

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

SAK ONKVISIT,

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF  
CALIFORNIA STATE UNIVERSITY  
et al.,

Defendants and Respondents.

H036735

(Santa Clara County  
Super. Ct. No. CV111076)

After appellant Sak Onkvist was temporarily demoted to the position of associate professor, he brought an action against respondents Board of Trustees of the California State University (CSU), Charles Reed, Don Kassing, Maria Carmen Sigler, David Conrath, Nancie Fimbel, and Jacqueline Snell for retaliation under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) and fraud. The trial court granted respondents' motion for summary judgment and entered judgment in their favor. We affirm the judgment.

## I. Procedural and Factual Background<sup>1</sup>

### A. Third Amended Complaint

In May 2009, appellant filed his third amended complaint. At issue in the present case are two causes of action. The violation of the California Whistleblower Protection Act cause of action alleged the following facts. Appellant was employed as a professor by CSU. Reed was the chancellor of CSU, Kassing was the president of San Jose State University (SJSU), Sigler was the provost of SJSU, Conrath was the dean of the college of business at SJSU, Fimbel was the senior director of development at SJSU, and Snell was the department chair. On January 2 and 3, 2003, appellant made a protective disclosure under the California Whistleblower Protection Act by informing Conrath, Fimbel, and Snell that they had illegally chosen Therese Louie for a teaching position with the marketing department. Respondents then used an incident involving one of appellant's students to retaliate against him for making this disclosure. The incident occurred in April 2003, when a student did not take one of appellant's examinations, and then falsely represented that he had been hospitalized on the day of the examination due to a motorcycle accident. Respondents began to harass appellant. In September 2003, Conrath attempted to cancel appellant's class after three weeks of instruction and to force him to accept additional work. In the spring of 2004, Conrath and Fimbel refused to make one of the computer labs available for appellant's students. In February 2004, Conrath chose a younger and less qualified candidate over appellant for the position of director of the Center of Global Enterprise Management.<sup>2</sup>

---

<sup>1</sup> Pursuant to Evidence Code section 452, subdivision (d), we have taken judicial notice of the records in the related appeals in *Onkvisit v. California State Personnel Board* (Apr. 27, 2010, H034449) [nonpub. opn.] and in *Onkvisit v. Board of Trustees of California State University* (Apr. 27, 2010, H034620) [nonpub. opn.].

<sup>2</sup> Appellant also alleged that he made another protective disclosure in October 2004 by filing a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). Appellant alleged that the EEOC dismissed the charge for insufficient evidence.

Between February 2004 and April 2005, appellant contacted Fimbel, Conrath, Kassing, Sigler, and others in writing regarding CSU's discriminatory and retaliatory practices.

On April 29, 2005, Sigler and Kassing announced that disciplinary action would be taken against him for insubordination and failure to perform his duties. In August 2005, respondents demoted appellant and reduced his salary.

The following facts were alleged as to the fraud cause of action. Respondents used the student's information to punish him even though they knew it was false. Respondents were also deceptive in other ways: Conrath "ordered" appellant to have a discussion, but instead intended to serve him with a notice of disciplinary action; Sigler inserted a "fraudulent clause so as to be able to proceed with disciplinary actions against [him] while stripping [him] of his arbitration rights"; and Kassing and Sigler imposed a disciplinary sanction during the appeal process. Appellant reasonably relied on their representations and suffered financial and emotional injuries as a result.

### **B. Summary Judgment Motion**

Respondents brought a motion for summary judgment or, alternatively, summary adjudication. They argued that the complaint was barred by the doctrines of collateral estoppel and/or res judicata. They also argued that the undisputed material facts established that the decision to impose discipline was based upon legitimate business reasons, appellant failed to exhaust his administrative remedies, and the fraud claim was barred by the statute of limitations. The motion was based on the declarations of Conrath, Fimbel, Kassing, Reed, Sigler, Snell, and their attorney. Respondents also requested judicial notice of various documents, including the joint appendix on appeal in case No. H034449, this court's order granting respondent CSU's motion to augment the record on appeal in case No. H034449, this court's opinion in case No. H034449 affirming the judgment in favor of respondent CSU, the California Supreme Court's

denial of appellant's petition for review in case No. H034449. The trial court granted the request for judicial notice.

In support of its motion, respondents presented the following facts. After appellant refused to allow the student to take a make-up examination and gave him a failing grade, the student filed a complaint with the Student Fairness Committee. In October 2003, the committee recommended that the student be allowed to take the missed examination and that his grade be recalculated based on the score on the make-up examination.

