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

RHODA AUSTIN,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA  
CLARA COUNTY,

Respondent;

PACIFIC AUTISM CENTER FOR  
EDUCATION et al.,

Real Parties in Interest.

H040333

(Santa Clara County

Super. Ct. No. 1-13-CV242322)

**I. INTRODUCTION**

After her employment was terminated, petitioner Rhoda Austin filed an action against her former employer, real party in interest Pacific Autism Center for Education (PACE), and its executive director, real party in interest Kurt Ohlfs, as defendants. Austin subsequently filed a first amended complaint, and defendants demurred to several causes of action. Relevant here, the trial court sustained the demurrer by defendant PACE to the second cause of action for violation of Labor Code section 1102.5,

subdivision (c)<sup>1</sup> without leave to amend, on the ground that Austin had failed to exhaust her administrative remedies. The court also sustained the demurrer by defendant Ohlfs to the fourth cause of action for invasion of privacy without leave to amend, on the ground that he may not be held liable for his conduct relating to personnel actions.

Austin filed a petition for a writ of mandate directing the trial court to vacate these orders sustaining the demurrers to the second cause of action for violation of the Labor Code and to the fourth cause of action for invasion of privacy. Austin argued that she was not required to exhaust administrative remedies before filing suit in superior court for the Labor Code violation, and that she had exhausted her administrative remedies to the extent she was required to do so. She further contended that Ohlfs may be held personally liable for an invasion of privacy.

For the reasons stated below, we determine that exhaustion of administrative remedies was not required before plaintiff filed suit on the section 1102.5 claim, and that plaintiff is not barred from seeking individual liability against defendant Ohlfs for an invasion of privacy based on the facts alleged in the pleading. We will therefore issue a peremptory writ of mandate directing respondent court to vacate its orders sustaining without leave to amend the demurrers to the second cause of action regarding violation of the Labor Code against defendant PACE and the fourth cause of action for invasion of privacy against defendant Ohlfs.

## **II. FACTUAL BACKGROUND**

Our summary of the facts is drawn from the allegations of the first amended complaint, since we must assume the truth of the properly pleaded factual allegations in reviewing an order sustaining a demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318;

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

*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200; *Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971-972.)

Plaintiff Austin was an employee of defendant PACE from 2005 until November 2012. PACE is a nonprofit organization serving the needs of individuals with autism and associated developmental disabilities. It owns and operates residential group homes. Defendant Ohlfs is the executive director of PACE.

Shortly after being hired, plaintiff was promoted to the position of residential administrator, and she worked exclusively in the children's residential homes. One of the homes provides the children a place to stay, meals, staff support, and structured programming (the PACE House). It is licensed by Community Care Licensing, a division of the California Department of Social Services, and it is funded and regulated by the state.

As part of its services, the PACE House is required to provide a behaviorist to work with each child. However, the PACE House did not have a behaviorist for several months in 2010, 2011, and 2012.

According to the first amended complaint, defendant Ohlfs at some point began falsifying records and signing for behaviorist hours, indicating that the children were receiving services when they were not. Further, part of the funding PACE received from the state was supposed to be for the services of a behaviorist. Ohlfs later instructed administrators to remove the false hours and record them as though a new behaviorist had provided the services. The new behaviorist only came to the PACE House once in late December 2011, and she never provided any behavior support to the PACE House. The new behaviorist also "backdate[d]" behaviorist hours pursuant to Ohlfs's instruction. The behaviorist eventually quit in early 2012.

Plaintiff "begged" that PACE hire a qualified behaviorist for the children and "protested" to Ohlfs and another individual about the false reports she believed were being made to those who funded PACE and to those who were in charge of licensing.

Plaintiff advised Ohlfs that she would not participate in the falsification of records, particularly when the children were not receiving the services. In August 2012, plaintiff contacted the San Andreas Regional Center (SARC), a private nonprofit entity that is funded by the state and that oversees PACE's activities, to file a whistleblower complaint. In September 2012, plaintiff was interviewed by SARC and was informed that PACE would be contacted and asked to cooperate with an investigation into behaviorist hours. In early October 2012, Ohlfs announced at a manager's meeting that SARC would be conducting an investigation into behaviorist hours at the PACE residential homes.

