Miklosy v. Regents of the University of California: The California Supreme Court Confronts the Whistleblower Protection Act

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The opinion in *Miklosy v. Regents of the University of California*,[1] issued July 31, 2008, was the California Supreme Court's first major decision construing and applying the California Whistleblower Protection Act (WPA or Act).[2] The Act prohibits retaliation against state employees—whether employed by state agencies, the California State University, or the University of California—who "report waste, fraud, abuse of authority, violation of law, or threat to public health."[3] In line with that prohibition, the Act authorizes an "action for damages" to redress any acts of retaliation.[4] But in the case of retaliation against employees of the University of California, who now number more than 150,000,[5] "any action for damages shall *not* be available . . . *unless the injured party has first filed a complaint with the [designated] university officer . . . and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents.*"[6] The *Miklosy* court held that the Act "means what it says, precluding a damages action when . . . the University of California has timely decided a retaliation complaint."[7]

In addition to the interpreting the WPA, *Miklosy* resolved issues involving the common law of wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.*[8] and intentional infliction of emotional distress. The court held that The Regents of the University of California were immune from *Tameny* wrongful termination claims under the California Government Claims Act[9] and that supervisory employees were outside the scope of such claims because they are not "employers."[10] The court also held that neither The Regents nor supervisory employees were subject to intentional infliction claims by operation of the exclusive remedy provision of the Workers' Compensation Act.[11]

BACKGROUND

The two plaintiffs in *Miklosy* were former employees of Lawrence Livermore National Laboratory (Laboratory), which was then operated by the University of California for the United States Department of Energy. The Laboratory terminated the employment of one plaintiff, while the other resigned.[12] Plaintiffs filed complaints for retaliation under the WPA with the designated University officer at the Laboratory.[13] After factfinding established that neither plaintiff had suffered retaliation—both plaintiffs refused to be interviewed in the investigation that followed their complaints, and the investigator interviewed more than twenty witnesses and produced a several-page written decision—the University, through the Laboratory's Director, rejected their complaints within the time limits The Regents had established.[14]

Without filing a petition for writ of mandate in superior court to review the Laboratory Director's decisions, plaintiffs then filed a complaint for damages against The Regents and certain supervisory employees, asserting WPA damages claims, common law *Tameny* wrongful termination claims, and common law intentional-infliction-of-emotional-distress claims.[15] The superior court sustained defendants' demurrer without leave to amend and dismissed the action.[16] The court of appeal affirmed.[17] The California Supreme Court granted review—and proceeded to affirm.[18]

WHISTLEBLOWER PROTECTION ACT DAMAGES CLAIMS

In 1993, the Legislature enacted the WPA.[19] From its inception, the Act has dealt with employees of state agencies and the University of California in separate provisions, reflecting its awareness of The Regents' "unique constitutional status" and the "concomitant need for special provisions to govern whistleblowing at the University."[20]

With one important caveat, the Act has always permitted a damages action against any person who retaliates against a state agency employee.[21] That caveat, as enacted, was that a damages action "shall not be available … unless the [employee] has first filed a complaint with the State Personnel Board … *and the board has failed to reach a decision*" within specified time limits.[22] In so doing, the Act made a damages action a remedy available only if the State Personnel Board failed to reach a timely decision.[23]

With a similar caveat, the Act has always permitted a damages action against any person who retaliates against a University of California employee.[24] That caveat, since its enactment, is that a damages action "shall not be available . . . unless the [employee] has first filed a complaint with the [designated] university officer . . . *and the university has failed to reach a decision . . . within the time limits established for that purpose by the regents*."[25] In so doing, the Act has always made a damages action a remedy available only if the University fails to reach a timely decision.

In 1994, the Legislature amended the Act to permit a damages action against any person who retaliates against a California State University employee, again with one caveat.[26] That caveat provided that a damages action "shall not be available . . . unless the [employee] has first filed a complaint with the [designated] university officer . . . *and the university has failed to reach a decision . . . within the time limits established for that purpose by the trustees*"—but further provided that the employee was not "*prohibit[ed] . . . from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months.*"[27]

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Whether the preceding sentence might authorize a court to find such a "decision" unsatisfactory, albeit timely, and on that basis allow a damages action, was not a question implicated in *Miklosy*.[28]

In 2001, the Legislature amended the provision applicable to state agency employees to make a damages action available to a state agency employee, *whether or not the State Personnel Board reaches a timely decision*[29]—i.e., imposing a "mere exhaustion [of administrative remedies] requirement."[30] The Act now provides that a damages action "shall not be available . . . unless the [employee] has first filed a complaint with the State Personnel Board . . . *and the board has issued, or failed to issue*," a decision.[31] In so amending the Act, the Legislature changed the damages action from a remedy available only if the State Personnel Board *failed to reach* a timely decision to a remedy available so long as the employee first exhausts administrative remedies.[32] As would become key for *Miklosy*, the Legislature did not amend the Act in a similar fashion with respect to University of California employees.[33]