After appellant rejected these recommendations, the matter was referred to the Office of Equity and Diversity, which consulted with the Disability Resource Center. It was determined that the student should be given the opportunity to take the missed examination and to have his grade recalculated.

Fimbel administered the make-up examination at the end of the spring semester in 2004. Beginning in July 2004, Fimbel contacted appellant on three occasions to request the student's other course grades so that his final grade could be calculated. Appellant refused to provide the grades.

In a letter dated April 8, 2005, appellant was given notice that he was being disciplined for failing to turn over a student's grades to university administrators after repeated requests. The notice stated that he would be demoted to associate professor for the 2005-2006 academic year, with a salary reduction of \$1,000 per month. On April 29, 2005, a final decision, which imposed the proposed discipline, was issued.

In May 2005, appellant submitted a grievance to the California Faculty Association (CFA). The CFA declined to submit appellant's grievance to arbitration. Appellant unsuccessfully appealed this decision.

Appellant also appealed his demotion to the State Personnel Board. An administrative law judge held a seven-day evidentiary hearing and concluded that

appellant's demotion for one year was appropriate. Appellant's petition for rehearing was denied.

On April 22, 2008, appellant filed the present action in which he alleged causes of action for demotion in violation of public policy, breach of contract, breach of the implied covenant of good faith and fair dealing, invasion of privacy, and fraud. Generally, appellant challenged his demotion and claimed that it was in retaliation for protected activity.

In June 2008, appellant filed a petition for writ of administrative mandate in which he challenged his demotion by CSU. He alleged that the demotion was unwarranted and in retaliation for protected activity. The trial court denied the petition for writ of mandate, concluding that appellant had failed to show that there was prejudicial abuse of discretion, denial of a fair hearing, or acts in excess of jurisdiction by the disciplining agency or reviewing board.

In March 2009, appellant filed a petition for writ of ordinary mandate in which he challenged his demotion by CSU. After CSU filed a demurrer to the petition, the trial court sustained the demurrer without leave to amend and dismissed the action.

Appellant appealed the judgments in both writ petitions and this court affirmed the judgments. (*Onkvisit v. California State Personnel Board, supra*, H034449; *Onkvisit v. Board of Trustees of California State University, supra*, H034620.) Appellant filed a petition for review in case No. H034449, which was denied in July 2010.

### **C. Summary Judgment Opposition**

Appellant argued that the motion for summary judgment was "merely another attempt to revisit their demurrers that have been already overruled." He argued that his own declaration created triable issues of fact, CSU misled him to believe that he was not entitled to arbitration, the doctrine of res judicata did not apply because the claims submitted to the State Personnel Board were not the same as those in the present case,

and respondents' notice of motion for summary judgment was untimely. Appellant's declaration essentially stated as fact the allegations in the third amended complaint.

Appellant also stated that respondents' notice of motion for summary judgment was not timely.

#### **D. Respondents' Reply**

Respondents argued in their reply in support of their motion for summary judgment or, alternatively, summary adjudication, that appellant had not met his burden to establish a triable issue of material fact. They also argued that appellant's declaration contained inadmissible evidence.

#### **E. Trial Court's Ruling**

Relying on this court's opinions in appellant's related appeals, the trial court concluded that collateral estoppel precluded litigation on the following issues: respondents' decision to take disciplinary action for insubordination and failure to perform his duties, resulting in his demotion; respondents' use of the student's false statements as a basis to punish appellant; respondents' insertion of a clause in the notice of disciplinary action that appellant could not request arbitration; and imposition of a disciplinary sanction despite a pending appeal. The trial court also found that respondents had established that appellant's claims that respondents' attempt to cancel his class, refusal to allow appellant's students to use the computer lab, and the selection of another candidate for the director position were not retaliatory. As to the fraud cause of action, the trial court found that it was barred by the statute of limitations. The trial court granted the motion and entered judgment in favor of respondents.

## II. Discussion

### A. Notice of Motion for Summary Judgment

Appellant contends that the trial court erred in granting the motion for summary judgment because respondents' notice was untimely.