On October 25, 2012, a child at the PACE House escaped the home in the early morning hours and was located within 15 minutes after the police were called. On October 29, 2012, plaintiff received her first performance review in five years and was rated as a "poor performer."

On November 7, 2012, PACE terminated plaintiff's employment for "poor management." Plaintiff alleges that the stated reason for her termination was a pretext and designed to conceal the fact that she was terminated in violation of public policy for protesting unlawful and fraudulent practices, and for her refusal to participate in activities that she knew were in violation of state law.

After plaintiff's termination, SARC contacted plaintiff and informed her that her allegations had been substantiated and that the matter had been forwarded to the Department of Developmental Services. Plaintiff subsequently learned from the department that it was conducting its own investigation with involvement by Community Care Licensing.

Plaintiff also alleged that, several months prior to her termination, she requested a medical leave of absence through July 29, 2011, in order to have surgery. Plaintiff had a chronic medical condition. Following complications from the surgery on July 19, 2011, plaintiff called "defendant" and provided an "update" regarding her hospitalization,

without indicating any need to extend her medical leave. Without any reason to doubt the authenticity of her request for leave and invading her privacy, Ohlfs went to plaintiff's private hospital room in order to "substantiate and verify" that she was hospitalized and that a surgery had taken place, and to learn the nature of plaintiff's illness. Plaintiff had signed papers at the hospital regarding no visitors and no phone calls except with certain family members.

Ohlfs remarked upon entering plaintiff's hospital room that it was like "getting into Ft. Knox." Plaintiff expressed her wish to Ohlfs that she have no visitors. Plaintiff was weak and could not respond to an inquiry by Ohlfs, and he asked the nurse in charge about her condition and prognosis. Plaintiff believes Ohlfs shared the information, because two other PACE employees came to see her at the hospital a short time later. This disrupted her serenity and privacy and was against orders that she had left with the hospital staff.

After plaintiff was released from the hospital and one day before her scheduled return to work, plaintiff was again hospitalized due to her medical condition. She remained at the hospital for more than a week. On the date she was discharged from the hospital, her doctor placed her off work for three weeks.

While plaintiff was in the hospital on this second occasion, Ohlfs again invaded her right to medical privacy and "with no known reason to do so," by going to her private hospital room to check on her status, to verify that she was hospitalized, and to ascertain the condition that compelled this second hospitalization. Plaintiff's leave of absence was extended twice by her doctor, and she eventually returned to work on or about September 13, 2011.

Plaintiff alleges that Ohlfs's conduct violated various statutory provisions regarding medical privacy and also violated Article I, section 1 of the California Constitution. She further alleges that defendants' acts were highly offensive to her, and that they penetrated a zone of physical privacy surrounding her. Defendants also sought

to obtain unwarranted access to data about her to which they were not entitled. Plaintiff alleges that she had an objectively reasonable expectation of seclusion and solitude while in the hospital and an expectation that the nature of her illness requiring hospitalization would remain private to her.

### **III. PROCEDURAL BACKGROUND**

#### ***A. The Complaint***

Plaintiff filed a complaint against defendants PACE and Ohlfs in 2013. Defendants filed a motion for judgment on the pleadings, which the superior court granted in part and denied in part.

Plaintiff subsequently filed a first amended complaint, the currently operative pleading, alleging seven causes of action. Relevant here, plaintiff alleged in the second cause of action a violation of section 1102.5, subdivision (c) (hereafter section 1102.5(c)) against defendant PACE, and in the fourth cause of action an invasion of privacy against defendants PACE and Ohlfs.

