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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

LINDA A. SQUILLACOTE,

Plaintiff and Appellant,

v.

RIDGECREST CHARTER SCHOOL,

Defendant and Respondent.

F062334

(Super. Ct. No. S-1500-CV268187)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Brian F. Drazich for Plaintiff and Appellant.

Middleton, Young & Minney, Paul C. Minney, Andrew G. Minney and Michael E. Hersher for Defendant and Respondent.

Ricardo J. Soto, Phillipa L. Altmann, Julie Ashby Umansky; Luce, Forward, Hamilton & Scripps and Charles A. Bird for California Charter Schools Association as Amicus Curiae on behalf of Defendant and Respondent.

Linda A. Squillacote was terminated from her certificated teaching position at Ridgecrest Charter School (Ridgecrest) after an incident involving a student. Squillacote filed an action against Ridgecrest and the members of Ridgecrest’s board of directors (the Board) challenging the termination. Defendants challenged each version of the complaint with demurrers and motions to strike. The version of the complaint before us is the second amended complaint, which contains six causes of action. Four causes of action challenge Squillacote’s termination, including tort causes of action for wrongful termination and intentional infliction of emotional distress. Two causes of action allege the Board violated the Ralph M. Brown Act (the Brown Act; Gov. Code, § 54950 et seq.<sup>1</sup>) when it approved Squillacote’s termination.

The trial court sustained without leave to amend the demurrers of the individual board members to all causes of action. Squillacote does not challenge this ruling. The trial court also sustained without leave to amend Ridgecrest’s demurrers to the four causes of action challenging the termination, concluding, in essence, that Squillacote was an “at-will” employee. Ridgecrest then answered the complaint and filed a motion for summary judgment, asserting the Board did not violate the Brown Act. The trial court granted the motion and judgment was entered in favor of Ridgecrest.

In a wide ranging attack, Squillacote argues the judgment must be reversed because the trial court erred in sustaining Ridgecrest’s demurrers and in granting Ridgecrest’s motion for summary judgment. We reject these arguments.

Finally, Squillacote contends that even if the demurrers were properly sustained, the trial court abused its discretion in refusing to grant her leave to amend the second amended complaint. As we shall explain, Squillacote failed to allege any facts or present any argument to the trial court that would support a cause of action on the theories she

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<sup>1</sup>All further statutory references are to the Government Code unless otherwise specified.

asserted. Because Squillacote failed to meet her burden of establishing there was a reasonable possibility she successfully could plead a cause of action, we will affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

The second amended complaint contains six causes of action. Named defendants are Ridgecrest, as well as each of the Board's members.<sup>2</sup> Squillacote alleges she was employed as a teacher by Ridgecrest for the 2007-2008 academic year. Squillacote and Ridgecrest entered into an employment contract for the 2008-2009 academic year (the Agreement), a copy of which is attached to the complaint. Despite having performed all of the requirements of her job in a satisfactory manner, Squillacote was terminated on April 17, 2009, for "serious misconduct."

The first cause of action seeks a writ of mandate, alleging the Board voted to terminate her teaching contract in a meeting that violated the Brown Act. She seeks an order compelling the Board to provide her with the opportunity to defend against the charge that she committed serious misconduct.

The second cause of action states that Squillacote is seeking declaratory relief. The relief she is seeking is an order from the trial court reinstating her to her teaching position because the Board's actions violated the Brown Act.

The third cause of action alleges that Squillacote was terminated in violation of her contract and Ridgecrest failed to comply with the procedures established by Ridgecrest to be used in such situations. Squillacote seeks compensatory and punitive damages as a result of the alleged tortious conduct by Ridgecrest.

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<sup>2</sup>The board of directors consisted of Richard Smith, Craig Bradley, Jerry Perez, Debbie Kurti, and Linda Greenlee.

The fourth cause of action again alleges that Ridgecrest breached Squillacote's contract by failing to comply with the procedures and practices Ridgecrest had established for such situations.

The fifth cause of action alleges that Ridgecrest breached a contract to employ Squillacote for the 2009-2010 school year.

The sixth cause of action alleges that the conduct of Ridgecrest in terminating Squillacote's employment was outrageous and in reckless disregard of her rights, causing her emotional distress and entitling her to compensatory and punitive damages.

The board members demurred to each cause of action, arguing that the trial court had determined in a previous motion that they were immune from prosecution for any actions they may have taken in this matter pursuant to Government Code section 820.2 and Corporations Code section 5047.5.

Ridgecrest demurred to each cause of action on various grounds. The demurrers to the first and second causes of actions argued they failed to state facts sufficient to constitute a cause of action. The demurrer to the third, fourth and fifth causes of action asserted that Squillacote failed to allege the existence of a contract that contained the provisions on which Squillacote relied as the basis for her causes of action. Ridgecrest demurred to the sixth cause of action, alleging that the Workers' Compensation Act was Squillacote's exclusive remedy for the damages alleged.

After full briefing and oral argument, the trial court sustained without leave to amend the demurrers of each of the board members. Ridgecrest's demurrers to the first and second causes of action were overruled. Ridgecrest's demurrers to the third, fourth, fifth, and sixth causes of actions were sustained without leave to amend.

Ridgecrest filed its answer to the complaint and then filed a motion for summary judgment, asserting that none of the actions the Board took implicated the Brown Act. Squillacote opposed the motion by objecting to the evidence submitted by Ridgecrest and by arguing that additional facts suggested the Board violated the requirements of the

Brown Act. The trial court granted Ridgecrest's motion, concluding the undisputed evidence established that the requirements of the Brown Act were not violated.

Squillacote appeals from the judgment entered after the Board's motion was granted.

## **DISCUSSION**

Squillacote challenges the order granting Ridgecrest's motion for summary judgment, as well as the order sustaining Ridgecrest's demurrers without leave to amend to the third, fourth, fifth, and sixth causes of actions. Our reading of her briefs leads us to conclude that she does not challenge the order granting the demurrers of the individual board members. Accordingly, we will focus on the dispute between Squillacote and Ridgecrest.

### **I. First and Second Causes of Actions**

The trial court granted summary judgment in favor of Ridgecrest on the first and second causes of action. The trial court ruled that Ridgecrest did not violate the Brown Act because Ridgecrest was entitled to decide to terminate Squillacote in a closed session.

#### ***Standard of review***

Summary judgment is properly granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment bears the initial burden of proving the cause of action has no merit by showing that one or more elements of the plaintiff's cause of action cannot be established or there is a complete defense. (*Id.*, subds. (a), (o)(2).) Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. (*Id.*, subd. (p)(2).)

“This court reviews de novo the trial court's decision to grant summary judgment and we are not bound by the trial court's stated reasons or rationales. [Citation.]”

(*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.) We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. (*Ibid.*) “To defeat the motion for summary judgment, the plaintiff must show ““specific facts,”” and cannot rely upon the allegations of the pleadings. [Citation.]” (*Snyder v. United States Fidelity & Guaranty Co.* (1997) 60 Cal.App.4th 561, 565.)