Respondents' proof of service shows that the process server attempted to serve appellant by personal service, declaring: "I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party on: Thur., Sep. 30, 2010 at 5:10PM, to the person(s) indicated below in the manner as provided in 1011 CCP. [¶] NO ANSWER/DOCUMENTS LEFT ON THE FRONT PORCH[.]" September 30 was 75 days before the scheduled hearing on December 14. Appellant retrieved the box of documents left on his porch when he returned home on October 12, 2010.

Code of Civil Procedure section 437c, subdivision (a) provides in relevant part: "Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. However, if the notice is served by mail, the required 75-day period of notice shall be increased by five days if the place of address is within the State of California, . . . and if the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days."

*McMahon v. Superior Court* (2003) 106 Cal.App.4th 112 held that "in light of the express statutory language, trial courts do not have authority to shorten the minimum notice period for summary judgment hearings." (*Id.* at p. 118.) *McMahon* reasoned that "[b]ecause it is potentially case dispositive and usually requires considerable time and effort to prepare, a summary judgment motion is perhaps the most important pretrial motion in a civil case. Therefore, the Legislature was entitled to conclude that parties should be afforded a minimum notice period for the hearing of summary judgment

motions so that they have sufficient time to assemble the relevant evidence and prepare an adequate opposition.” (*Id.* at pp. 117-118.)

Since respondents did not personally serve appellant with the notice of the motion at least 75 days before the hearing, the notice was not timely. However, appellant has not met his burden to show that he was prejudiced by the untimely notice.

Our Constitution provides “[n]o judgment shall be set aside . . . in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.) Code of Civil Procedure section 475 provides in relevant part: “No judgment, decision, or decree shall be reversed or affected by reason of any error . . . unless it shall appear from the record that such error . . . was prejudicial.” An appellant has the burden of showing that the trial court’s error was prejudicial. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347.) An error is prejudicial “if it is reasonably probable that a result more favorable to the appellant would have been reached absent the error.” (*Id.* at p. 348.)

Here, appellant’s opening brief does not state how he was prejudiced by the fact that he did not receive the requisite statutory notice. He also did not file a reply brief and thus did not respond to respondents’ argument that he had failed to show prejudice. At the hearing on the summary judgment motion, though appellant stated that he suffered prejudice because there was insufficient time “to prepare the proper points,” he did not explain how additional time would have allowed him to successfully oppose the summary judgment motion. Based on this record, we conclude that appellant has failed to carry his burden of establishing prejudice. Thus, the error does not warrant reversal of the judgment.

## **B. Motion for Summary Judgment**

Appellant contends that the trial court erred in granting the motion for summary judgment because he produced evidence creating triable issues of material fact. We conclude that the trial court properly granted the motion for summary judgment.

### **1. Standard of Review**

““Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo.” [Citation.] The party moving for summary judgment bears the ‘burden of persuasion’ that there are no triable issues of material fact and that the moving party is entitled to judgment as a matter of law. [Citation.] ‘There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.]” (*Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 993-994.)

### **2. California Whistleblower Protection Act**

The purpose of the California Whistleblower Protection Act is to ensure that CSU employees, among others, are “free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.” (Gov. Code, §§ 8547, 8547.1.) Thus, “any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party.” (Gov. Code, § 8547.12, subd. (c).) A “protected disclosure” includes “any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity . . . .” (Gov. Code, § 8547.2, former subd. (d).) Thus, here, appellant was required to prove: (1) he made a protected disclosure; (2) respondents retaliated against him for making this disclosure. At issue in

the present case is whether there are triable issue of fact that respondents retaliated against appellant for his communications regarding the hiring of Louie.

**a. Collateral Estoppel**

Respondents contend that collateral estoppel precluded litigation of the California Whistleblower Protection Act cause of action.

“The doctrine [of res judicata] has a double aspect, a prior judgment is a bar in a new action on the same cause of action, and in a new action on a different cause of action the former judgment is a collateral estoppel, being conclusive on issues actually litigated in the former action.” (*Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851.) This first aspect of the doctrine is often referred to as claim preclusion or res judicata while the second aspect of the doctrine is referred to as issue preclusion or collateral estoppel. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. 7.) The present case involves the issue preclusion aspect of res judicata.

“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*)). Once the threshold requirements are met, courts consider whether application of issue preclusion will further the public policies of “preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.” (*Id.* at p. 343.)