#### ***B. The Defendants' Demurrer***

Defendants filed a demurrer to the second and fourth causes of action, among others, in the first amended complaint on the grounds that the causes of action did not state facts sufficient to constitute a cause of action and were uncertain. (Code Civ. Proc., § 430.10, subs. (e) & (f).) Regarding the second cause of action for violation of section 1102.5(c) against defendant PACE, PACE contended that plaintiff failed to exhaust her administrative remedies with the Labor Commissioner under section 98.7, subdivision (a). Regarding the fourth cause of action for invasion of privacy against both defendants, defendants contended that plaintiff failed to establish that her protected privacy rights were violated, and that defendant Ohlfs could not be held individually liable.

***C. Opposition to the Demurrer***

In opposition to the demurrer, plaintiff argued that she was not required to exhaust administrative remedies before filing suit under section 1102.5. Further, to the extent that exhaustion of administrative remedies was required, plaintiff contended that she had complied by complaining to various entities, including to the California Department of Fair Employment and Housing (DFEH) and the United States Equal Employment Opportunity Commission (EEOC). Regarding her invasion of privacy claim, plaintiff argued that she had sufficiently alleged a claim, including against defendant Ohlfs individually.

***D. Reply in Support of the Demurrer***

In reply, defendants again contended that plaintiff failed to exhaust her administrative remedies regarding her Labor Code claim, that she had not alleged sufficient facts to support her invasion of privacy claim, and that Ohlfs could not be held individually liable for an invasion of privacy. Defendants also sought judicial notice of the discrimination charge that plaintiff had filed with the DFEH and EEOC.

***E. The Trial Court's Order***

A hearing was held on the demurrer, and the trial court ultimately sustained the demurrer by written order filed October 15, 2013. The court also granted defendants' request for judicial notice of plaintiff's discrimination charge.

Regarding the second cause of action for violation of section 1102.5(c), the court determined that plaintiff was required to exhaust administrative remedies with the Labor Commissioner under section 98.7, subdivision (a), and that she had failed to do so. The court sustained the demurrer to the cause of action without leave to amend. In making the determination that exhaustion of administrative remedies was a prerequisite, the court declined to follow *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320 (*Lloyd*), and instead relied on another California appellate court decision that has since been depublished (*MacDonald v. State of California* (Aug. 27, 2013, C069646) review den.

and opn. ordered nonpub. Nov. 26, 2013, S213450), as well as relied on *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 (*Campbell*) and several federal cases.

Regarding the fourth cause of action for invasion of privacy, the trial court determined that the pleading failed to include an allegation that Ohlfs intentionally meant to intrude on plaintiff's solitude or seclusion. The court thus sustained the demurrer with leave to amend as to defendant PACE. However, as to defendant Ohlfs, the court believed that he could not "be sued based on his conduct relating to personnel actions," citing *Sheppard v. Freeman* (1998) 67 Cal.App.4th 339 (*Sheppard*). The court consequently sustained the demurrer without leave to amend as to Ohlfs.

#### **F. Writ Proceedings**

Plaintiff filed a petition for a writ of mandate in this court. She sought a writ of mandate directing the superior court to vacate that portion of the trial court's order of October 15, 2013, sustaining defendant PACE's demurrer to the second cause of action for violation of section 1102.5(c) and defendant Ohlfs's demurrer to the fourth cause of action for invasion of privacy, and to enter a new order overruling or sustaining with leave to amend PACE's demurrer to the second cause of action, and overruling Ohlfs's demurrer to the fourth cause of action.

Defendants filed preliminary opposition to the petition, to which plaintiff replied. We issued an order to show cause why a peremptory writ should not issue as requested in the petition for a writ of mandate and provided an opportunity for further briefing and oral argument.

### **IV. DISCUSSION**

In her petition, regarding the second cause of action for violation of section 1102.5(c) against defendant PACE, plaintiff contends that exhaustion of administrative remedies is not a prerequisite to bringing the claim and that, even if it is, she exhausted her administrative remedies. Regarding the fourth cause of action for

invasion of privacy against defendant Ohlfs, plaintiff contends that he may be sued individually for an invasion of privacy. Before considering these contentions, we will address the propriety of writ review and outline the applicable standard of review.