### ***Analysis***

Ridgecrest argued in its motion for summary judgment that these causes of action were assertions by Squillacote that the Board violated the Brown Act when it approved the recommendation of the principal to terminate Squillacote. We have reviewed Squillacote’s opposition to Ridgecrest’s motion for summary judgment and, although numerous arguments were made, it does not appear she asserted these two causes of action were intended to address a different legal wrong. Moreover, after reviewing Squillacote’s briefs in this court, we cannot discern any other meaning that could be attributed to these causes of action. Accordingly, we will proceed on the basis that these two causes of action sought relief for an alleged violation of the Brown Act.

We begin our analysis with a review of the Brown Act. The Legislature enacted the Brown Act to ensure that public entities conducted the public’s business in open meetings so the public could keep itself informed of the activities of the entities that are designed to serve them. (§ 54950.) Some of the requirements imposed on legislative bodies to accomplish this goal include requirements to (1) open all meetings to the general public (§ 54956, subd. (a)), (2) establish a time and place for regular meetings (§ 54954, subd. (a)), (3) post the agenda for the meeting at least 72 hours before the meeting (§ 54954.2, subd. (a)(1)), (4) provide an opportunity for the public to comment on any item of interest to the public (§ 54954.3, subd. (a)), (5) permit the public to address the legislative body (*ibid.*), and (6) permit members of the public to record proceedings (§ 54953.5, subd. (a)).

The Legislature also established exceptions to the open meeting requirement. At issue in this case is the “personnel exception” found in section 54957. Subdivision (b)(1) of this section permits a local agency to meet in closed session to consider the dismissal of a public employee or hear complaints or charges brought against the employee by another employee, unless the employee requests a public session.<sup>3</sup> Subdivision (b)(2) of this section provides that if the local agency intends to hold a closed session on specific complaints or charges brought against an employee, then the employee must be given written notice of his or her right to have the complaints heard in an open session rather than a closed session, and this notice must be delivered to the employee at least 24 hours before the time for holding the session.<sup>4</sup> “If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.” (§ 54957, subd. (b)(2).)

Squillacote alleges in her complaint that because she was not given 24 hours written notice of the closed session that resulted in her dismissal as required by subdivision (b)(2) of section 54957, the actions taken at that meeting were null and void.

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<sup>3</sup>Section 54957, subdivision (b)(1) states in full: “Subject to paragraph (2), nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.”

<sup>4</sup>Section 54957, subdivision (b)(2) states in full: “As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.”

Ridgecrest admitted it did not give Squillacote notice of the closed session, but argued notice was not required by the Brown Act.

The basis for Ridgecrest's argument is a line of cases that have interpreted section 54957, subdivision (b)(1) as containing two separate clauses. The first clause permits the local agency to meet in closed session to consider "the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee." If the local agency is meeting for one of these purposes, section 54957, subdivision (b)(2) is not implicated, and the employee is not entitled to notice or demand the matter be heard in open session.

The second clause found in section 54957, subdivision (b)(1) permits the board to meet in closed session "to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session." If the local agency is meeting under these circumstances, then section 54957, subdivision (b)(2) is implicated and the local agency must provide the employee 24 hours notice of the meeting and the employee may demand the matter be heard in public session.

The basis for interpreting section 54957, subdivision (b) in this manner was explained in *Bollinger v. San Diego Civil Service Com.* (1999) 71 Cal.App.4th 568, 574-575 (*Bollinger*):

"The Commission relies upon the clause in [section 54957, subdivision (b)(2)], which provides 'the employee shall be given written notice of his or her right to have the complaints or charges *heard* in open session rather than a closed session[.]' (Italics added.) We also note that in [section 54957, subdivision (b)(1)], the Legislature used 'to consider' in reference to the 'appointment, employment, evaluation of performance, discipline, or dismissal' of an employee, but used 'to hear' in reference to 'complaints or charges brought against the employee by another person or employee.' To 'consider' is to 'deliberate upon[.]' [Citation.] To 'hear' is to 'listen to in an official ... capacity[.]' [Citation.] A 'hearing' is '[a] proceeding of relative formality ..., generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence

presented.’ [Citation.] The plain language of section 54957 lends itself to the interpretation the Commission urges.

“The statute’s legislative history further supports the Commission’s position. [Section 54957, subdivision (b)(2)] was enacted by parallel Assembly and Senate Bills. [Citations.] As originally introduced, both bills read in part: ‘As a condition to holding a closed session *on the complaints or charges to consider disciplinary action or to consider dismissal*, the employee shall be given written notice of his or her right to have a public hearing rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session.’ [Citation.]

“Later, however, the italicized language was deleted and the bills were altered to what now appears in [section 54957, subdivision (b)(2)] .... [Citations.] The Legislature thus specifically rejected the notion an employee is entitled to 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action. ‘The rejection of a specific provision contained in an act as originally introduced is “most persuasive” that the act should not be interpreted to include what was left out. [Citations.]’ [Citation.] Accordingly, we conclude a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice.”

Other cases have relied on rules of grammar and statutory interpretation to reach the same conclusion:

“The interpretation of section 54957 begins with [subdivision (b)(1)]. In [subdivision (b)(1)], the phrase ‘unless the employee requests a public session’ modifies only the phrase nearest to it, i.e., ‘or to hear complaints or charges brought against [an] employee,’ and does not modify the earlier phrase ‘to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee.’ Thus the right to request a ‘public’ (or, in the second paragraph, an ‘open’) session applies only when the local legislative body hears specific complaints or charges brought against the employee. Several reasons lead us to adopt this interpretation of section 54957.

“In the latter part of ... section 54957, [subdivision (b)(1),] the word ‘or’ divides two phrases. ‘[T]o consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee’

precedes the disjunctive ‘or,’ followed by ‘to hear complaints or charges brought against the employee by another person or employee.’ An accepted rule of statutory construction holds that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. [Citation.] ‘Pursuant to this rule, the qualifying phrase concerning an employee’s request for a public session refers only to situations where the Board is hearing complaints or charges against the employee.’ [Citation.] By using the disjunctive ‘or’ before the final clause of [subdivision (b)(1)], the Legislature chose not to extend the 24-hour written notice requirement to appointment, employment, evaluation of performance, discipline, or dismissal.

“[Subdivision (b)(2)] of section 54957 supports this interpretation. [Subdivision (b)(2)] specifies what kind of notice the employee should receive, but defines the right narrowly: ‘As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her *right to have the complaints or charges heard in an open session* rather than a closed session[.]’ (Italics added.) Thus the statute grants only the right to have complaints or charges heard in open session. The requirement that employees receive notice of the right to have complaints or charges heard in open session does not extend to appointment, employment, evaluation of performance, discipline, or dismissal. [Subdivision (b)(2)] does not list ‘appointment, employment, evaluation of performance, discipline, or dismissal of a public employee’ in the right to notice. This omission means that the Legislature intended to exclude these personnel matters from the right to receive 24-hour written notice, and intended to restrict the requirement of 24-hour written notice of the right to request an open session to ‘specific complaints or charges brought against an employee by another person or [persons] ....’ A fundamental rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed. [Citation.] When the Legislature has carefully employed a term in one place but has excluded it in another, the term should not be implied where it does not appear. [Citation.]