*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477 (*Castillo*) is illustrative. In *Castillo*, the plaintiff was dismissed from his employment for cause. (*Id.* at p. 479.) He sought administrative review of his discharge, and following an evidentiary hearing, his discharge was reaffirmed. (*Ibid.*) He then filed a petition for administrative mandate seeking review of the administrative decision. (*Ibid.*) While the mandate petition was pending, the plaintiff filed an action in which he alleged that he had been wrongfully discharged based on his age, race, and national origin, and in violation of public policy. (*Id.* at p. 480.) After the mandate petition was denied, the trial court granted the defendant's motion for summary judgment on the wrongful discharge complaint on the ground that it was barred by collateral estoppel. (*Id.* at p. 481.) Relying on the test set forth in *Lucido*, *Castillo* affirmed the judgment. (*Id.* at pp. 481-484.)

Similarly, here, the threshold requirements of *Lucido* have been met as to appellant's cause of action for the violation of the California Whistleblower Protection Act. Appellant has alleged in his third amended complaint that respondents temporarily demoted him to associate professor in retaliation for his disclosures regarding illegal behavior in their hiring practices, thereby violating the California Whistleblower Protection Act. This issue is identical to that in appellant's appeal to the State Personnel Board in which he claimed that his demotion was unwarranted and due to retaliation.

The next *Lucido* requirement involves a determination of whether the issue was actually litigated in the prior proceeding. "An issue is actually litigated "[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . ." [Citations.]" (*Castillo, supra*, 92 Cal.App.4th at p. 482.) Here, appellant had a seven-day hearing before an administrative law judge on the issue of his demotion. Though he claimed in his appeal from the denial of his petition for administrative mandamus that he was not allowed to introduce evidence of retaliation at this hearing, this court held that there was no evidence to support his claim. Thus, the record establishes that the issue was previously litigated.

*Lucido* also requires “that the issue was ‘necessarily decided,’ [which] has been interpreted to mean that the issue was not “‘entirely unnecessary’” to the judgment in the prior proceeding. [Citation.]” (*Castillo, supra*, 92 Cal.App.4th at p. 482.) Here, the State Personnel Board rejected appellant’s contentions and affirmed the disciplinary action on the ground that his “refusal to turn over the student’s grades to the ad hoc committee constituted unprofessional conduct and a failure or refusal to perform the normal and reasonable duties of his position . . . .” In finding that appellant’s temporary demotion was an “appropriate” sanction for his conduct, the State Personnel Board necessarily found that the disciplinary action was not retaliatory.

The administrative decision was also final and on the merits. Appellant filed a petition for writ of mandamus in superior court, which was denied. Following his appeal, this court affirmed the judgment in case No. H034449, and the California Supreme Court denied review. (*Onkvisit v. California State Personnel Board (supra*, H034449) review den. July 28, 2010, S183318.) The decision was on the merits because it followed a “‘full hearing’ in which “‘the substance of the claim [was] tried and determined.’” [Citations.]” (*Castillo, supra*, 92 Cal.App.4th at p. 483.)

As to the final *Lucido* requirement, appellant, the party against whom preclusion is sought, was a party in both proceedings.

Turning to the public policy considerations, we conclude that they are the same as those in *Castillo*. First, application of issue preclusion in the present case would preserve the integrity of the judicial system. If appellant were allowed to relitigate whether the temporary demotion was wrongful, the administrative proceedings that concluded the disciplinary sanction was appropriate would be undermined. Second, judicial economy would also be promoted in the present case because “[a]llowing the trial court to rely on the litigated and necessary findings from the administrative process would ‘minimize repetitive litigation.’ [Citation.]” (*Castillo, supra*, 92 Cal.App.4th at p. 483.) Third, “[t]he policy against vexatious litigation favors applying issue preclusion here because

[appellant] had an adequate opportunity at the administrative hearing to prove that his discharge was wrongful, and because a single interest is being protected by both the administrative and present proceedings.” (*Id.* at p. 484.)

In sum, collateral estoppel precludes litigation of respondents’ decision to demote appellant for insubordination and failure to perform his duties, respondents’ use of the student’s statements in reaching its decision, and respondents’ order to the student that he not see appellant to resolve the grade issue.

**b. Other Allegations Under the California Whistleblower Protection Act**

Appellant also alleged that respondents retaliated against him in violation of the California Whistleblower Protection Act on three other occasions.