**A. Propriety of Writ Review**

“Extraordinary relief is generally not granted at the pleading stage. But an appellate court can do so when it concludes the trial court has deprived a party of an opportunity to plead his or her cause of action or defense and granting the petition will prevent a needless and expensive trial and reversal. [Citation.]” (*Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043; accord, *Driscoll v. Superior Court* (2014) 223 Cal.App.4th 630, 636.) We determine that the instant matter presents such a case.

**B. Standard of Review**

After a demurrer is sustained without leave to amend, the standard of review is de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) In performing our independent review of the pleading, we assume the truth of all facts properly pleaded by the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) “We also accept as true all facts that may be implied or inferred from those expressly alleged. [Citations.] [Citation.]” (*Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 925 (*Guerrero*)). Further, “we give the complaint a reasonable interpretation, and read it in context.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*)).

**C. Second Cause of Action for Violation of Section 1102.5(c)**

Plaintiff contends that she was not required to exhaust administrative remedies with the Labor Commissioner under section 98.7 prior to bringing her claim for violation of section 1102.5(c) against defendant PACE. In particular, she contends that there was no exhaustion requirement either before or after certain Labor Code amendments became effective January 1, 2014. Plaintiff also argues that she exhausted her administrative remedies by complaining to various agencies although not to the Labor Commissioner.

Defendant PACE contends that plaintiff was required to exhaust her administrative remedies under former section 98.7, and that she did not do so. PACE further argues that, although certain Labor Code amendments effective January 1, 2014, do not require exhaustion of administrative remedies, those amendments do not apply to plaintiff.

### **1. Section 1102.5**

Section 1102.5 has been generally described as “a whistleblower statute, the purpose of which is to ‘encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287.) At the time plaintiff was employed by defendant PACE, and continuing through the time that the trial court ruled on PACE’s demurrer, former section 1102.5(c) provided that “[a]n employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.” (Stats. 2003, ch. 484, § 2.) In sustaining defendant PACE’s demurrer to plaintiff’s claim for violation of former section 1102.5(c) without leave to amend, the trial court determined that plaintiff was required to exhaust her administrative remedies with the Labor Commissioner pursuant to section 98.7, subdivision (a). Plaintiff did not allege in the operative pleading that she had exhausted administrative remedies with the Labor Commissioner.

### **2. Exhaustion of administrative remedies and section 98.7**

“[T]he rule of exhaustion of administrative remedies is well established in California jurisprudence.” (*Campbell, supra*, 35 Cal.4th at p. 321.) “ ‘In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.’ [Citation.] The rule ‘is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.’ [Citation.] . . . ‘Exhaustion of administrative remedies is “a

jurisdictional prerequisite to resort to the courts.” [Citation].’ [Citation.]” (*Id.* at p. 321, italics omitted.)

Section 1102.5 is silent on the issue of exhaustion of administrative remedies. Instead, the purported exhaustion requirement in this case arises from section 98.7, subdivision (a), which states in part: “Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation.”

Section 98.7 outlines the investigation and decision process by the Labor Commissioner. For example, section 98.7 provides that “[e]ach complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint.” (*Id.*, subd. (b).) The Labor Commissioner may hold an investigative hearing and may utilize subpoenas. (*Ibid.*) “If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney’s fees . . . , and the posting of notices to employees.” (*Id.*, subd. (c).) “If the Labor Commissioner determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint.” (*Id.*, subd. (d)(1).) The complainant may then “bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation.” (*Ibid.*) Section 98.7 further provides that “[t]he rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.” (*Id.*, subd. (f).)

Effective January 1, 2014, after the trial court in this case issued its order on the demurrer, section 244 was added to the Labor Code (Stats. 2013, ch. 577, § 4) and section 98.7 was amended to add a new subdivision (g) (Stats. 2013, ch. 732, § 3). In particular, section 244, subdivision (a) provides that “[a]n individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy.” New subdivision (g) of section 98.7 provides that, “[i]n the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures.”

As we will next explain, we determine that under the law at the time of the ruling on the demurrer, which was prior to January 1, 2014, plaintiff was not required to exhaust administrative remedies pursuant to section 98.7 before filing suit under section 1102.5. We therefore do not decide whether the Labor Code amendments effective January 1, 2014 apply to this case.

