Administrative remedies can be exhausting for plaintiffs employed by public entities

In the context of employment litigation, "exhaustion" of administrative remedies before filing suit can indeed be exhausting

By James H. Cordes

On February 16, 2018, the Court of Appeal, Second District, Division Six, answered a question which had not been answered before; namely, do a public entity's internal administrative-exhaustion requirements, of the type discussed in *Campbell v. Regents of Univ. of California* (2005) 35 Cal.4th 311, survive the enactment of Labor Code section 244, subdivision (a)? That statute provides in pertinent 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, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy." Surprisingly, in *Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551, the Court of Appeal held they do.

As set forth below, this article notes that practitioners ought not to rely on the plain language of Labor Code section 244(a) if their clients are covered by civil service and/or a merit-based system and have employment law retaliation claims such as claims under Labor Code 1102.5. However, practitioners must also be aware that pursuing the appropriate administrative procedure may result in their being unable to bring retaliation claims into state or federal court and may find the remedies available for their clients to be limited.

Background of exhaustion of administrative remedies

"Exhaustion of administrative remedies" is a legal doctrine that requires a person to seek all remedies directly with an agency before a suit will ever be heard by a state or federal court. Once the agency's own procedures are finished ("exhausted"), then the person may file a complaint in state or federal court. However, the doctrine of exhaustion of remedies prevents a person from filing directly in court without availing themselves of the agency's procedure (the "administrative remedy"). Depending on the nature of the administrative remedy, a party may thereafter file a complaint alleging the relevant violation of law.

In the context of employment litigation, "exhaustion" can refer to a number of different doctrines. Each one requires the employee to undergo a process beyond, and often before, filing a lawsuit.

First, if a statute creates an administrative agency and charges that agency with enforcement of the act, the employee is usually required to exhaust the government agency's procedures. This is sometimes referred to as "administrative agency exhaustion." In California, most employment anti-discrimination claims are brought under Title VII of the Civil Rights Act of 1964 ("Title VII") (42 U.S.C. §§ 2000e-2000e-17) or the California Fair Employment and Housing Act ("FEHA") (Gov. Code, §§ 12900-12996). These schemes contain provisions that require an administrative charge be filed before bringing legal action. (See 42 U.S.C. § 2000e-5(f)(1) (Title VII), Gov. Code, § 12965(b) (FEHA).) Once an employee files his or her administrative charge, the appropriate administrative agency will generally issue a "right-to-sue" letter. (See 42 U.S.C. §§ 2000e-5(f)(1) (Title VII); Gov. Code, § 12965(b) (FEHA).

Second, if an employer imposes some type of internal review process for employee complaints or grievances, an employee must decide whether or not to use such processes, if indeed the employee has a choice. That type of exhaustion refers to "internal exhaustion." This is what was involved in *Terris*.

Third, in some cases, either administrative agency exhaustion or internal exhaustion is required or has occurred. If so, the employee must decide whether to challenge the outcome of agency or employer internal processes in court. Such exhaustion is known as "exhaustion of judicial remedies." (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) In these cases, a party who is not satisfied with the administrative remedy is required to challenge the administrative agency's finding, either by filing a petition for writ of administrative mandate (see Code Civ. Proc. § 1094.5) challenging a quasi-judicial decision of the agency or a petition for writ of traditional mandate (see Code Civ. Proc., § 1085) to seek to compel an agency to perform a ministerial duty or legal obligation. *Terris* appears to conclude that this is the sole route into state or federal court for civil-service protected employees with Labor Code retaliation claims – most typically, retaliation claims brought under Labor Code section 1102.5.

Facts of the case

Plaintiff Shawn Terris worked for the County of Santa Barbara for 13 years until her termination in 2009 as Program Business Leader, assigned to the Office of County Executive Officer Michael Brown. Ms. Terris was covered by Santa Barbara County Civil Service Rules, including but

not limited to Rule Eleven (Resignation, Voluntary Demotion, Non-Disciplinary Separation, and Layoff) and Rule Thirteen (Appeal and Hearing Procedure).

During her employment, Ms. Terris engaged in protected activity. She was a Retirement Board Trustee, whose activities were protected by Government Code section 31522 and Article 16, Section 17 of the California Constitution. Terris also engaged in union organizing activities, protected by Meyers-Milias-Brown Act, Government Code sections 3500 et seq. These protected activities put Terris in conflict with County Executive Officer Brown, to whom her position was assigned.