Against this backdrop, the *Miklosy* opinion—authored by Associate Justice Joyce L. Kennard and joined by three other justices—read the WPA to draw the following facial distinction between state agency employees and University of California employees: While a state agency employee may sue for damages after the State Personnel Board has issued or failed to issue a decision, a University of California employee may do so only if the University fails to reach a timely decision. In other words, if the University reaches such a decision, the employee may *not* sue for damages.[34]

The supreme court then proceeded to ask whether the Legislature intended to draw this distinction—specifically, whether it meant to treat University of California employees as it did.[35] After detailed and extensive review, the court answered "yes."[36]

The court reasoned that construing the Act to maintain the distinction was the only interpretation that "fits comfortably" with the Act's "plain meaning" and accords with the interpretation given the Act, albeit in dictum, in *Campbell v. Regents of the University of California*.[37] In addition, the court noted, to read the University of California damages provision as a bar rather than an exhaustion requirement was "reasonable in light of the unique constitutional status" of The Regents, which "functions in some ways like an independent sovereign, retaining a degree of control over the terms and scope of its own liability."[38] Given that status, the court held, "it is not surprising that the Legislature would take a deferential approach when authorizing damages actions against the University."[39] As a result, the court continued, the Act gives The Regents the "flexibility appropriate to a semiautonomous branch of the state government to create its own mechanism for resolving whistleblower retaliation claims, but it also provides an alternative remedy when the University's remedy is withheld."[40]

The court cautioned, however, that although the Act "give[s] considerable leeway to the University to operate with relative autonomy within the state governmental system," it "does not leave the University's decision completely unreviewable—an action for a writ of mandate provides limited review."[41] Review by mandate, even if limited, has bite: "The University must provide a viable mechanism for fairly evaluating whistleblower retaliation complaints," and its consideration of such complaints "cannot be so perfunctory or arbitrary as to violate . . . due process."[42]

In so construing the Act, the court addressed arguments plaintiffs raised involving the Act's legislative history. Ultimately, however, the court found that history supported the court's construction.[43] The court determined that both before and after the 2001 amendment—by which, as noted, the Legislature subjected state agency employees to a "mere exhaustion requirement"—the Legislature chose *not* to do the same for University of California employees.[44] The court could not deem the Legislature's choice to be a "matter of inadvertence or oversight."[45]

The court also rejected plaintiffs' argument that its reading of the Act frustrated the Act's purpose, which is to prevent retaliation. The court concluded that that purpose did not trump the Act's terms, but instead its terms confined its purpose.[46] "Tenfold damages," the court explained, might "deter . . . retaliation, but the [Act] does not impose such damages, and they are not awarded."[47]

The court also rejected plaintiffs' claim that its construction produced an "absurdity"—which plaintiffs believed existed by permitting state agency employees to sue for damages after exhausting administrative remedies but forbidding University of California employees from doing so.[48] The court, however, found a "rational, nonabsurd basis for the distinction" in The Regents' "unique status . . . and the Legislature's 'consequent desire to preserve' its 'autonomy.'"[49] Although recognizing the "possibility of abuse" in the self-policing mechanism the Legislature has established for The Regents, the court found it was required to construe the Act according to its plain meaning because the Act did not reflect any "legislative error" and was not "absurd" or "inherently unfair."[50]

"What is clear [] is that Miklosy *is not the California Supreme Court's last word on how to construe and apply the WPA."*

Applying its holding, the court then found that because the University had reached a timely decision on plaintiffs' complaints—a point plaintiffs never challenged—plaintiffs could not bring their WPA damages action, as both lower courts had ruled.

In a concurring opinion, Associate Justice Werdegar (joined by two other justices) agreed with Justice Kennard's reasoning and result, but solely on the ground that the Act "unambiguously" renders a damages action unavailable to a University of California employee if the University reaches a timely decision on the employee's complaint.[51] Although Justice Werdegar "suspect[ed] that the Act's unambiguity resulted from "oversight" or a "drafting error," she could not be "sure."[52] Troubled by what she asserted was the lack of "any meaningful judicial review," she therefore "urge[d] the Legislature to revisit" the Act.[53] The Legislature has accepted that invitation, as discussed *post*.

