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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

VICKY WHETSTONE, Plaintiff and Appellant, v. CITY OF LODI, Defendant and Respondent.	C067003 (Super. Ct. No. 39200900209947CUWMSTK)

Vicky Whetstone appeals from a judgment dismissing her petition for writ of mandate against the City of Lodi (the City) following an order sustaining the City's demurrer without leave to amend. The writ petition sought an order directing the City to "pay full back pay and benefits" from May 2004 through January 2007, plus interest, attorney fees, and costs. The trial court sustained the City's demurrer on the ground that the petition failed to allege facts demonstrating or excusing

compliance with the claims presentation requirements of the California Tort Claims Act (the Act) (Gov. Code, § 810 et seq.)[1].

On appeal, Whetstone asserts: (1) her action for back pay and benefits is exempt from the claims presentation requirement of the Act; (2) her repeated demands for reinstatement and back pay constitute substantial compliance with the Act; and (3) the City is estopped from asserting the protection of the Act. As we shall explain, because Whetstone's writ petition sought money damages measured by the amount of wages she *would have* earned and benefits she *would have* accrued had she been allowed to work, rather than wages and benefits she actually earned, her claim is not exempt from the claims presentation requirement of the Act. She did not substantially comply with the Act. And Whetstone neither pled nor carried her burden on appeal of persuading us that the City should be estopped from asserting the Act's protection. We affirm the judgment.

BACKGROUND

In accordance with the standard of review, we recite the facts as they are alleged in Whetstone's writ petition. (See *Department of Corporations v. Superior Court* (2007) 153 Cal.App.4th 916, 922, fn. 2 ["standard of review for a ruling on a demurrer requires that we 'assume that the complaint's properly pleaded material allegations are true'"].)

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[1] Undesignated statutory references are to the Government Code.

The City hired Whetstone as a meter reader in August 1989. In February 2004, after sustaining unspecified injuries at work, Whetstone was examined by Dr. Ernest B. Miller at the City's request. Dr. Miller issued a report the following month stating that Whetstone was able to continue performing her duties as a meter reader.

In June 2004, Whetstone's primary treating physician, Dr. Donald Kobrin issued a report informing the City that Whetstone was permanently disabled with the following work restrictions: no lifting or carrying more than 20 pounds, no keyboarding, and no holding her neck in static positions. Based on this report, the City declined to allow her to return to work. The City informed Whetstone that if she did not file for disability retirement with the California Public Employees' Retirement System (CalPERS), the City would file the application on her behalf. Whetstone filed an application for disability retirement on June 27, 2004. In September 2004, Whetstone was again examined by Dr. Miller at the City's request. Dr. Miller again issued a report indicating that Whetstone was able to perform her duties as a meter reader.

In August 2006, CalPERS denied Whetstone's application for disability retirement. In October 2006, Whetstone sent the City a letter demanding that she be returned to her former job and compensated for back pay. The City did not respond. In December 2006, Whetstone sent a second letter to the City demanding that she be returned to work and compensated for back

pay from May 2, 2004, forward. This time, the City responded and agreed to allow her to return to work. Whetstone resumed her duties as a meter reader on January 16, 2007. In August 2007, Whetstone sent a letter to the City's human resources director reiterating her demand for back pay from May 2, 2004, to January 15, 2007. The City did not respond.

In April 2009, Whetstone filed a petition for writ of mandate in the trial court seeking to compel the City to pay her "full back pay and benefits" between May 2, 2004, and January 15, 2007, plus interest, attorney fees, and costs, alleging the City constructively separated her from employment by placing her on unpaid status during this time period in violation of section 21153.[2] The City filed a demurrer on the ground the petition did not allege facts demonstrating or excusing compliance with the Act. In opposition to the demurrer, Whetstone argued her action against the City was exempted from the claims presentation requirement of the Act because it amounted to a claim by a public employee for wages (§ 905, subd. (c)) and benefits under a public retirement or pension system (§ 905, subd. (f)). Whetstone also argued that

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[2] Section 21153 provides: "Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731."

her repeated demands for back pay constituted substantial compliance with the Act and that the City was estopped from asserting non-compliance with the Act. The trial court sustained the demurrer with leave to amend, explaining that Whetstone did not plead the asserted exemptions.

In September 2009, Whetstone filed an amended petition for writ of mandate. The City again filed a demurrer. While the amended petition alleged exemption from compliance with the Act, the City argued the asserted exemptions did not apply to Whetstone because she "was not an employee of the City of Lodi during the period of time for which she seeks monetary damages." The trial court sustained the demurrer without leave to amend. Citing *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071 (*Loehr*), the trial court explained that section 905, subdivisions (c) and (f), "do not exempt [Whetstone] from claims presentation requirements under [the Act] because her claim is for a lost opportunity to earn wages, not a claim for wages actually *earned* for services rendered." The trial court entered judgment dismissing the writ petition. This appeal followed.