On July 7, 2009, the County notified Terris that she was being laid off for budgetary reasons, but she could exercise a right to displace, or "bump" another Program Business Leader. Terris accepted that offer. However, about a month later, on August 7, 2009, Terris was informed that she would not be able to "bump" the other Program Business Leader because that individual had been designated as having "special skills." Consequently, Terris was notified that she would be terminated effective September 6, 2009.

Civil service and EEO rules

Santa Barbara County has civil service rules. Among the rules were Rule Eleven (Resignation, Voluntary Demotion, Non-Disciplinary Separation, and Layoff), which includes Rule 1109 (Appeal of Layoff), which provides, "Permanent employees laid off or demoted in lieu of layoff shall have the right to appeal such layoff or demotion; however, such appeal shall be limited only to the layoff or demotion procedures herein prescribed;" and Rule Thirteen (Appeal and Hearing Procedure), which includes Rule 1302 (Definitions), which defines an "Appeal" as "Any written request for relief from disciplinary or alleged discriminatory action."

After Terris was informed that her bumping rights were denied and that she would be terminated, but before the effective date of her termination, she filed a claim with the Santa Barbara County Civil Service Commission. Her claim prayed for rescission of the Notice of Layoff or an order for the County to refrain from acting on the Notice of Layoff so the Civil Service Commission could hear the matter.

Ms. Terris requested a hearing under both Civil Service Commission Rule Eleven to challenge the bumping process and Rule Thirteen to challenge what she contended was the discriminatory motive behind the decisions together. The Commissioners determined that the questions of whether the bumping process under Rule Eleven was followed and whether there was discriminatory motive behind the selection process under Rule Thirteen were separate questions requiring separate hearings, and the Rule Thirteen hearing could not be concluded before the effective date of Ms. Terris's termination. Ms. Terris therefore elected only a Rule Eleven hearing because there was time to halt the layoff. After a hearing, the Commission ruled that the bumping process was procedurally proper. It did not hear or rule on the underlying motive.

Terris thereafter sued the County of Santa Barbara for a variety of statutory wrongful termination claims, including Labor Code sections 1101, 1102 and 1102.5.

The County moved for summary judgment on Terris's claims based on the fact that she had failed to exhaust the County's "internal" administrative process, that is, a complaint with the County Equal Employment Opportunity Office and then a complaint to the County Civil Service Commission. Terris argued that "internal" administrative exhaustion requirement had been eliminated with the enactment of Labor Code section 244. The trial court granted summary judgment, and Terris appealed.

Outline of the court's reasoning

The *Terris* court upheld the trial court's grant of summary judgment. It held: "*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 holds that public employees must pursue appropriate internal administrative remedies before filing a civil action against their employer. Labor Code section 244 does not require a litigant to exhaust administrative remedies before bringing a civil action. [Fn. omitted.] Here we hold section 244 applies only to claims before the Labor Commissioner. It has no effect on the *Campbell* rule." (Internal citations to the published opinion were not available for this article.)

The court relied on *Campbell*: "[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. Administrative remedies include 'internal grievance procedures' provided by a public entity. County employees must exhaust internal administrative remedies that are provided in county civil service rules. Terris was a County employee 'subject to the' County's 'Civil Service Rules.'" (*Terris, supra*, slip op. at 4, internal citations and quotation marks omitted.) As to the effect of Labor Code section 244, subdivision (a), the court ruled that the phrase "administrative remedies" in Labor Code section 244 referred only to Labor Commissioner claims, relying on the legislative history.

In reaching its conclusion, the court distinguished an earlier case which held that Labor Code 244 excused Labor Commissioner exhaustion, *Satyadi v. W. Contra Costa Healthcare Dist*. (2014) 232 Cal.App.4th 1022, by noting dicta in *Satyadi* from which it appeared that Satyadi had exhausted her employer's internal administrative remedies.

The court also distinguished *Neushul v. Regents of the University of California* (C.D.Cal. 2016) 168 F.Supp.3d 1242, the only published case which addressed exhaustion of internal administrative remedies, by noting the context and purpose of the statutory change and relying on legislative history. The Court concluded that the enactment of Labor Code section

244, subdivision (a) and Labor Code section 98.7, subdivision (g) ("In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures") was meant to "resolve[] 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." (*Terris, supra*, slip op. at 8.)

The court concluded, "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.'* (*Campbell v. Regents of the University of California, supra*, 35 Cal.4th at p. 321, italics added.) 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 bought before the Labor Commissioner before filing a civil action."

Therefore, *Terris* concluded that internal administrative exhaustion requirements, even if described as optional instead of mandatory, are the sine qua non of any civil-service protected employee who wants to bring a retaliation case under Labor Code section 1102.5.