In *Lloyd*, Division Three of the Second Appellate District concluded that former section 98.7 (Stats. 2002, ch. 664, § 158) did *not* require a plaintiff to exhaust administrative remedies with the Labor Commissioner before pursuing a claim under section 1102.5. (*Lloyd, supra*, 172 Cal.App.4th at p. 323.) In reaching this determination, the *Lloyd* court set forth the following three reasons.

First, the *Lloyd* court placed emphasis on certain language in section 98.7. For example, under the former and current versions of section 98.7, subdivision (a) states that a person “*may file a complaint with the division,*” and subdivision (f) provides that “[*t*he rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.” (Italics added.) The *Lloyd* court reasoned that “it would appear [former] Labor Code section 98.7 merely provides the employee with an additional remedy, which the employee may choose to pursue.” (*Lloyd, supra*, at p. 331.)

Second, the *Lloyd* court explained that “case law has recognized there is no requirement that a plaintiff proceed through the Labor Code administrative procedure in order to pursue a statutory cause of action. (*Daly v. Exxon Corp.*[ (1997) 55 Cal.App.4th 39,] 46 [suit under Lab. Code, § 6310 alleging retaliation for complaint of unsafe working conditions]; *Murray v. Oceanside Unified School Dist.*[ (2000) 79 Cal.App.4th 1338,] 1359 [suit under Lab. Code, former § 1102.1 relating to sexual orientation discrimination].)” (*Lloyd, supra*, 172 Cal.App.4th at pp. 331-332.) The *Lloyd* court found “no reason to differ with these decisions and to impose an administrative exhaustion requirement on plaintiffs seeking to sue for Labor Code violations.” (*Id.* at p. 332.)

Third, the *Lloyd* court observed that “construing [former] Labor Code section 98.7 to obligate a plaintiff to seek relief from the Labor Commissioner prior to filing suit for Labor Code violations flies in the face of the concerns underlying the Labor Code Private Attorneys General Act of 2004 (PAG Act) (Lab. Code, § 2698 et seq.).” (*Lloyd, supra*, 172 Cal.App.4th at p. 332.) The *Lloyd* court explained, “[T]he PAG Act was adopted to augment the enforcement abilities of the Labor Commissioner with a private attorney general system for labor law enforcement. ‘The Legislature declared its intent as follows: “(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies’ enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.” (Stats. 2003, ch. 906, § 1, italics added.)’ [Citation.] The PAG Act’s approach, enlisting aggrieved employees to augment the Labor Commissioner’s enforcement of state labor law, undermines the notion that

[former] Labor Code section 98.7 compels exhaustion of administrative remedies with the Labor Commissioner.” (*Lloyd, supra*, at p. 332.)

The trial court in this case declined to follow *Lloyd*, and instead relied on a decision from the Third Appellate District that criticized *Lloyd* and that has since been ordered depublished. (*MacDonald v. State of California* (Aug. 27, 2013, C069646) review den. and opn. ordered nonpub. Nov. 26, 2013, S213450.) The trial court also relied on *Campbell* and several federal court cases.

Although *Campbell* provides general legal principles concerning the rule of exhaustion of administrative remedies, we do not believe *Campbell* dictates a result different than that reached in *Lloyd* concerning whether a plaintiff must exhaust administrative remedies with the Labor Commissioner before pursuing a section 1102.5 claim.

In *Campbell*, the California Supreme Court “address[ed] whether an employee of the Regents of the University of California (the Regents) must exhaust university *internal* administrative remedies before filing suit in superior court for retaliatory termination under either Government Code section 12653, subdivision (c), or Labor Code section 1102.5 . . . .” (*Campbell, supra*, 35 Cal.4th at p. 317, italics added.) The court explained that “[t]he Regents may . . . exercise quasi-legislative powers,” and that “‘policies established by the Regents as matters of internal regulation may enjoy a status equivalent to that of state statutes.’ [Citations.]” (*Id.* at p. 320.) Thus, “[t]he Regents may create a policy for handling whistleblower claims under their power to organize and govern the University. Such a policy is treated as a statute in order to determine whether the exhaustion doctrine applies.” (*Id.* at p. 321.) The court determined that the Regents had “established [a policy] to handle complaints of retaliatory dismissal for whistleblowing in an orderly manner,” and that the policy may be treated “as equivalent to a statute in this action.” (*Id.* at p. 324.)