“This interpretation of section 54957 is consistent with the purposes of the personnel exception. Our interpretation of the statute recognizes the Legislature’s clear authorization of local legislative bodies to meet in closed session to consider personnel matters and to evaluate a specific employee’s performance. [Citation.]” (*Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, 96-97 (*Fischer*).

The parties have not cited, nor has our research located, any case that disagrees with this interpretation of section 54957, subdivision (b). “Thus section 54957[, subdivision (b)(1)] authorizes a local legislative body to hold a closed session to consider ‘personnel matters,’ which the statute defines as the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee. It also authorizes a local legislative body to hold a closed session to hear complaints or charges brought against a public employee by another person or employee, ‘unless the employee requests a public session.’ [Subdivision (b)(2)] of section 54957 sets forth the notice that a local legislative body must provide to the employee ‘[a]s a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee[.]’” (*Fischer, supra*, 70 Cal.App.4th at p. 96.)

Thus, the issue presented is whether the Board acted to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or whether the Board heard complaints or charges brought against the employee by another person or employee. In the former instance, Squillacote did not have the right to notice and to demand the matter be heard in public, while in the latter instance she did have such rights. If she had the right to demand a public hearing and notice of the session, then the Board’s actions were null and void. (§ 54957, subd. (b)(2).)

In *Bollinger*, the plaintiff was disciplined by the San Diego Police Department for misconduct. A public hearing was held over three days by a hearing officer. The hearing officer recommended the plaintiff be disciplined. The San Diego Civil Service Commission met in closed session and ratified the hearing officer’s findings and recommendation. After the commission met, it provided the plaintiff with a copy of the report. The plaintiff filed an action asserting the commission violated the Brown Act when it met in closed session and ratified the hearing officer’s factual findings and recommendation. (*Bollinger, supra*, 71 Cal.App.4th at p. 571.) The commission admitted the plaintiff was disciplined as the result of specific complaints made by other

police officers. Nonetheless, the commission argued the plaintiff was not entitled to notice or a public hearing because at the closed session it merely “*deliberat[ed]* whether the complaints or charges justified disciplinary action rather than conducting an evidentiary hearing thereon.” (*Id.* at p. 574.) The appellate court concluded the commission’s actions were confined to deliberation of the hearing officer’s report and thus did not constitute a hearing within the meaning of section 54957, subdivision (b). Thus, the commission did not violate the Brown Act. (*Bollinger*, at p. 578.)

In *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902, 909, this court concluded that “evaluation of performance,” as that phrase is used in section 54957, subdivision (b)(1), “encompasses a review of an employee’s job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance,” and “evaluation” includes “consideration of the criteria for such evaluation, consideration of the process for conducting the evaluation, and other preliminary matters, to the extent those matters constitute an exercise of defendant’s discretion in evaluating a particular employee.”

*Kolter v. Commission on Professional Competence of Los Angeles Unified School Dist.* (2009) 170 Cal.App.4th 1346, relying primarily on *Bollinger*, held that the plaintiff, a certificated teacher, was not entitled to 24-hour written notice and the right to demand the matter be heard in open session when the governing board met in a closed session to decide whether termination proceedings should be initiated against the plaintiff. “In this matter, the governing board did not conduct an evidentiary hearing on the verified statement of charges against [the plaintiff]; rather, it considered whether those charges justified the initiation of dismissal proceedings under Education Code section 44944. [The plaintiff] exercised her statutory right under the Education Code and was accorded a noticed public evidentiary hearing. The personnel exception to the Brown Act applied to the governing board’s action, and 24-hour written notice was not required.” (*Kolter*, at p. 1352.)

In *Fischer*, the appellate court held that the school board did not violate the Brown Act when it met in closed session to decide whether it would offer probationary teachers a contract for the following year, even though the school board may have reviewed personnel evaluations that contained specific instances of misconduct. “The Board met after it received recommendations from administrative personnel. The Board’s decision [whether to offer a new contract] necessarily involved the ‘evaluation of performance,’ which section 54957 permits to be in a closed session. The record shows that the probationary teachers’ performance evaluations served as the basis for the Board’s determination [not to offer them a new contract]. We do not find that mere consideration of reasons for [not offering a new contract] constitutes hearing specific complaints or charges brought against an employee by another person or employee. That finding would nullify Education Code section 44929.21 and the ‘personnel exception’ of the Brown Act.” (*Fischer, supra*, 70 Cal.App.4th at p. 102.)

On the other hand, in *Moreno v. City of King* (2005) 127 Cal.App.4th 17, the appellate court concluded that a hearing was held and the employee was entitled to notice and an opportunity to demand the matter be heard in public session, where the local agency was provided a document containing the details of five accusations of misconduct against the employee, and the agency spent a considerable portion of a meeting discussing the employee and his potential termination. (*Id.* at pp. 28-29.)

In *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672 (*Bell*), the issue was whether the board of trustees violated section 54957, subdivision (b) when it met in closed session to discuss the potential disciplining of a teacher who also coached the football team. The appellate court identified the issue as whether the proceedings consisted of hearing “complaints or charges” against the teacher, as that term is used in section 54957, subdivision (b). The appellate court defined the phrase “complaints or charges” as an accusation, something that is “brought against” an employee by another

person or employee, but excluded negative comments in an employee's performance evaluation from this definition. (*Bell*, at p. 683.)

The appellate court held the facts before it constituted a "complaint or charge" because the board of trustees heard and acted upon factual findings made by another entity against the teacher as presented by two individuals. "Once [the two individuals] presented the [other entity's] undue influence finding to the Board as a basis for disciplining [the plaintiff], that finding essentially became an accusation—an indictment brought against him with potential disciplinary consequences. As such, [the plaintiff] was entitled to the opportunity to respond to it, so as to put it in proper factual context, to clear his name and to avoid imposition of discipline." (*Bell, supra*, 82 Cal.App.4th at p. 683.)

We now apply these principles to Ridgecrest's motion for summary judgment. In support of its motion, Ridgecrest introduced the declarations of Tina Ellingsworth, Linda Greenlee, Debbi Kurti, and Jerry Perez. Ellingsworth stated that she was the director of Ridgecrest, which was a nonprofit public benefit corporation. She described the incident and then stated that after considering the circumstances, she concluded that termination of Squillacote's employment was "necessary and appropriate." She then recommended to the Board that it approve the proposed personnel action.

Ellingsworth was not present when the Board met in closed session to consider her recommendation, nor did she provide the Board with any reports or evidence regarding the incident. After returning from the closed session, the Board stated that it had "[come] to a consensus to instruct the Director to release a certificated employee from her contract."