Analysis and questions for civil-service protected employees

The court described Ms. Terris as a "civil-service protected employee." This phrase is evidently shorthand for a permanent public employee who has a vested property right in continued employment that cannot be taken away by an employer without first being afforded certain procedural safeguards under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. In *Skelly*, the California Supreme Court ruled that under the California Constitution, public employees who have a property interest in continued employment are entitled to pre-disciplinary due process rights.

Most of California's approximately one million state, county, and local employees are protected by civil service and/or merit system rules. Most public employers establish appeal rights for employees with a property interest in their positions through collective bargaining agreements, policies, and/or civil service rules. In addition, statutes establish specific appeal procedures for state employees, school district and community college employees, and public safety officers. Due process concerns require that a good-cause requirement be included in administrative procedures for terminated employees where there is a fundamental vested right to continued employment. (*Hall-Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24, 34.)

In *Terris*, the court reasoned, "Terris was required to file an EEO complaint, and if she disagreed with the EEO report, she could file 'an appeal directly to the [Commission].' The EEO investigates employment discrimination based on violations of sections 1101, 1102, and 1102.5. The civil service rules provided her with 'the right to challenge the alleged discrimination . . . before the Commission . . . .' Terris could have subpoenaed witnesses to testify at an evidentiary hearing. She could have sought judicial review of the Commission's decisions on her discrimination claims through administrative mandamus. The Commission had the authority to reinstate her and order back pay and attorney fees if it so decided." (*Terris, supra*, slip op. at 1.)

The import of this reasoning is that claims by civil service-protected employees based on Labor Code section 1102.5 and presumably other non-FEHA causes of action will not be able to be brought directly; instead, he or she must only do so "through administrative mandamus," that is, a petition for writ of administrative mandamus, which is a request that a Superior Court review and reverse the final decision or order of an administrative agency, brought under Code of Civil Procedure section 1094.5, following exhaustion of the relevant internal administrative procedures.

The *Terris* opinion flows contrary to the general thrust of California opinions that have analyzed the continuing viability of exhaustion requirements, including *Satyadi v. W. Contra Costa Healthcare Dist., supra,* as well as *Sheridan v. Touchstone Tel. Prods., LLC* (2015) 241 Cal.App.4th 508, and *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, which both held that causes of action alleging statutory violations of the Labor Code are not barred by the failure to exhaust the administrative remedy afforded by Labor Code section 98.7. The Supreme Court had also depublished several cases which dismissed claims based on failure to exhaust administrative remedies, including *MacDonald v. State of California, supra,* Cal.App.3rd Dist., Aug. 27, 2013, rehearing denied (Sep. 19, 2013), review denied and ordered not to be officially published (Nov. 26, 2013) and *Gallup v. Superior Court* (2015) 235 Cal.App.4th 682, Cal.App.3rd Dist., Mar. 30, 2015, review denied and ordered not to be officially published (Jun 10, 2015). The Ninth Circuit and federal district courts have frequently ruled that exhaustion of administrative remedies is not a bar to wrongful termination claims under Labor Code section 1102.5 and similar statutes. (See, e.g., *Reynolds v. City & Cnty. of San Francisco* (9th Cir. 2014) 576 Fed.Appx. 698; *Ramirez v. County of Marin* (9th Cir. 2014) 578 Fed.Appx. 673; *Vasquez v. County of Los Angeles* (9th Cir. 2015) 594 Fed.Appx. 386, 387; *Neushul v. Regents of the University of California* (C.D. Cal. 2017) 168 F.Supp.3d 1242; *Kappelman v. City & County of San Francisco* (N.D. Cal., Oct. 27, 2015) 2015 WL 6471184; and *Tobin v. City & County of San Francisco* (N.D. Cal June 16, 2015) 2015 WL 3763917.)

Considerations for the practitioner

What remedies are available for a public employee who has been subjected to retaliation? *Terris* notes that the Santa Barbara Civil Service Commission "had the authority to reinstate her and order back pay and attorney fees if it so decided."

(*Terris*, *supra*, slip op. at 5.) Notably absent were general damages for emotional distress. The remedies were available under the civil service rules. Other counties, cities, or other public entities, on the other hand, may make available more, different, or lesser remedies in their civil service rules. Fees are sometimes available in writ proceedings, under Government Code section 800 based on a finding of "arbitrary or capricious conduct" or Code of Civil Procedure section 1021.5, if the result was an enforcement of an important right affecting the public interest.

