or that she inflated the actual amounts paid. Rather, appellant complained that the dean travelled on more expensive flights and stayed at more expensive hotels.

Appellant contends he reported that Dean Schwartz filed false claims because she sought reimbursement for personal, not business-related expenses. However, appellant never disputed that Dean Schwartz had a business purpose for her travels. Rather, he contended that she could have achieved her business

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[2] Our review of the May 9, 2013 e-mail to Provost Waugh shows appellant did not mention Dean Schwartz's spending.

purpose with more economical options. This opinion is not tantamount to a report of a false claim.[3]

With respect to Labor Code section 1102.5 and the CWPA, appellant has not identified how Dean Schwartz's spending violated any specific state or federal rule, statute or regulation. Nor has appellant disclosed any information not previously disclosed to and investigated by UCLA. As the trial court noted, Dean Schwartz disclosed her actual business expenditures to UCLA. During the principal period of time covered by appellant's complaints, the dean's expenses were examined and approved. As to his allegations about subsequent expenditures, they are too vague to demonstrate economic waste. At most, appellant was reporting his personal opinion that the dean could have traveled more economically and found accommodations at a lower cost. As the trial court observed, "Mr. Heller believes that UCLA made a mistake in approving those expenses." Such an opinion about UCLA's expense reimbursement policy is not, in our view, a protected disclosure. (See *Mize-Kurzman v. Marin Community College Dist*. (2012) 202 Cal.App.4th 832, 852 (*Mize-Kurzman*) ["'[D]ebatable differences of opinion concerning policy matters'" that do not also violate state or federal statute, rule or regulation are not protected disclosures].)

Appellant's reliance on *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 is misplaced. There, the court of appeal rejected a "'first report'" rule, finding that such a rule would defeat the legislative purpose of protecting workplace whistleblowers, "as employees would not come forward to report

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[3] Appellant's complaints about the dean's spending are the only complaints involving false claims.

unlawful conduct for fear that someone else already had done so." (*Id*. at p. 1550.) Implicit in the court's reasoning was a concern that persons seeking to report misconduct should not fear losing whistleblower protection simply because, unbeknownst to them, the information they reported had been previously disclosed. That concern is not present here, as by appellant's own admission, Dean Schwartz's allegedly excessive spending (an "urban legend") was well known before he made his complaints.

2. *Complaints about "Inaccurate" Award Numbers*

Appellant contends he engaged in protected activity when he e-mailed Dean Schwartz on February 8, 2013, asking her to accurately characterize TFT alumni's achievements on the web portal by separately stating the number of nominations and wins. When he communicated with Dean Schwartz, appellant did not suggest the award numbers were "fraudulent," but that by conflating award nominees and recipients, the school could be subject to "embarrassing [media] coverage." Only months later, after the website had been modified, did appellant call UCLA's whistleblower hotline to complain that the dean had committed "fraud" in using inflated award numbers. We conclude appellant's conduct did not constitute protected activity.

Appellant alleges Dean Schwartz's use of the inaccurate award numbers violated Penal Code section 532d, which generally prohibits misrepresentations in the solicitation of donations.[4] It is questionable whether the web portal and brand

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[4] Penal Code section 532d provides that "[a]ny person who solicits or attempts to solicit . . . money or property . . . for a charitable . . . purpose and who, directly or indirectly, makes, utters, or delivers, either orally or in writing, an unqualified statement of fact concerning the purpose or organization for

book constituted solicitations. In any event, the evidence does not support an inference that Dean Schwartz purposefully falsified the award information to solicit donations. As the record shows, in response to appellant's e-mail, the dean stated that she believed the numbers she had been given were accurate, but that if they were not, they should be corrected. Six days later, the award numbers were removed from the website and digital prints of the brand book.

3. *Complaints about Dean Schwartz's Poor Leadership*

Appellant contends his complaints about Dean Schwartz's "general incompetence," absenteeism, lack of focus and poor communications constituted protected disclosures.[5] We disagree. Appellant has identified no specific state or federal statute, rule or regulation that was violated by Dean Schwartz's allegedly poor leadership. Moreover, appellant's allegations are insufficient to show "gross misconduct, incompetency or inefficiency" (Gov. Code, § 8547.2). Rather, his allegations concerning the dean's leadership reflect his disagreements with UCLA's internal practices and policies, which are outside the scope of the whistleblowing statutes. (See *Mize-Kurzman*, *supra*, 202 Cal.App.4th at p. 852 ["'[d]ebatable differences of opinion concerning policy matters'" that do not also violate state or

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which the money or property is solicited . . . , which statement is in fact false and was made, uttered, or delivered by that person either willfully and with knowledge of its falsity or negligently . . . , is guilty of a misdemeanor. . . ."

[5] This allegation is distinct from appellant's complaints concerning the dean's allegedly excessive spending, which we have previously addressed.

federal statute, rule or regulation are not protected disclosures].) As one court has observed, "[t]o exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385 [disclosures of student complaints of teacher misconduct and of need for more staffing did not constitute whistleblowing]; accord, *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 ["Matters such as transferring employees, writing up employees, and counseling employees are personnel matters" not subject to whistleblowing statute].) In short, appellant's complaints about the quality of Dean Schwartz's leadership are not protected disclosures.

4. *Request for "360-Degree Performance Review"*

On appeal, appellant contends that his request for a "360-degree performance review" was itself protected conduct. We disagree. As respondents noted below, appellant's complaint did not allege that his request for a performance review was protected activity, and this contention is arguably forfeited. Even if considered, we would find no protected disclosure, as a request for a performance review does not disclose any "improper governmental activity" within the meaning of the CWPA or any violation of a specific state or federal statute, rule or regulation. Moreover, to the extent appellant argues his request for a performance review was made to draw attention to Dean Schwartz's spending, fraud and poor leadership, these complaints

were separately raised in other incidents which, as explained above, fail to constitute protected disclosures.

Because appellant cannot show he engaged in protected whistleblowing activity, respondents were entitled to summary judgment on his whistleblower retaliation causes of action under the WPA, Labor Code section 1102.5 and the CFCA. As appellant does not have a viable Labor Code section 1102.5 claim, the derivative PAGA claim also fails.

The lack of protected whistleblowing activity also dooms the NIED and IIED causes of action. As a general matter,"an action for negligent infliction of emotional distress resulting from employment dismissal is barred by the workers' compensation exclusivity rule." (*Robomatic, Inc. v. Vetco Offshore* (1990) 225 Cal.App.3d 270, 274.) Likewise, in *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876 (*Miklosy*), our Supreme Court held that a public employee who was terminated as a result of alleged whistleblowing is barred from bringing a cause of action for IIED by the workers' compensation exclusive remedy provisions, unless the dismissal involves conduct that exceeds the risks inherent in the employment context. (*Id*. at p. 902.) Appellant's sole contention is that dismissal for protected activity is not an inherent risk in the employment context. However, our Supreme Court has expressly rejected the argument that whistleblower retaliation is not a risk inherent in the employment relationship. (*Miklosy*, *supra*, at p. 903, citing *Shoemaker v. Myers* (1990) 52 Cal.3d, 1, 25.) In any event, due to the lack of protected activity, appellant could not present a prima facie case of whistleblower retaliation. Accordingly, he is not entitled to the exception for noninherent employment risks. In

sum, the trial court properly granted respondents' motion for summary judgment and dismissed appellant's complaint.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.