Greenlee identified herself as a member of the Board. The Board met in closed session to consider Ellingsworth's recommendation that Squillacote be dismissed from her employment with Ridgecrest. Also present during the closed session were board members Kurti and Perez. The board members were not provided with any reports or

evidence to consider during the closed session. The board members did not review any complaints or charges or weigh testimony or evidence. The board members voted unanimously to accept Ellingsworth's recommendation. When the board members returned to the public meeting, they did not make any findings or conclusions regarding the incident. The board members merely reported to the public session that they had come to a consensus to instruct Ellingsworth to "release a certificated employee from her contract."

Perez and Kurti identified themselves as members of the Board and reiterated in almost identical language the statements made by Greenlee regarding this matter.

In opposition, Squillacote executed a declaration stating that she was not given any notice of proposed action about her employment at the meeting of the Board, nor was she given the opportunity to defend herself prior to her termination against what she viewed as false accusations. She also argued that other members of the Board, who recused themselves from the closed session and thus were not present, had stated to her that the Board would review the evidence and then decide what action to take.

To summarize, Ridgecrest offered evidence that the Board did not evaluate any evidence, nor did it make a determination about the truth or falsity of the charge that Squillacote acted improperly in any manner. Thus, Ridgecrest's evidence established that it did not hear complaints or charges brought against the employee by another person or employee. Accordingly, nothing occurred at the closed session of the board meeting that would have required the Board to comply with the protections found in section 54957, subdivision (b)(2).

Squillacote was unable to provide any evidence to suggest that something occurred in the closed session in addition to what was included in the director's declarations. Instead, she argued it was unlikely the Board acted as indicated in their declarations, and there probably was a determination made about whether she acted improperly, thus implicating section 54957, subdivision (b)(2). This is not evidence, it is

speculation. Speculation does not create a triable issue of material fact. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.)

Here, as she did in the trial court, Squillacote's primary argument is that Ridgecrest failed to present admissible evidence to support its motion. Therefore, according to Squillacote, the trial court erred when it granted Ridgecrest's motion for summary judgment.

The basis for Squillacote's objection to Ridgecrest's evidence is her contention that the certification for the declarations rendered them inadmissible. Code of Civil Procedure section 2015.5 provides, in relevant part, that any matter that is to be proved by declaration shall be certified or declared by the declarant to be true under penalty of perjury, subscribed by the declarant, and, if executed in this state, must state the date and place where subscribed. This section also provides, "The certification or declaration may be in substantially the following form: [¶] ... [¶] 'I certify (or declare) under penalty of perjury that the foregoing is true and correct.'"

Instead of utilizing the suggested certification found in Code of Civil Procedure section 2015.5, the declarations provided by the members each stated, "I declare that the foregoing is true and correct *to the best of my knowledge* under penalty of perjury this ... day of August 2010 in Ridgecrest, California." (Italics added.) Relying on *Bowden v. Robinson* (1977) 67 Cal.App.3d 705 (*Bowden*), Squillacote argues that the phrase "to the best of my knowledge" renders Ridgecrest's declarations inadmissible, or at least insufficient to support a summary judgment.

Code of Civil Procedure section 437c, subdivision (d) states, "[D]eclarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." These requirements were one of the issues in *Bowden*. In support of its motion for summary judgment, one party submitted the declaration of D. N. Robinson, which contained the statement, "To the best of my knowledge, neither Ronald

Compton nor Norman Compton were ever formally elected to the positions of Vice President or any other office of [the corporation.]” (*Bowden, supra*, 67 Cal.App.3d at p. 719.) The appellate court correctly found this statement to be lacking.

“The phrase ‘To the best of my knowledge’ indicates something less than the ‘personal knowledge’ required under Code of Civil Procedure section 437c, and implies that the declarant’s statement is based on something similar to information and belief. (See Code Civ. Proc., § 431.30.) Furthermore, none of the facts contained in the declaration show that the declarant was ‘competent to testify’ as to whether the Comptons were ever elected officers of [the corporation].” (*Bowden, supra*, 67 Cal.App.3d at pp. 719-720.) The appellate court found another statement in the declaration inadmissible because it offered a legal conclusion (whether stock was issued pursuant to the provisions of the Federal Securities Act of 1933), and the declarant had not established his expertise to issue legal opinions. (*Bowden*, at p. 720.)

While we agree with Squillacote that statements in a declaration made on information and belief do not meet the requirements of Code of Civil Procedure section 437c, we do not agree that necessarily means the trial court erred in considering the declarations offered by Ridgecrest. Two cases, both of which Squillacote attempts to distinguish, establish this point.

In *Katellaris v. County of Orange* (2001) 92 Cal.App.4th 1211 (*Katellaris*), the plaintiffs argued, as Squillacote does here, that the defendant’s motion for summary judgment should have been denied because it was not supported by admissible evidence. The issue in the case was whether the county had timely served a notice of rejection of the plaintiffs’ claim. The county contended it had done so and moved for summary judgment, arguing the plaintiffs’ lawsuit was barred by the statute of limitations because it was filed after the time permitted by statute once a claim has been rejected.

To prove the notice of rejection had been mailed, the county offered the declaration of an employee who stated that he was responsible for ensuring that mail in

the office was processed and then described his regular routine for depositing mailed correspondence. He concluded his declaration by stating, “[t]o the best of my knowledge ... I followed the” described procedures on the date the notice of rejection was mailed. (*Katellaris, supra*, 92 Cal.App.4th at p. 1214.) Relying on *Bowden*, the plaintiffs argued the employee’s declaration established that he did not have personal knowledge that he actually mailed the notice of rejection, and thus his declaration was inadmissible. The appellate court rejected the argument by distinguishing *Bowden*.

“[In *Bowden*], the court rejected a declaration of a corporate officer that asserted ‘[t]o the best of my knowledge,’ certain individuals were never elected as corporate officers, and ‘[t]o the best of my knowledge’ he never said shares could legally be issued in California. The *Bowden* declaration is obviously suspect, since the question of what corporate officers were elected would be easily verifiable from corporate records. And, as the court observed, it was unclear with regard to the statement about the issuance of shares whether the declarant meant that he did not recall making the representation, or was affirmatively saying he never uttered it. [¶] So the court held the declaration in question was inadequate to show who the company’s corporate officers were. It did *not*, however, hold that the phrase somehow magically nullifies whatever statement follows it. It merely held, correctly, that the phrase ‘to the best of my knowledge’ introduces an element of uncertainty which, under certain circumstances, can be lethal. Indeed, the *Bowden* court invalidated another statement in the declaration—which also used the phrase ‘to the best of my knowledge’—*not* on the basis that it was not based on personal knowledge, but on the basis it was a lay opinion on a matter of law. Obviously, if appellant’s reading of the first part of *Bowden* were correct, the lay opinion analysis would not have been necessary.” (*Katellaris*, at pp. 1215-1216.)