COMMON LAW *TAMENY* WRONGFUL-TERMINATION CLAIMS

Under *Tameny*, an employer—and *only* an employer—may be liable in common law tort if it wrongfully terminates an employee in violation of public policy.[54] But under the California Government Claims Act, The Regents are immune from common law tort liability.[55]

Miklosy held that plaintiffs could not bring their common law *Tameny* wrongful termination claims against The Regents, even though they alleged that The Regents violated public policy—the public policy embodied in the WPA—because the claims would expose The Regents to common law tort liability—from which The Regents are immune.[56] And the court held that plaintiffs could not bring these claims against the supervisory employees because they were not "employers."[57]

COMMON LAW INTENTIONAL-INFLICTION-OF-EMOTIONAL-DISTRESS CLAIMS

The common law exposes a person to tort liability for intentionally inflicting emotional distress on another.[58] But when the "infliction" occurs in the workplace in the normal course of the employment relationship, the exclusive remedy provision of the Workers' Compensation Act bars such a claim, even if the "infliction" constitutes retaliation.[59]

Miklosy held that plaintiffs could not bring their common law intentional-infliction claims because the alleged "retaliation" occurred in the workplace in the normal course of the employment relationship.[60]

THE FUTURE—AND THE LEGISLATURE

Not long after the California Supreme Court handed down *Miklosy*, Senate Bill No. 1199, which would have required the Department of Corrections and Rehabilitation to conduct a study relating to juveniles sentenced to life imprisonment without the possibility of parole, was "gutted and amended" to provide that a University of California employee may sue for damages once the University has "*reached* or *failed to reach*" a decision on the employee's administrative complaint within the deadline set by The Regents.[61] Around the same time, Assembly Bill No. 2988, which would have amended a provision of the California Environmental Protection Act unrelated to the Whistleblower Protection Act, was also "gutted and amended" to "overturn[ ]" *Miklosy* and "ensure" that University of California employees enjoy the "same measure of protection" under the Act as California State University employees.[62]

As of this writing, it is unclear whether *Miklosy* will survive this legislative session. It is also unclear whether any "overturning" of *Miklosy* will produce greater protection for University of California employees. After all, the protection the WPA gives California State University employees is uncertain since it depends on the opaque "not-satisfactorily-addressed" proviso. What is clear, however, is that *Miklosy* is not the California Supreme Court's last word on how to construe and apply the WPA.[63]

ENDNOTES

1. *Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876 (2008).
2. Cal. Gov't Code § 8547 et seq.
3. *Id.* § 8547.1.
4. *Id.* §§ 8547.8(c), 8547.10(c), 8547.12(c).
5. About UC: Employment Opportunities, *available at* http://www.-universityofcalifornia.edu/aboutuc/-employment.html (as of Sept. 9, 2008).
6. *Id.* § 8547.10(c), italics added.
7. *Miklosy*, 44 Cal. 4th at 882.
8. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980).
9. Cal. Gov't Code § 810 et seq.; *see Miklosy*, 44 Cal. 4th at 898-901.
10. *Tameny*, 27 Cal. 3d at 170; *see Miklosy*, 44 Cal. 4th at 900-01.
11. Cal. Lab. Code § 3602; *see Miklosy*, 44 Cal. 4th at 902-03.
12. *Miklosy*, 44 Cal. 4th at 883.
13. *Id.* at 884.
14. *Id.*
15. *Id.* at 884, 891 n.5.
16. *Id.* at 885.
17. *Id.*
18. *Id.* at 882, 885, 903.
19. Cal. Stats. 1993, ch. 12, § 8; *see Miklosy*, 44 Cal. 4th at 885.
20. *Miklosy*, 44 Cal. 4th at 885.
21. Cal. Gov't Code § 8547.8(c); *see Miklosy*, 44 Cal. 4th at 885.
22. Cal. Stats. 1993, ch. 12, § 8, italics added; *see Miklosy*, 44 Cal. 4th at 885-86.
23. *Miklosy*, 44 Cal. 4th at 886.
24. *Id.*
25. Cal. Gov't Code § 8547.10(c), italics added; *see Miklosy*, 44 Cal. 4th at 886.
26. Cal. Stats. 1994, ch. 834, § 1; *see Miklosy*, 44 Cal. 4th at 886.
27. Cal. Gov't Code § 8547.12(c), italics added; *see Miklosy*, 44 Cal. 4th at 886.
28. *Miklosy*, 44 Cal. 4th at 886.
29. Cal. Stats. 2001, ch. 883, § 3; *see Miklosy*, 44 Cal. 4th at 886-87.
30. *Miklosy*, 44 Cal. 4th at 893.
31. Cal. Gov't Code § 8547.8(c) (italics added); *see Miklosy*, 44 Cal. 4th at 887.
32. *Miklosy*, 44 Cal. 4th at 887.
33. *Id.*
34. *Id.* (citations omitted).
35. *Id.* at 887-888.
36. *Id.* at 887-98.
37. *Id.* at 889 (*citing Campbell v. Regents of Univ. of Cal.*, 35 Cal. 4th 311, 327 (2005)).
38. *Id.* at 890.
39. *Id.*
40. *Id.* at 891.
41. *Id.* (fn. omitted). As stated, neither plaintiff petitioned for a writ of mandate to review the rejection of their administrative complaints. *Id.*, n.5.
42. *Id.* at 891 n.4.
43. *Id.* at 891-97.
44. There was no issue in *Miklosy* whether "mere exhaustion" of *administrative* remedies under the WPA—for state agency employees or others—is sufficient to sue for damages. A few recent court of appeal cases hold that exhaus-