The California Supreme Court recognized that section 1102.5 was itself “silenc[ed] on the exhaustion requirement.” (*Campbell, supra*, 35 Cal.4th at p. 329.) The court cautioned, however, that “ ‘courts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication.’ [Citation.]” (*Ibid.*) The court also explained that, “absent a clear indication of legislative intent, [a court] should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies.” (*Id.* at p. 333.) The court ultimately concluded that the plaintiff, a university employee, was required to exhaust university internal administrative remedies before filing suit in superior court. (*Id.* at pp. 317, 333.)

*Campbell* did not address the issue of whether the administrative remedies with the Labor Commissioner provided by former section 98.7 had to be exhausted before a plaintiff filed suit in superior court. On this point, *Lloyd* considered the specific statutory language of former section 98.7, including language concerning the ability of an employee to “pursu[e] any other rights and remedies under any other law” (*id.*, subd. (f)), and also considered the legislative intent of the PAG Act, in determining that exhaustion of administrative remedies is not required. We find *Lloyd* persuasive. We therefore determine that plaintiff was not required to exhaust administrative remedies with the Labor Commissioner under former section 98.7 before filing suit on a claim for a violation of section 1102.5(c).

Defendant PACE contends that, “even when an administrative remedy is couched in permissive rather than mandatory language,” the administrative remedy must be exhausted before resorting to the courts.

The exhaustion of administrative remedies is not required when there is “a clear indication of legislative intent” that the exhaustion requirement does not apply. (*Campbell, supra*, 35 Cal.4th at p. 333; see also *id.* at p. 329 [intention must “ ‘clearly . . . appear either by express declaration or by necessary implication’ ”].) For the reasons set

forth in *Lloyd* regarding the particular language of former section 98.7 and the expressed intent of the Legislature regarding the PAG Act, we believe the Legislature has clearly indicated that the exhaustion requirement does not apply.

For the same reasons, we find unpersuasive defendant PACE's argument that former section 98.7 should be construed consistent with Government Code section 12960, subdivision (b). Government Code section 12960, subdivision (b) provides that a person "may file" a complaint with the DFEH for a violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA). FEHA has been interpreted as requiring a person to exhaust administrative remedies with the DFEH before filing a civil action based on a violation of the FEHA. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) However, the specific language of former section 98.7, and particularly the ability of an employee to "pursu[e] any other rights and remedies under any other law" (*id.*, subd. (f)), as well as the legislative intent of the PAG Act, distinguishes former section 98.7 from Government Code section 12960, subdivision (b) and the exhaustion requirement under FEHA.

Lastly, we observe that federal district courts were split on whether former section 98.7 required the exhaustion of administrative remedies before a plaintiff was entitled to bring a civil action for a violation of section 1102.5. (Compare *Turner v. City & County of San Francisco* (N.D.Cal. 2012) 892 F.Supp.2d 1188, 1200-1204 [concluding that exhaustion of administrative remedies before the Labor Commissioner was not required although most federal district courts had determined otherwise ] with *Ferretti v. Pfizer Inc.* (N.D.Cal. 2012) 855 F.Supp.2d 1017, 1022-1024 [exhaustion of administrative remedies was required before bringing a claim under section 1102.5].) However, "[d]ecisions of federal courts are not binding on state courts in matters of state law. [Citations.]" (*Michail v. Fluor Mining & Metals* (1986) 180 Cal.App.3d 284, 286.) As we have explained, we find *Lloyd* persuasive and conclude that exhaustion of administrative remedies was not required under former section 98.7, subdivision (a). In

view of our determination under former law, we need not decide whether the Labor Code amendments effective January 1, 2014, which provide that exhaustion of administrative remedies is not required under section 98.7 (see §§ 244, subd. (a), 98.7, subd. (g)), apply to this case,<sup>2</sup> or whether plaintiff exhausted her administrative remedies by complaining to various entities other than to the Labor Commissioner.