The appellate court went on to note that under Code of Civil Procedure section 1013a, the county’s employee was not required to establish personal knowledge that the notice of rejection had been deposited in the mail, but only the normal business practice for the mailing of correspondence. (*Katellaris, supra*, 92 Cal.App.4th at p. 1216.)

In *Pelayo v. J. J. Lee Management Co., Inc.* (2009) 174 Cal.App.4th 484, the plaintiff obtained a default judgment against the defendant after the defendant was added to the action as a “Doe” defendant. The defendant then moved to vacate the judgment,

arguing that it had not been served properly. In support of his opposition to the motion to vacate the judgment, the plaintiff submitted the declaration of the process server, who explained the process she followed in preparing the summons. The declaration stated that she was making the statements based on her personal knowledge, but concluded with the statement, “I swear under penalty of perjury under the laws of the State of California that the forgoing is true and correct to the best of my knowledge.” (*Id.* at p. 492.) The defendant objected to the declaration, arguing that it had no evidentiary value because the process server had qualified her statements with the phrase “to the best of my knowledge.”

Citing *Katellaris*, the appellate court noted that such qualification can be lethal *in certain circumstances* because it introduces an element of uncertainty. (*Pelayo, supra*, 174 Cal.App.4th at p. 494.) This declaration, however, did not fall in that category. “The relevant portions of [the process server’s] declaration described events about which she had personal knowledge: the manner in which she generally prepared a summons for a Doe defendant and how she prepared the summons in question. In this context, the phrase ‘to the best of my knowledge’ at most raised an issue about the clarity and certitude of [the process server’s] memory, matters going to the credibility and weight to be accorded her declaration, not its admissibility. In short, the trial court’s implicit overruling of [the defendant’s] objections was sound.” (*Ibid.*)

These cases establish that the phrase “to the best of my knowledge” can add an element of uncertainty to a declaration that can render some or all of the declaration objectionable. It is clear, however, that the addition of the phrase does not render the entire declaration inadmissible, but instead requires a review of the declaration to determine what effect, if any, the phrase has on the admissibility of the statements contained there.

The trial court overruled Squillacote’s objection to Ridgecrest’s declarations, finding that the phrase “to the best of my knowledge” did not render them inadmissible.

We agree with this ruling. The declarations established that each declarant was speaking on his or her own personal knowledge. The board members who executed declarations were the only individuals present in the closed session. Their statements were not equivocal, nor did they indicate any doubt about what was considered or discussed during the meeting. At most, the addition of the phrase “to the best of my knowledge” could have cast some doubt about the credibility of the declarants or the weight to be given their testimony. Since there was no evidence submitted to contradict the statements of the board members, the trial court correctly concluded that the declarations were entitled to be considered in their entirety. Squillacote’s objections properly were overruled.

### ***Conclusion***

The trial court’s duty when evaluating a motion for summary judgment is to determine if there are any material factual disputes and, if not, whether the moving party is entitled to judgment on the undisputed facts presented. Squillacote failed to introduce any facts that contradicted the admissible evidence submitted by Ridgecrest. Since this evidence established Ridgecrest was entitled to judgment, the trial court properly granted Ridgecrest’s motion for summary judgment.

## **II. Ridgecrest’s Demurrers**

The trial court sustained without leave to amend Ridgecrest’s demurrers to the third, fourth, fifth and sixth causes of action in the second amended complaint.

### ***Standard of review***

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the trial court’s ruling and determine de novo whether the complaint alleged facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice may be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We do not, however, assume the truth of contentions,

deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We construe the pleading in a reasonable manner and read the allegations in context (*Schifando*, at p. 1081), and will affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons (*Aubry*, at p. 967).

***Allegations of the second amended complaint***

The third cause of action, entitled "Wrongful Termination," alleges that Squillacote was terminated in violation of public policy. As we understand the allegations, Squillacote alleges that Education Code sections 44932, 44660 through 44665, 44948.2, and 44948.3 were incorporated into the Agreement. Education Code sections 44948.2 and 44948.3 provide specific procedures to be followed when a school decides to terminate a certificated employee. Ridgecrest allegedly failed to comply with the procedures set forth in these statutes when it dismissed Squillacote. The only public policy identified by Squillacote that applies to her dismissal is that implied by these statutes.

The fourth cause of action, entitled "Breach of Contract," alleges that Ridgecrest incorporated the above cited Education Code sections into the Agreement and, when Ridgecrest terminated her employment, it failed to comply with the requirements of the code sections, thereby violating the Agreement.

The fifth cause of action, also entitled "Breach of Contract," alleges that Squillacote and Ridgecrest entered into a contract for employment for the following school year. When Ridgecrest terminated her employment, it violated the terms of this contract, including the Education Code sections identified above.

The sixth cause of action alleges Ridgecrest's conduct was intentional and outrageous, with the probability of causing emotional distress. As a result of defendants' conduct, Squillacote suffered severe emotional distress, entitling her to recover damages.

Ridgecrest's conduct also constituted oppression or malice as those terms are defined in Civil Code section 3294, entitling Squillacote to recover punitive damages.

### ***The demurrer***

Ridgecrest demurred to the third, fourth and fifth causes of actions on the grounds that Squillacote failed to allege facts sufficient to state a cause of action. Ridgecrest alleged the Agreement did not incorporate the above cited Education Code sections.

Ridgecrest demurred to the sixth cause of action, alleging that Squillacote failed to plead sufficient facts that would establish extreme and outrageous conduct and because her exclusive remedy was provided by the workers' compensation laws. Finally, Ridgecrest demurred to the punitive damage allegation, arguing that it was immune from punitive damages.

The trial court sustained each of the demurrers. It did not explain the basis for its ruling.

### ***Analysis***

The termination causes of action all revolve around Squillacote's assertion that various portions of the Education Code were incorporated into the Agreement, either expressly or by implication. We will begin our analysis of this argument with the terms of the Agreement.

### ***The Agreement***

Attached as exhibit 1 to the second amended complaint is a copy of the Agreement between Ridgecrest and Squillacote dated August 25, 2008. The introductory paragraph identifies the parties, identifies Ridgecrest as "a California public charter school approved by the California State Board of Education," and states, "The parties recognize that the provisions of the California Education Code do not govern [Ridgecrest], except as expressly set forth in the Charter Schools Act of 1992, as amended."

Paragraph A.1. of the Agreement reiterates that Ridgecrest is a public charter school operating pursuant to the Charter Schools Act of 1992 and incorporates by

reference Ridgecrest's charter. Paragraph A.3. states, "Pursuant to Education Code section 47610, [Ridgecrest] must comply with all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts except as specified in Education Code section 47610."