Appellant alleged that Conrath retaliated against him when Conrath attempted to cancel appellant’s classes and to force him to accept additional work. Respondents submitted declarations and appellant’s deposition testimony that Conrath “delegated such decisions to the department chairs and/or the associate dean for undergraduate studies,” and that classes with low enrollment were cancelled, but appellant’s class was not cancelled. Appellant’s declaration submitted in opposition to the motion of summary judgment merely restated the allegations in the third amended complaint. Though appellant concedes that his class was not cancelled, he argues that Conrath’s “order” was a retaliatory act. However, respondents submitted evidence that classes with low enrollment were cancelled and appellant has not shown that his class did not have low enrollment. More importantly, if appellant’s class was not cancelled, he has not shown how he was damaged by Conrath’s conduct. Thus, respondents have shown that there were no triable issues of material fact on this issue.

Appellant also alleged that Conrath and Fimbel refused to make a computer lab available to appellant’s students. Both Conrath’s and Fimbel’s declarations stated that they did not decide whether appellant’s students would have access to a computer lab. Fimbel further stated that “lab time had become a very scarce resource” in 2004. It was

her opinion that since Management Information Science (MIS) courses were computer-related, these courses should have first priority for computer lab access. According to Fimbel, appellant “was not the only professor outside the MIS faculty who wanted to use the labs for teaching purposes, and the deans and chairs discussed at length whether the best policy would be first come, first served or something else. Ultimately, the MIS Dept. was asked to book its courses first, keeping a list of other professors to book them into the labs on the basis of the date of the request.” Appellant’s declaration states that “Conrath and Fimbel were in charge of the resources (including the labs) of the College of Business.” However, he provides no evidence that Conrath and Fimbel made the decision that appellant’s students would not have access to the computer lab or that the decision to award computer access first to MIS students was not a legitimate business reason.

Appellant next alleged that Conrath “chose a younger and less qualified Caucasian over [him] for the position of director of the Center of Global Enterprise Management.”

Fimbel’s declaration stated that she listened to the selection committee interviews with the candidates and the deliberations by the selection committee. The selection committee, which was composed of faculty members, unanimously recommended Dr. Osland for the position because he had “the best interpersonal skills of the candidates.” Fimbel then submitted the selection committee’s recommendation to Conrath. Fimbel further stated that appellant’s e-mail regarding Louie and his concern about her hiring were never mentioned by the selection committee, Conrath, or her during the decisionmaking process.

Conrath’s declaration stated that he “selected a different candidate because the person chosen had a broader base of experience in the fields covered by the center and had superior interpersonal skills. The ability to lead, coordinate and cooperate with others was critical to the success of the center, and the decision was based on feedback obtained from extensive consultation with many members of the faculty.” According to

Conrath, appellant's e-mail concerning Louie was "of no consequence" to him and did not affect his decision to select a different candidate for the position.

Appellant's declaration restates the allegations of his third amended complaint. He also states: "Although defendant Fimbel told [him] that she had nothing to do with the selection of the director of the Center of Global Enterprise Management, she was actively involved in the selection process. Defendant Conrath neither interviewed [him] nor discussed with [him] about his selection." Once again, appellant has failed to show that Conrath's decision to hire another candidate was not based on a legitimate business reason. Appellant has produced no evidence that he was better qualified than the other candidate or any other evidence tending to show that Conrath's decision was based on appellant's protected disclosure.<sup>3</sup>

In sum, appellant failed to carry his burden to show that there were triable issues of material fact in connection with the California Whistleblower Protection Act cause of action.

### **3. Fraud**

In connection with his fraud cause of action, appellant alleged that Kassing and Sigler "showed actual fraud and malice by imposing a disciplinary sanction [on August 22, 2005] even after being informed ...on May 9, 2005 and August 4, 2005 that any disciplinary action had to be held in abeyance during the appeal process" as required by the collective bargaining agreement.

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage."

---

<sup>3</sup> In his opening brief, appellant claims that the person chosen for the director position "had a lower degree of experience as well as a lower rank." However, appellant has failed to provide citations to the record, and thus has forfeited any error on appeal. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743.)

(*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) Here, appellant has not alleged that Kassing and Sigler made a misrepresentation. He also could not have alleged justifiable reliance since he knew the terms of the collective bargaining agreement. While Kassing and Sigler may have breached the terms of the collective bargaining agreement, appellant cannot base his fraud cause of action on these allegations.<sup>4</sup>

Appellant also alleged in his fraud cause of action: respondents used the student's false statements in 2003 to punish him; in May 2003, respondents ordered the student not to see appellant to resolve the grade issue; respondents proceeded with the student's petition even though they knew it was false; Conrath was "deceptive" on February 15, 2005, when he ordered appellant to a discussion on March 3, 2005, because Conrath intended to serve appellant with a notice of disciplinary action; and on April 8, 2005, Sigler inserted a fraudulent clause in the notice of disciplinary action that appellant could not ask for arbitration.