Does *Terris* cover probationary employees? In *Board of Regents v. Roth* (1972) 408 U.S. 564, the United States Supreme Court held that probationary employees did not have vested property rights in continued employment. This suggests that probationary employees do not have a right to avail themselves of their public entity employer's administrative process and consequently no obligation to exhaust that remedy. The rule in California is the same. (See *California Dept. of Corrections and Rehabilitation v. California State Personnel Bd.* (2015) 238 Cal.App.4th 710.)

What happens if the employee is laid off? According to *Duncan v. Dept. of Personnel Admin.* (2000) 77 Cal.App.4th 1166, pre-layoff due process hearings are not required. However, the Ninth Circuit, in *Levine v. City of Alameda* (9th Cir. 2008) 525 F.3d 903, suggested that a public employee who is laid-off from work is entitled to a pre-layoff due process hearing. One way to reconcile those cases is that pre-layoff hearings are only potentially required in situations where the employee argues that he or she has been targeted for layoff. In situations involving mass layoffs, it was believed that *Duncan* would still apply.

What if an internal merit review process is phrased in the permissive ("an employee *may*") as opposed to the mandatory ("an employee *must*")?

In *Terris*, Civil Service Rule 1304 states, "Persons alleging discrimination ... *shall have the right* to challenge" and "[p]ersons *retain the right* to pursue an appeal directly..." (Emphasis added.) The Santa Barbara County EEO website indicated filing an EEO complaint was optional: "What should I do if I feel I have been a victim of discrimination? .... You *may* also file your complaint directly with the Equal Employment Opportunity Office." (Emphasis added.) Nowhere on the EEO website is it indicated that an employee must go through the EEO process prior to initiating litigation, including particularly the page entitled "Federal and State Laws." The County does not have any statutes, policies or procedures that require their employees to file an EEO complaint in order to file a lawsuit, including the County's Code, Civil Service Rules, and EEO Policies and Procedures.

On the other hand, the process in *Campbell* was mandatory: "A complaint of retaliation/interference *must be filed* under existing University grievance or complaint resolution procedures ... if acceptable under those procedures." (*Campbell, supra*, 35 Cal.4th at 325, emphasis added.) Because Campbell thereafter refused to file that mandatory complaint, her superior court action was dismissed. (*Campbell, supra*, 35 Cal.4th at 336.)

Nevertheless, the *Terris* opinion dispensed with Terris' argument that the civil service rules were couched in optional, not mandatory, language, relying on *Marquez v. Gourley* (2002) 102 Cal.App.4th 710, 714, which held that exhaustion of administrative remedies is mandatory "even though the administrative remedy is couched in permissive language."

What if the public entity waives or is otherwise estopped from asserting the exhaustion defense?

The Court did not address Terris' argument that the County should be estopped under *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476 because she claimed she was misled about the protections and procedures available to her four separate times: in the two notices of layoff she received, on the County EEO website, and finally when she presented her case to the Civil Service Commission.

In *Shuer*, the court held that the employer, County of San Diego, was equitably estopped from asserting failure to exhaust administrative remedies as a defense in a wrongful termination and unlawful retaliation action where it provided "misleading and mistaken information concerning the availability of an administrative remedy." (*Shuer v. County of San Diego, supra*, Cal.App.4th at 486; see also *Farahani v. San Diego Community College Dist*. (2009) 175 Cal.App.4th 1486, 1497 (recognizing that a party is excused from exhausting applicable administrative remedies where the reviewing agency has already rejected the party's claim or announced its position on the claim).

Moreover, if the recommendations of the author are followed, public employees will be required to avail themselves of whatever administrative procedure exists, whether it is voluntary or mandatory, or whether it is an ombudsman, an equal employment opportunity officer, a *Skelly* hearing or some other more formal appeal process. This may result in these agencies facing increased demands on their processes as aggrieved employees who may otherwise consider proceeding to court will now feel compelled to utilize the services.

Conclusion

The *Terris* court's conclusion indicates that *Campbell* is alive and well as a requirement that civil-service protected employees must continue to exhaust internal administrative remedies, notwithstanding what appears to be the clear language of Labor Code section 244(a). Practitioners who represent public-sector employees who are protected by civil-service law must familiarize themselves with the relevant rules and avail themselves of the available processes, even if those processes appear to be optional and not mandatory.

Ms. Terris is currently seeking review or depublication of this case from the California Supreme Court but, in the meantime, any civil-service protected

employee whose employer has in place equal opportunity guidelines or civil service commission or some internal administrative remedy needs to deal with exhausting those administrative remedies before bringing a non-FEHA employment claim against the public entity employer. Unless and until *Terris* is depublished or overturned, it is important for civil-service protected employees to exhaust in accordance with *Terris*.


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