DISCUSSION

I

Standard of Review

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, our standard of review is de novo, i.e., we exercise our independent judgment

about whether the complaint alleges facts sufficient to state a cause of action under any possible legal theory. (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415; *Santa Teresa Citizen Action Group v. California Energy Com.* (2003) 105 Cal.App.4th 1441, 1445.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967, quoting *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21.)[3]

II

Tort Claims Act

Whetstone asserts the trial court erred in sustaining the City's demurrer and dismissing the writ petition because her

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[3] It is also an abuse of discretion to sustain a demurrer without leave to amend when there is a reasonable possibility that the defect can be cured by amendment. However, "[t]he burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.) Here, Whetstone does not argue there to be a reasonable possibility that amendment of the writ petition would adequately allege facts demonstrating or excusing compliance with the Act.

action for back pay and benefits is exempt from the claims presentation requirement of the Act. She is mistaken.

Under the Act, "no suit for 'money or damages' may be brought against a public entity until a written claim has been presented to the entity and the claim either has been acted upon or is deemed to have been rejected." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1493; §§ 905, 945.4.) "Such a suit includes all actions where the plaintiff is seeking monetary relief. [Citation.] Accordingly, the claims presentation requirement applies to all forms of monetary demands, regardless of the theory of the action. [Citation.] This includes a mandamus action seeking monetary reimbursement. [Citation.]" (*Sparks v. Kern County Bd. of Supervisors* (2009) 173 Cal.App.4th 794, 798.) It also includes a former employee's action seeking back pay and benefits for an allegedly wrongful termination or failure to rehire. (*Loehr*, *supra*, 147 Cal.App.3d at pp. 1080-1082; *Hanson v. Garden Grove Unified School Dist.* (1982) 129 Cal.App.3d 942, 946-948 (*Hanson*).) "The failure to timely present a claim for money or damages to a public entity bars the plaintiff from bringing suit against that entity. [Citation.]" (*Sparks v. Kern County Bd. of Supervisors*, *supra*, 173 Cal.App.4th at p. 798; *State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1237.)

Section 905 excludes from the Act's claims presentation requirement "[c]laims by public employees for fees, salaries,

wages, mileage, or other expenses and allowances" (§ 905, subd. (c)), and "[a]pplications or claims for money or benefits under any public retirement or pension system." (§ 905, subd. (f).) Whetstone argues her writ petition seeking an order directing the City to pay back pay and benefits falls within these exceptions. She is mistaken.

In *Loehr*, *supra*, 147 Cal.App.3d 1071, the Court of Appeal held the Act barred a lawsuit arising out of an alleged wrongful termination seeking to recover "lost salary and other benefits," which plaintiff asserted fell within the exceptions provided by section 905, subdivisions (c) and (f). The court explained: "The limited exceptions set forth in section 905 have, for the most part, been narrowly construed. [Citation.] Having reviewed the applicable authorities, we construe section 905, subdivision (c) as exempting from the act claims for salaries and wages which have been *earned but not paid*. Earned but unpaid salary or wages are vested property rights, claims for which may not be properly characterized as actions for monetary damages. [Citations.] [¶] Similarly, the exemption specified in section 905, subdivision (f) must be limited to benefits *earned during the course of employment*. [Citations.]" (*Id*. at p. 1080, italics added.) The court continued: "Our review of the complaint in the instant case reveals that the relief sought by plaintiff in his first three causes of action (breach of contract, tortious breach of covenant of good faith and fair dealing, and conspiracy to induce breach) does not qualify for

either the section 905, subdivision (c) or (f) exemption. Plaintiff does not seek to recover salary or wages that he previously earned nor does he seek to recover benefits to which he is presently entitled under a public retirement or pension system. Plaintiff does seek, however, to obtain monetary damages for defendants' alleged misconduct in preventing him from rendering services through which he might have acquired a vested right to additional amounts in salary or benefits." (*Id*. at pp. 1080-1081.)

Similarly, in *Hanson*, *supra*, 129 Cal.App.3d 942, the Court of Appeal held the Act barred a lawsuit arising out of an alleged wrongful failure to rehire. The court explained: "In spite of [plaintiff's] assertion his claim should be construed as if it were for breach of contract to recover wages and benefits unlawfully withheld, the plain fact is he is suing in tort to recover damages for being denied reemployment. The issues are not limited to whether [the employer], having already received the benefits of an employee's service, is now dealing fairly with him in withholding compensation earned. Rather, the issues here are whether [plaintiff], *not having performed any services*, is entitled to be compensated (he is not asking for reinstatement) because of [the employer's] alleged tortious conduct." (*Id*. at p. 947.) The court further explained: "The categories of claims [exempted in section 905] are generally those for which the governmental entity requires no advance notice. This is self-evident when you construe section 905,

subdivisions (c) and (f) as being limited to employees who are claiming salaries, wages and benefits earned during their employment by the entity." (*Id*. at p. 948.)

Here, Whetstone's writ petition sought "full back pay and benefits" between May 2, 2004, and January 15, 2007, the period of time she alleged the City constructively separated her from employment in violation of section 21153. She did not *earn* any wages or benefits during this period of time. Instead, Whetstone is seeking damages measured by the amount of wages and benefits she *would have earned* had the City not placed her on unpaid status. We conclude that Whetstone's writ petition does not qualify for either the section 905, subdivision (c) or (f), exemption.