The statute of limitations for an action for fraud is three years. (Code Civ. Proc., § 338, subd. (d).) However, a fraud action "is not deemed to have accrued until the discovery, by the aggrieved party, of the fact constituting the fraud." (*Ibid.*) "[A] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.)

Here, appellant filed his complaint on April 22, 2008, which was more than three years after his fraud cause of action accrued. Appellant did not allege any facts to show

---

<sup>4</sup> We also note that the issue of whether the collective bargaining agreement was violated by imposing discipline during appellant's administrative appeal was resolved adversely to appellant in his related appeal in case No. H034449.

his inability to have made an earlier discovery of respondents' fraudulent conduct. Accordingly, appellant's cause of action for fraud was barred by the statute of limitations.<sup>5</sup>

### C. Judicial Bias

Appellant also contends that the trial court was biased against him because he was representing himself. He argues that "Judge Kleinberg appeared to *subconsciously* harbor a preconceived notion that a pro per could not be competent in court." Appellant was "shocked" when, Judge Kleinberg stated at the unrecorded trial setting conference that "while [appellant] may be a professor, [his] self-representation in court was like trying to do brain surgery on oneself." Appellant further claims that "Judge Kleinberg's series of remarks and rulings demonstrated a pattern of judicial bias that denied [him] due process."

Pursuant to Code of Civil Procedure section 170.6, a party may file "an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath," that the judge is prejudiced against him or her. (Code Civ. Proc., § 170.6, subd. (a)(2).) In general, "the complaining party must seek disqualification at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. In doing so, the party must bring to the trial court's attention 'all of the facts' later cited on appeal in support of the judicial bias claim. [Citation.] By failing to do so when the relevant events occurred, [a party] has

---

<sup>5</sup> As an alternative ground to granting the motion for summary judgment, the trial court found that appellant failed to file a complaint as required by Government Code section 8547.12, subdivision (a), which states that the complaint must include a "sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury." Appellant contends that he complied with the statute. However, we need not resolve this issue, because we have concluded that respondents established that there were no triable issues of material fact and that they were entitled to judgment as a matter of law.

forfeited the right to complain about them on appeal. [Citation.]” (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 994.) Here, since appellant failed to raise this issue in the trial court, it has been forfeited.

#### **D. Discovery**

Appellant next contends that the trial court abused its discretion in denying his discovery requests.

A discovery order is an interim order which this court reviews on appeal from the final judgment. (*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1060.) We review a trial court’s ruling on a motion to compel discovery under the abuse of discretion standard. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

A party may bring a motion for an order compelling further response to a discovery request under specified circumstances. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must be accompanied by a meet and confer declaration, which “shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.” (Code Civ. Proc., §§ 2016.040, 2031.310, subd. (b)(2).) In determining whether a party met the meet and confer requirement, a reviewing court must “first determine whether substantial evidence supports the factual basis on which the trial court acted, and then determine whether the orders made by the trial court were an abuse of discretion in light of those facts.” (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.)

Appellant had sought all documents related to: the hiring, tenure, promotion, and salary increases of Louie; the resignation of Fimbel from the position of associate dean; the resignation of Snell from the position of department chair; the decisions of Fimbel and Sigler to remove Kwan from position of associate dean; the decisions of Sigler and Kassing to appoint Fimbel to the position of interim or acting dean; the appointment and

acceptance of Veril Phillips as the reviewing officer of SJSU; the preparation of the April 29, 2005 notice of disciplinary action against appellant, including those documents used to communicate between Conrath, Fimbel, Sigler, Joan Merdinger, William Jiang, and Bradley Davis.

On March 18, 2010, appellant sent an e-mail to GayLynn Kirn Conant, respondents' counsel. He stated that respondents had failed to comply with seven of the nine requests for the production of documents, and that their statements of compliance with respect to the other requests were incomplete. He also asserted that none of his requests were "overly broad," respondents "certainly know what the documents in question are," the objections were "without merit or too general," "no person has a privilege to refuse to disclose any matter or to refuse to produce any writing," and the right of privacy was not absolute. He continued with general propositions of law and concluded that the e-mail was his attempt to informally resolve the dispute.