Paragraph B. identifies Squillacote's duties, work schedule, and benefits. It also contains a section entitled "Employee Rights," which states, "Employment rights and benefits for employment at [Ridgecrest] shall only be as specified in [the Agreement, Ridgecrest's] charter, the Charter Schools Act and [Ridgecrest's] Employee Handbook .... Employment rights and benefits may be affected by other applicable agreements or directives or advisories from the California Department of Education or State Board of Education. During the term of this Agreement, [Squillacote] shall not acquire or accrue tenure, any employment rights with the State Board of Education or [Ridgecrest]."<sup>5</sup>

Paragraph C.1. identifies the term of the contract as comprising a "period not to exceed 12 months beginning on July 1, 2008 and ending on June 30, 2009," and also addresses termination of the agreement: "Either party may immediately terminate this Agreement and this employment relationship upon written notice to the other party. [Ridgecrest] requests, when feasible, a minimum of thirty (30) days['] written notice of intent to terminate. Although the Employee is contractually bound to thirty (30) days['] notice, [Ridgecrest] may release the Employee from this notice requirement if a replacement is hired within that period."

Finally, as relevant to this dispute, Paragraph C.3. defines the employment relationship as "an 'At-Will' contract and the [Board] exercises their right ... 'At-Will'

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<sup>5</sup>In a motion filed August 11, 2011, Ridgecrest requested we take judicial notice of various documents. Squillacote opposed the motion. After a review of the items, we deny the motion as they were not presented to the trial court and are not items of which we may take judicial notice.

contracts for employees. During its term, an employee will be terminated without termination proceedings for the following reasons[.]” This paragraph then lists 18 reasons for termination, including incompetency, insubordination, negligence in the performance of duties, dishonesty, and consuming alcoholic beverages during school hours. The Agreement goes on to provide, “If [Ridgecrest] terminates this Agreement for reasons not listed above, Employee shall be entitled to thirty (30) days[’] severance pay, even if the effective date of the termination is fewer than thirty (30) days.”

Paragraph E. is entitled “Acceptance of Employment” and provides that by signing the Agreement Squillacote confirms (1) she read the agreement and accepted employment pursuant to the terms therein, and (2) the agreement was “the entire agreement between [Ridgecrest] and me regarding the terms and conditions of my employment. This is a final and complete agreement and there are no other agreements, oral or written, express or implied, concerning the subject matter of this Agreement.”

To summarize, the Agreement purported to establish an “at-will” employment contract, but then modified the relationship with various provisions. In addition, the Agreement stated Ridgecrest was a charter school, exempt from the provisions of the Government Code that apply to public schools, except for the Charter Schools Act and the provisions of Education Code section 47610.

### ***Squillacote’s contentions***

Squillacote asserts that the policies adopted by the Board were incorporated into the Agreement. These policies included provisions that permit dismissal of permanent employees pursuant to the provisions of Education Code section 44932 and dismissal of probationary employees pursuant to the provisions of Education Code section 44948.3. Education Code section 44932, subdivision (a) lists grounds for dismissal of a permanent employee, which vary somewhat from those listed in the Agreement. Subdivision (b) of section 44932 permits the suspension without pay of a certificated permanent employee, provided specific procedural steps are followed.

Education Code section 44948.3, subdivision (a) addresses dismissal for cause of probationary employees and also requires compliance with specific procedural steps. It is not disputed that Ridgecrest did not comply with the procedures set forth in this section.

The issue, therefore, is whether the Agreement incorporated the policies adopted by the Board.

The Agreement specifically incorporates Ridgecrest's charter and also states that the employee's rights are governed by the Agreement, the Charter Schools Act, and Ridgecrest's employee handbook. The Agreement limits modification to those signed by the Board and the employee. It also confirms that the terms of the Agreement constituted the entire agreement between the parties. Nowhere in the Agreement is there any reference to the *Board's* policies.

Squillacote ignores the absence of any reference to the Board's policies and instead focuses on the following sentence found in Paragraph B.1. of the Agreement: "Employee will perform such duties as RCS may reasonably assign and Employee will abide by all RCS' policies and procedures as adopted and amended from time to time." We have quoted this section verbatim. The Agreement identifies "RCS" as Ridgecrest Charter School. It also identifies the board of directors as the "Board." Therefore, the plain language of the above quoted sentence only can mean that Squillacote was required to abide by *Ridgecrest's* policies and procedures, not *the Board's* policies and procedures.

To interpret the Agreement to include the Board's policies would require us to ignore the language of the Agreement and the integration clause contained in the Agreement, which we will not do. Accordingly, we conclude the Agreement did not incorporate by reference or implication the policies of the Board. Squillacote's reliance on the Board's policies is misplaced. We now turn to the causes of action.

### ***Third cause of action***

The third cause of action in the second amended complaint alleges that Squillacote's termination "constitutes a wrongful termination as it is against public policy and a violation of" her rights. The only public policy Squillacote identified in the second amended complaint was the "public policy as expressed in the statutes and Constitution of the State of California, and in particular in violation of the provisions of California Education Code including §§ 44932, 44948.2, and 44948.3." Squillacote's brief relies on the same "public policy."

The Supreme Court "first recognized a public policy exception to the at-will employment doctrine in *Tameny* [*v. Atlantic Richfield Co.* (1980)] 27 Cal.3d 167, and has since reaffirmed its commitment to that principle on several occasions [citations], and most recently in *Rojo* [*v. Kliger* (1990)] 52 Cal.3d 65, 88-89. Indeed, following the seminal California decision in *Peterman v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184 [(*Peterman*)], the antecedent to our holding in *Tameny*, the vast majority of states have recognized that an at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn. [Citations.] [¶] Yet despite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee. This determination depends in large part on whether the public policy alleged is sufficiently clear to provide the basis for such a potent remedy. In *Foley v. Interactive Data Corp.* [(1988)] 47 Cal.3d 654 [(*Foley*)], we endeavored to provide some guidelines by noting that the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer; in addition, the policy must be 'fundamental,' 'substantial' and 'well established' at the time of the discharge.

(*Id.* at pp. 669-670.)” (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1089-1090 (*Gantt*), overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6.)

In a later case, the Supreme Court counseled that to support a tortious discharge claim, the public policy on which the plaintiff relies must meet four requirements: (1) the policy must be supported by either constitutional or statutory provisions; (2) the policy must be “public,” in the sense that it inures to the benefit of the public rather than serving merely the interests of the individual; (3) the policy must have been articulated at the time of the discharge; and (4) the policy must be fundamental and substantial. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890.) As a result of these requirements, violations of public policy that will give rise to a tort cause of action generally fall into one of four categories: (1) refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance. (*Gantt, supra*, 1 Cal.4th at pp. 1090-1091.)

Squillacote has not cited any authority that suggests the cited provisions of the Education Code establish a public policy that would support a tort cause of action for wrongful discharge. None of the cited provisions meet the requirements discussed above. Instead, she simply has asserted, without meaningful analysis, that these statutes represent a fundamental public policy that will support her cause of action.

Not every statute represents a fundamental public policy that will support a tort cause of action for wrongful termination. Our research has not located a case that would support Squillacote’s claim. A superficial review of the statutes suggests the reason no authority exists to support Squillacote’s argument -- the policy espoused by Squillacote does not inure to the benefit of the public, nor is it substantial or fundamental. The cited provisions inure to the benefit of the individual. Thus, the trial court properly sustained the demurrer to this cause of action.