tion of administrative remedies is a *necessary* but *not* sufficient prerequisite to a damages action, even in the WPA context, and that *judicial* exhaustion—i.e., obtaining a writ of mandate that sets aside the administrative decision—is necessary. *See Ohton v. Bd. of Trustees of Cal. State Univ.*, 148 Cal. App. 4th 749, 767-69 (2007) (CSU employees); *CalPERS v. Super. Ct.*, 160 Cal. App. 4th 174, 177-78, 182-83 (2008) (state agency employees). Without a writ, if the proceeding that produced the administrative decision was "quasi-judicial" in character—i.e., if the administrative agency acted "'in a judicial capacity and resolve[d] disputed issues of fact . . . which the parties . . . had an adequate opportunity to litigate'" [*People v. Sims*, 32 Cal. 3d 468, 479 (1982)]—the administrative decision collaterally estops a party from pursuing a damages action on the same grounds as alleged in the administrative complaint. *See Ohton* and *CalPERS, supra*; *see also Ahmadi-Kashani v. Regents of Univ. of Cal.*, 159 Cal. App. 4th 449 (2008) (finding no collateral estoppel because proceeding there was not quasi-judicial). Thus, *Miklosy*'s reference to the WPA damages provision relating to state agency employees as a "mere exhaustion requirement" [44 Cal. 4th at 892] needs to be understood in the context of the judicial exhaustion case law.

The issue of what procedures are necessary to qualify an administrative proceeding as "quasi-judicial" is before the state supreme court in *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)*, No. S151705 (rev. grtd. June 27, 2007) (WPA as to state agency employees) and *Brand v. Regents of University of California*, No. S162019 (rev. grtd. May 14, 2008 and holding for *Arbuckle*) (WPA as to University of California employees).

45. *Miklosy*, 44 Cal. 4th at 897.
46. *Id.*
47. *Id.* at 897.
48. *Id.* at 898.
49. *Id.*
50. *Id.*, n.6.
51. *Id.* at 903 (Werdegar, J., conc.).
52. *Id.* at 905, 906 (Werdegar, J., conc.).
53. *Id.* at 904, 907 (Werdegar, J., conc.). The concurrence attributed the asserted lack of "meaningful judicial review" to the following: "[T]he "University's process for resolving whistleblower retaliation complaints does not include the right to an evidentiary hearing before a neutral hearing officer," and as a result does not trigger "substantial-evidence review by petition for writ of administrative mandate," but instead the "much laxer and more limited arbitrary-and-capricious standard" of "ordinary mandate." *Id.* at 904 n.2 (Werdegar, J., conc.). Whether or not ordinary mandate is deemed *not* to constitute "meaningful judicial review," the "University's process" can include "include the right to an evidentiary hearing before a neutral hearing officer." *See*, *e.g.*, University of California, Berkeley Campus, Personnel Policies for Staff Members, Policy 70: Complaint Resolution, *available at* http://hrweb.berkeley.edu/policy/policy70.htm (as of Sept. 10, 2008) (right to such a hearing at Step III Review Process).
54. *Id.* at 898, 900-01 (quoting and citing *Tameny*, 27 Cal. 3d at 170).
55. *Id.* at 899 (citing Cal. Gov't Code § 810 et seq.).
56. *Id.* at 899-900.
57. *Id.* at 900-01.
58. *Id.* at 902.
59. *Id.* at 902-03.
60 *Id.* at 903.
61. Cal. Sen. Bill No. 1199 (2007-08 Reg. Sess.), as amended Aug. 12, 2008, §§ 1, 2, *available at* Legislative Counsel, State of California, Official California Legislative Information, http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1151-1200/sb_1199_bill_20080812_amended_asm_v96.html (as of Sept. 22, 2008).
62. Cal. Assem. Bill No. 2988 (2007-08 Reg. Sess.), as amended Aug. 18, 2008, §§ 1, 2, *available at* Legislative Counsel, State of California, Official California Legislative Information, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2951-3000/ab_2988_bill_20080818_amended_sen_v94.html (as of Sept. 22, 2008). Assembly Bill No. 2988 was subsequently "gutted" and "amended" again to delete any reference to *Miklosy* or the Act. Cal. Assem. Bill No. 2988 (2007-08 Reg. Sess.), as amended Sept. 16, 2008, *available at* Legislative Counsel, State of California, Official California Legislative Information, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2951-3000/ab_2988_bill_20080916_amended_sen_v93.html (as of Sept. 22, 2008).
63. *See* fn. 44, *ante.*