On March 23, 2010, Conant notified appellant that he would be receiving a supplemental response to the request for documents and would include responsive documents. Citing several cases, Conant stated that information regarding personnel issues involving Louie's hiring, Fimbel's resignation, and related personnel issues were protected by the state and federal Constitutions. She also stated that employee privacy rights extended to letters of recommendation and comments, and pointed out that he had failed to establish a nexus between the contents of these individual's personnel files and his claims of violation of the California Whistleblower Protection Act and fraud. Conant further noted that respondents would be willing to reconsider their position if he could explain how this information was relevant. Conant posed several questions to appellant as to why he believed the documents he sought were relevant.

Appellant responded on the same day. He claimed that since CSU had retaliated against him for his disclosure about Louie's hiring, he needed documents to show that the

hiring and compensation practices were illegal. He also wanted to show that respondents had engaged in far more serious misconduct and they were never disciplined.

On March 30, 2010, respondents served a supplemental response to appellant's request for production of documents. Conant also responded to appellant's March 23 e-mail, and tried to explain to appellant that he was not entitled to confidential material and that his requests were not relevant to the legal issues in the case.

Later that day, appellant sent an e-mail to Conant in which he stated that she was trying to narrow the issues and he wanted to show that CSU engaged in "a pattern of irregularities." He believed that cases he had previously cited did not support respondents' position. He did not narrow his requests. The following day, he notified Conant that the documents which he had received were inadequate because they related only to grade information and did not include "documents (including electronic messages) written by or exchanged between or among" the specified SJSU employees.

On April 2, 2010, Conant advised appellant that he had been provided with "all of the communications related to [his] discipline" and that she was "unaware of any e-mails between these individuals." Conant again asked appellant to be more specific in his requests. She also stated that she did not believe that he had engaged in the meet and confer process in good faith.

On April 5, 2010, appellant responded by asserting that respondents had failed to engage in the meet and confer process in good faith. He noted that CSU had provided him with the letter from its counsel to Phillips to appoint him as the hearing officer, but he could not believe that there were no other documents relating to his appointment. He did, however, specify that he wanted "the applicant pool report package" that required respondents to certify that they followed the legal requirements for Louie's hiring. Appellant reiterated his general request for documents relating to Louie and evidence that Sigler, Fimbel, and Snell "defrauded the state." Appellant also found that it was "not

credible” that Conrath, Fimbel, Sigler, Merdinger, and others did not take notes when they attended meetings regarding the preparation of the notice of disciplinary action.

On April 16, 2010, Conant advised appellant that respondents would produce portions of the hiring file for Louis and redact confidential information pursuant to the cases that had been previously cited.

On April 19, 2010, appellant requested the production of documents relating to salary increases for Louie. The following day, Conant responded by noting that his complaint did not reference Louie’s salary and requested that he provide legal support for his position that these documents were discoverable. Later that day, appellant responded by citing boiler plate case law without explaining how these cases were applicable to the present case.

On April 23, 2010, Conant explained in detail why the cases cited by appellant did not support his position. The same day, appellant responded by stating that he would file a motion to compel.

On April 29, 2010, appellant brought a motion to compel further responses to his request for the production of documents and requested monetary sanctions. Appellant’s motion to compel included his declaration stating that he had made a reasonable and good faith attempt at an informal resolution. Respondents filed Conant’s declaration in support of opposition to appellant’s motion and attached several exhibits.

Following a hearing, the trial court denied the motion to compel and imposed sanctions against appellant. The trial court explained to appellant that he should read the opposition to his motion to understand the defects in his papers. The trial court also advised him that “on these kinds of motions, you should meet and confer, try to work it out. Usually most discovery motions are worked out in the meet and confer process.”

Here, there was substantial evidence to support the trial court’s finding that appellant did not satisfy the meet and confer requirement of Code of Civil Procedure sections 2016.040 and 2031.310, subdivision (b)(2). Respondents’ counsel made several

attempts to resolve appellant's concerns informally. However, appellant continued to make overly broad and improper requests. Accordingly, the trial court did not abuse its discretion in denying the motion.

Appellant also brought a motion for an order compelling further response to interrogatory No. 15 of the second set of interrogatories, and for monetary sanctions.

Interrogatory No. 15 was directed to Chancellor Reed, and stated: "From 1986 to present, by category of alleged misconduct of CSU employees (e.g. insubordination, fraud, illegal activities, etc.), provide the cases and their final outcomes based on CSU's action."