#### ***Fourth cause of action***

The fourth cause of action in the second amended complaint alleges Ridgecrest breached the Agreement because it failed to comply with the provisions of the Education Code discussed above. This argument was based on the assertion that the Board adopted various regulations that required Ridgecrest to comply with provisions of the Education Code prior to terminating teachers. Since we have concluded the portions of the Education Code identified by Squillacote were not incorporated into the Agreement, Ridgecrest's failure to comply with them was not a breach of contract. The trial court correctly sustained Ridgecrest's demurrer to this cause of action.

#### ***Fifth and sixth causes of actions***

Squillacote was terminated by Ridgecrest during the 2008-2009 school year. The fifth cause of action alleges that when Ridgecrest terminated her employment, it also breached a contract to employ Squillacote for the *following* school year (2009-2010). The sixth cause of action alleges Ridgecrest was liable for intentional infliction of emotional distress because of the manner in which the investigation was conducted, and also when it decided to terminate Squillacote's employment.

We have reviewed Squillacote's opening and reply briefs and can find no argument or authority directed at these causes of action. Accordingly, we conclude Squillacote has abandoned any claim that the trial court erred in sustaining without leave to amend Ridgecrest's demurrer to these causes of action. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161-1162; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

### **III. Remaining Contentions**

#### ***At-will employment***

The trial court's order sustaining Ridgecrest's demurrer concluded that Squillacote was an at-will employee of Ridgecrest. Almost in passing, Squillacote asserts the trial court erred in reaching this conclusion. While we agree with Squillacote that the

Agreement was not a traditional at-will employment contract, this conclusion does not change our analysis or conclusions regarding the causes of action and the facts pled by Squillacote.

Labor Code section 2922 recognizes “at-will” employment in California.<sup>6</sup> Indeed, “the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment.” (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350.) If Squillacote was an at-will employee, Ridgecrest could terminate her employment at any time for any reason, subject to limits imposed by statute or public policy, “since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal.” (*Foley, supra*, 47 Cal.3d at p. 665; see also *Petermann, supra*, 174 Cal.App.2d at p. 188.)

The parties may agree, through either an express or implied contract, to limit an employer’s right to terminate the employee. (*Foley, supra*, 47 Cal.3d at p. 665.) Consistent with the fundamental principle of freedom of contract, an “employer and employee are free to agree to a contract terminable at will or subject to limitations. Their agreement will be enforced so long as it does not violate legal strictures external to the contract, such as laws affecting union membership and activity, prohibitions on indentured servitude, or the many other legal restrictions” that may impose restraints imposed on the employment arrangement. (*Id.* at p. 677.)

With these principles in mind, we now turn to the Agreement, which we summarized above. As explained, we conclude the Agreement did not incorporate

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<sup>6</sup>Labor Code section 2922 states: “An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.”

policies of the Board; it did, however, contain provisions that could be interpreted as restricting Ridgecrest's ability to terminate Squillacote's employment.

Paragraph C. of the Agreement contains the terms of employment; paragraph C.1. defines the term of employment as consisting of a period not exceeding 12 months. Paragraph C.1. also states either party may terminate the employment relationship "immediately," upon notice to the other party, but goes on to state, "[Ridgecrest] requests, when feasible, a minimum of thirty (30) days['] written notice of intent to terminate. Although the Employee is contractually bound to thirty (30) days['] notice, [Ridgecrest] may release the Employee from this notice requirement if a replacement is hired within that period."

The quoted provisions of paragraph C.1. are impossible to reconcile. The Agreement begins by stating that the employment relationship may be terminated immediately upon notice to the other party. This sentence is not limited to Ridgecrest but appears to be bilateral. This paragraph next states that Ridgecrest *requests* a 30-day notice if the employee intends to terminate the relationship. This sentence can be reconciled with the preceding sentence because it does not impose a 30-day notice requirement on the employee but merely requests such notice. The next sentence, however, appears to impose the 30-day notice requirement on the employee ("the Employee is contractually bound to thirty (30) days['] notice"). Without additional evidence to aid in interpreting this provision, we are unable to determine the parties' intent.

Paragraph C.3. is similarly inconsistent. It begins by stating that the employee is an "At-will" employee. This statement is consistent with the first part of paragraph C.1. but inconsistent with the second part of that paragraph. Paragraph C.3. also is internally inconsistent because the second sentence places limitations on the ability of Ridgecrest to terminate the employee by stating, "During its term an employee will be terminated without termination proceedings for the following reasons," and then lists 18 offenses,

including incompetency, insubordination, negligent performance of duties, and addiction to the use of narcotics. After the 18 termination offenses, this paragraph states that if Ridgecrest terminates the Agreement for a reason not listed above, then the employee shall be entitled to 30 days' severance pay.

An at-will employee can be terminated for any reason; therefore, if the parties truly contemplated an at-will employment contract, it would be unnecessary to list 18 termination offenses. Moreover, the reference to proceedings suggests that in some unknown circumstances the employee is entitled to some type of undefined proceeding before the contract can be terminated. The reference to severance pay also is confusing because an at-will employee is not entitled to severance pay.

Our task in interpreting a contract is to determine the mutual intent of the parties at the time the contract was formed. (Civ. Code, § 1636.) The language of the contract is our first resource to determine the parties' intent if it is clear and explicit. (*Id.*, § 1638.) Where the language of the contract is ambiguous, however, as the language of the Agreement most certainly is, it may be necessary to introduce parole evidence to determine the intent of the parties. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

Since it is impossible to interpret the ambiguous provisions of the Agreement without extrinsic evidence, Squillacote is correct in asserting that her status as an at-will employee cannot be determined simply by reading the terms of the Agreement. Nonetheless, the trial court did not err in granting Ridgecrest's demurrer because Squillacote never alleged Ridgecrest breached the provisions contained in the Agreement. Instead, she argued Ridgecrest breached the Agreement based on the incorrect assertion that Education Code provisions were incorporated into the Agreement. Therefore, while Squillacote is correct, this argument does not aid her attempts to reverse the trial court's ruling.

### ***Collective bargaining***

Squillacote argues in her opening brief that Labor Code sections 920 through 923 prohibit Ridgecrest from terminating her employment as a result of her engaging in the organization or negotiating of a collective bargaining agreement. While these code sections may prohibit such conduct, nowhere in the second amended complaint does Squillacote allege the reason she was terminated was because she engaged in activity protected by these code sections. We are unable to understand why Squillacote places any reliance on these code sections.

### ***Education Code section 47611***

Education Code section 47610 provides that charter schools are exempt from the laws governing school districts, except for the provisions in its charter and for other specifically identified statutes. One code section that charter schools are required to comply with is Education Code section 47611. This section provides that *if* the charter school chooses to make the State Teachers' Retirement Plan (STRP) available, all qualified employees are entitled to have their service covered under the various plans available in the same manner as a teacher employed at a public school. The charter school must inform all applicants of the retirement options available, including whether the charter school allows participation in STRP, and that employment with the charter school may exclude the applicant from further coverage in the applicant's current retirement system.