III

Substantial Compliance

Whetstone also claims that her repeated demands for reinstatement and back pay constitute substantial compliance with the Act. We are not persuaded.

Section 910 provides the essential elements to be included in a claim under the Act: "A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following: [¶] (a) The name and post office address of the claimant. [¶] (b) The post office address to which the person presenting the claim desires notices to be sent. [¶] (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

[¶] (d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim. [¶] (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known. [¶] (f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case."

"Where a claimant has attempted to comply with the claim requirements but the claim is deficient in some way, the doctrine of substantial compliance may validate the claim 'if it substantially complies with all of the statutory requirements . . . even though it is technically deficient in one or more particulars.' [Citation.] 'The doctrine is based on the premise that substantial compliance fulfills the purpose of the claims statutes, namely, to give the public entity timely notice of the nature of the claim so that it may investigate and settle those having merit without litigation. [Citations.]'" (*Connelly v. County of Fresno* (2006) 146 Cal.App.4th 29, 38, quoting *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 713.) However, this doctrine "cannot cure

the total omission of an essential element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute." (*Dilts v. Cantua Elementary School Dist.* (1987) 189 Cal.App.3d 27, 37; *Loehr*, *supra*, 147 Cal.App.3d at p. 1083.)

Whetstone's substantial compliance argument fails for two reasons. First, the record does not contain the letters she claims substantially comply with the Act. Nor does the writ petition allege that these letters contain her name and address, the address to which she desired notices to be sent, the circumstances giving rise to the claim, a general description of the damages sought, the name or names of the public employee or employees who allegedly caused these damages, or whether the claim would be a limited civil case. (See § 910.) The writ petition simply alleged that Whetstone sent three letters to the City: an October 2006 letter demanding that she be returned to her former job and compensated for back pay; a December 2006 letter demanding that she be returned to work and compensated for back pay from May 2, 2004, forward; and an August 2007 letter demanding back pay from May 2, 2004, to January 15, 2007. These allegations do not establish substantial compliance with the Act.

Second, and more fundamentally, a series of letters cannot constitute a "claim" within the meaning of the Act. (*Dilts v. Cantua Elementary School Dist.*, *supra*, 189 Cal.App.3d at pp. 35-36.) "If a series of letters received over a period of time could collectively constitute a claim, it would be impossible to

ascertain whether a claim had been presented within the [six months] or one-year time limitation as specified in section 911.2. The act provides that if a claimant files a timely claim, the public entity has 45 days within which to grant or deny the claim. (§ 911.6.) If the claim is denied by way of written notice, the claimant has six months within which to file a court action. (§ 913.) If the claim is not acted upon by the public agency within 45 days, it is deemed denied by operation of law and the claimant has two years within which to file a court action. (§ 945.6.) It would be difficult for the public entity to identify whether a particular letter were a claim and which letter triggered its obligation to accept or deny a claim if a series of correspondence could be considered collectively to constitute a claim. If an agency was unable to determine whether a claim had been filed or when the claim had been filed, it would be equally difficult for the court to determine which statute of limitation applied or when the statute of limitation began to run." (*Id*. at p. 36; see also *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524, 535-536.)

We conclude the letters sent by Whetstone to the City demanding back pay do not constitute a claim within the meaning of the Act.

IV

Estoppel

Whetstone's final contention is that the City "should not be allowed to rely on a tort claims defense when the City received Whetstone's demands for reinstatement and back wages, but failed to timely respond," "advised Whetstone her only recourse was to file an application for disability retirement," and "never gave Whetstone written notice pursuant to [section] 910.8 that her claim was insufficient." We reject this contention.

"It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. [Citations.]" (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 445.) However, such an estoppel "must be pleaded and proved as an affirmative bar to a defense of statute of limitations." (*Hanson*, *supra*, 129 Cal.App.3d at p. 948; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785.)

Whetstone did not plead estoppel in her writ petition. And, unlike *Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339, the only case cited by Whetstone on the subject in her opening brief, Whetstone did not specifically request leave to amend the petition to allege estoppel on the part of the City. In any event, because Whetstone's letters did not constitute a claim within the meaning of the Act, we cannot conclude that the

City's failure to timely respond or notify Whetstone that these letters did not substantially comply with the Act estopped the City from asserting the Act's protection. And contrary to Whetstone's argument on appeal, her writ petition does not allege that the City informed her that her "only recourse" was to file for disability retirement. The writ petition alleges only that the City told her to do so. This statement would not have deterred a reasonable person from filing a timely claim.

DISPOSITION

The judgment dismissing Vicky Whetstone's amended petition for writ of mandate is affirmed. Costs on appeal are awarded to the City of Lodi. (Cal. Rules of Court, rule 8.278(a)(1).)

HOCH, J.

We concur:

RAYE, P. J.

ROBIE, J.