On June 24, 2010, Conant advised appellant that Reed was not a decision maker and appellant's only basis for a claim against him was that he allegedly did not take action in response to appellant's letters. She also pointed out that seeking information about CSU employee personal information was inappropriate and violated their privacy rights.

On July 1, 2010, appellant responded that the information was necessary so that he could determine whether the disciplinary action taken against him was "discriminatory and retaliatory." He noted that the names of the individuals did not need to be disclosed.

On July 13, 2010, Conant reiterated the objections to appellant's interrogatories, and stated that she welcomed a discussion on "reasonable limits on the interrogatory seeking information regarding other discipline cases." Later that day, appellant stated that he was willing to accept information based on categories of discipline, and would consider "other reasonable suggestions." Shortly thereafter, Conant stated that appellant "need[ed] to propose a reasonable limitation on [his] request for disciplinary information in order for CSU to consider an informal compromise. You have asked for information for all campus[e]s, all employees, all subject matters. If you propose a reasonable, limited scope (i.e. matters similarly situated to your situation), perhaps CSU would agree to provide limited information concerning those matters." Appellant responded that he

was willing to focus only on faculty, but would not limit discovery only to matters similar to his situation, continued to demand responses from all campuses of CSU on all subjects of discipline for the past 24 years.

On July 16, 2010, Conant clarified that appellant was “unwilling to limit the scope by year, campus, decision-maker or any other limitation . . . .” She also stated that she did “not understand what the ‘provide the cases and their final outcomes based on CSU’s actions’ means.” Appellant responded that he was unwilling to limit the scope of the interrogatory. He explained that he needed “to know all the cases (without names, addresses or other personal identification) and final outcomes (i.e., for such cases, what were the proposed disciplinary actions and what were the actual actions or final decisions).” He also refused to further limit the interrogatory No. 15.

On July 27, 2010, appellant filed his motion to compel. Respondents filed Conant’s declaration in support of opposition to appellant’s motion and attached several exhibits. Following a hearing, the trial court denied the motion to compel and imposed sanctions.

Here, there was substantial evidence to support the trial court’s finding that appellant did not satisfy the meet and confer requirement of Code of Civil Procedure sections 2016.040 and 2031.310, subd. (b)(2). Despite several attempts by respondents’ counsel to resolve the issue, appellant continued to make overly broad and improper discovery requests. Accordingly, the trial court did not abuse its discretion in denying the motion to compel.

Appellant also contends that the trial court “gave no consideration to case law that requires the court to balance privacy interests against public right to know.”

The personnel records of other employees are confidential and thus protected from discovery “unless the litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources.” (*Harding Lawson Associates v. Superior Court* (1992) 10

Cal.App.4th 7, 10.) Thus, it is insufficient for a plaintiff to state that discovery of an employee's personnel record is necessary to facilitate the prosecution of the action. (*El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 Cal.App.3d 342, 345-346.) A plaintiff must also show that there are no less intrusive means to "satisfy plaintiffs' legitimate need for relevant information." (*Id.* at p. 346.)

Here, appellant made no attempt to show a compelling need for the personnel records of Louie, Fimbel, Snell, Sigler, Kwan, and Kassing and that the information could not reasonably be obtained through depositions or from nonconfidential sources. He also made no attempt to show how information regarding "cases" and "actions" from 23 campuses during the last 24 years would lead to discovery of admissible evidence. At issue in the present case was whether respondents retaliated against appellant for making a protected disclosure in connection with the hiring of Louie. Thus, the trial court did not abuse its discretion in denying the motions to compel.

#### **E. CSU Disciplinary Proceedings**

Appellant also challenges the disciplinary proceedings at CSU. He claims that this court "has made rulings against [him], due to [his] incomplete information and the Court's misunderstanding of the facts. [Appellant] respectfully requests the Court to reconsider the issues in the interest of justice." Appellant raised several issues relating to CSU disciplinary proceedings in his related appeal. (*Onkvisit v. California State Personnel Board, supra*, H034449.) This court rejected his contentions and affirmed the judgment. Appellant's petition for review was denied. This court does not have jurisdiction to reconsider issues which were resolved in the related appeal.

**III. Disposition**

The judgment is affirmed.

---

Mihara, J.

WE CONCUR:

---

Premo, Acting P. J.

---

Elia, J.