Squillacote argues that if the Legislature had intended to exempt charter schools from the provisions of Education Code sections 44830 through 44988 (conditions of employment), then it would have included a statute specifically requiring a charter school to inform applicants that they were losing these protections, as is required for STRP. According to Squillacote, since charter schools are not required to provide this disclosure to applicants, then the Legislature must have intended to require charter schools to

comply with Education Code sections 44830 through 44988, notwithstanding the exemption given to charter schools in Education Code section 47610.

Squillacote has not provided any authority to support this argument. If this contention were so, it would be directly contrary to the exemption found in Education Code section 47610. We are confident that in passing Education Code section 47610, the Legislature intended to accomplish exactly what was stated -- exempting charter schools from the onerous conditions of employment imposed on public schools. We have no basis to impose these conditions by implication.

***Equal protection***

Squillacote concludes her arguments by asserting that she was denied her constitutional right to equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7.)

““The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” [Citation.] ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (Cooley v. Superior Court (2002) 29 Cal.4th 228, 253.)

Squillacote asserts the two groups that are similarly situated consist of certificated teachers that work for public schools and certificated teachers that work for charter schools. These two groups are treated unequally because public school teachers are guaranteed rights and benefits in Education Code sections 44830 through 44988, while charter school teachers are not guaranteed these benefits because of the exemption found in Education Code section 47610.

We will assume for the purposes of our analysis that these two groups are similarly situated<sup>7</sup> and proceed to the second step of the equal protection analysis. Once it is determined that two groups are similarly situated for the purposes of a statute, we next must determine what level of analysis to apply to the distinction.

“In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*).

Squillacote concedes that the distinction between public and charter school teachers is subject to rational relationship analysis. Accordingly, we turn to the question of determining if there is a legitimate state purpose for treating the two classes differently.

“As both the United States Supreme Court and this court have explained on many occasions, “[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*. [Citations.] Where there are ‘plausible reasons’ for [the classification] ‘our inquiry is at an end.’” [Citations.]” (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482.) “On rational-basis review, a

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<sup>7</sup>Our assumption is not a concession that the two groups are similarly situated, since in general private employers are not required to provide the same benefits as public employers. Since this contention is resolved at the second step of the analysis, however, we need not dwell on it.

classification in a statute ... comes to us bearing a strong presumption of validity, [citation], and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,' [citation]." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314-315.) "But this is not an impossible task. The rationale must be 'plausible' [citation] and the factual basis for that rationale must be *reasonably* conceivable [citation]. And 'even in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause.' [Citation.]" (*Hofsheier, supra*, 37 Cal.4th at p. 1201.)

We need not search through secondary sources to determine the state of facts that provide a rational basis for the distinction between public school teachers and charter school teachers because the Legislature has codified its intent in Education Code section 47601. We begin, however, with a short historical review.

The legislation creating charter schools was passed in 1992 by adding Education Code sections 47600 through 47616. (Stats. 1992, ch. 781, § 1, pp. 3756-3761.) The legislation was an attempt to address the "complex tangle of rules sustaining our public school system," that has the "potential to sap creativity and innovation, thwart accountability and undermine the effective education of our children." (*Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1130 (*Wilson*)). The legislation "sought to disrupt entrenchment of these traits within the educational bureaucracy by encouraging the establishment of charter schools." (*Ibid.*)

This intent was specifically stated in Education Code section 47601:

"It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:

- (a) Improve pupil learning.
- (b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.
- (c) Encourage the use of different and innovative teaching methods.
- (d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the schoolsite.
- (e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
- (f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems.
- (g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.”

To avoid the pitfalls of the entrenched public school system, charter schools were exempted “from the laws governing school districts,” with some exceptions not relevant to our analysis.<sup>8</sup> (Ed. Code, § 47610.)

Squillacote complains that she was denied equal protection because, as a charter school teacher, she was not provided the same protections public school teachers receive before she was terminated. Permanent public school teachers can be terminated only for cause as specified in Education Code sections 44932 and 44933 and pursuant to the procedures set forth in Education Code section 44934, which include a 30-day notice of the intent to terminate employment and a right to a hearing. Public school probationary employees have similar protections. (See, e.g., Ed. Code, §§ 44948-44949.) As a charter school employee, Squillacote did not have these protections.

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<sup>8</sup>In a motion filed November 17, 2011, amicus curiae California Charter Schools Association requested we take judicial notice of various documents comprising the legislative history of the Charter Schools Act of 1992. Squillacote opposed this motion. This motion is granted.

Accordingly, the issue presented is whether this charter school system bears a rational relationship to a legitimate state interest, i.e., is there a reasonably conceivable state of facts that justify treating charter school teachers differently than public school teachers. The answer is undeniable -- yes.

The Legislature has a legitimate state interest in improving the performance of public schools. A quick review of the Education Code confirms that public school teachers receive benefits and protections unavailable in the private sector. The Legislature rationally could conclude that under performance of the public school system is directly related to the “complex tangle of rules sustaining our public school system.” (*Wilson, supra*, 75 Cal.App.4th at p. 1130.) Accordingly, by creating a new type of school (charter schools) that was exempt from the complex web of statutory protections, the Legislature was addressing a legitimate state interest, and doing so in a manner that rationally was related to this interest. For this reason, Squillacote’s equal protection challenge must fail.

#### **IV. Leave to Amend**

Squillacote claims the trial court erred in refusing to grant her leave to amend her complaint. Squillacote provided to the trial court a proposed third amended complaint that formed the basis for her argument that she should have been granted leave to amend because she could state a cause of action that would survive a demurrer.

We have reviewed the charging allegations in the proposed third amended complaint. In our view, they essentially are identical to the charging allegations in the second amended complaint. We have rejected each legal theory on which Squillacote relies to support her claim of right to recovery.

In oral argument Squillacote suggested for the first time that perhaps she could state a cause of action for breach of contract because the contract was not an at-will contract. However viable this theory may be, it was never presented to the trial court. Instead, Squillacote asserted only the theories we have rejected in this opinion.

It is an abuse of discretion to refuse to grant a plaintiff leave to amend a complaint when there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) It is plaintiff's burden, however, to prove there is a reasonable possibility that the defect can be cured by amendment. (*Ibid.*) Since Squillacote failed to present any facts or argument to the trial court that would support a cause of action, the trial court did not abuse its discretion when it denied her leave to amend.

### DISPOSITION

The judgment is affirmed. Ridgecrest's motion for judicial notice filed August 11, 2011, is denied; amicus curiae California Charter Schools Association's motion for judicial notice filed November 17, 2011, is granted. Ridgecrest is awarded its costs on appeal.

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CORNELL, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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LEVY, J.