Therefore, we conclude that the trial court erred in ruling that exhaustion of administrative remedies was required in sustaining defendant PACE's demurrer to the second cause of action for violation of section 1102.5(c).

**D. *Fourth Cause of Action for Invasion of Privacy***

As we set forth above, the trial court determined that plaintiff failed to allege in the cause of action for invasion of privacy that defendant Ohlfs intentionally meant to intrude on plaintiff's solitude or seclusion. Based on this ground, the court sustained the demurrer *with* leave to amend as to defendant PACE. The court determined that, as to defendant Ohlfs, he could not "be sued based on his conduct relating to personnel actions," citing *Sheppard, supra*, 67 Cal.App.4th 339. The court thus sustained the demurrer *without* leave to amend as to Ohlfs.

In the pending petition, plaintiff contends that the court erred in determining that defendant Ohlfs may not be individually liable for the invasion of privacy claim. Plaintiff contends that *Sheppard* is distinguishable and was wrongly decided.

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<sup>2</sup> Recently, in *Satyadi v. West Contra Costa Healthcare District* (2014) 232 Cal.App.4th 1022 (*Satyadi*), an appellate court determined that the two new Labor Code provisions effective January 1, 2014 – section 98.7, subdivision (g) and section 244, subdivision (a) – clarified, and did not change, existing law that a person may bring a civil action for violation of section 1102.5 without first exhausting the administrative remedy provided by section 98.7. The *Satyadi* court concluded that the two new Labor Code provisions applied to the appeal pending before it, and that the trial court erred in sustaining a demurrer on the ground of failure to exhaust administrative remedies. (*Satyadi, supra*, at pp. 1024, 1032-1033.)

Defendant Ohlfs contends that plaintiff's first amended complaint includes allegations that he was acting as an agent and within the course and scope of his employment. According to Ohlfs, an employee generally cannot be held individually liable for conduct relating to personnel actions under such circumstances, and general agency principles also preclude liability under the circumstances.

### **1. General principles regarding an employee's liability**

“One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency . . . [¶] . . . [¶] . . . [w]hen his acts are wrongful in their nature.” (Civ. Code, § 2343, subd. (3).) Thus, in general “ ‘[a]n agent or employee is . . . liable for his own torts, whether his employer is liable or not.’ ” [Citations.] ‘In other words, when the agent commits a tort, . . . then . . . the agent [is] subject to liability in a civil suit for such wrongful conduct.’ [Citations.]” (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 68; accord, *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505 [stating that an agent is liable for his or her own acts, regardless of whether the principal is liable].)

### **2. *Sheppard v. Freeman* (1998) 67 Cal.App.4th 339**

In *Sheppard*, the plaintiff was an airline pilot who “claimed that evaluations of his performance had been falsified in an elaborate conspiracy among his coworkers, which caused him to fail to be upgraded to captain and ultimately caused his termination.” (*Sheppard, supra*, 67 Cal.App.4th at p. 342.) The plaintiff sued his former coworkers for their alleged conduct relating to his termination. (*Id.* at pp. 341-342.) Specifically, the plaintiff alleged claims for interference with contract and prospective economic advantage, libel, and infliction of emotional distress, based on his former coworkers' false reports to their employer that the plaintiff was incompetent. (*Id.* at p. 342.)

In a divided decision, the *Sheppard* majority addressed “whether an employee or former employee can sue other coemployees individually based on their conduct relating to personnel actions, e.g., termination, demotion, discipline, transfers, compensation

setting, work assignments, and/or performance appraisals.” (*Sheppard, supra*, 67 Cal.App.4th at p. 343.) The majority concluded that, except for torts involving physical injury or “where mandated by statute, such actions are barred, whether or not the employees are determined to have been acting within their scope of employment and regardless of their personal motives.” (*Ibid.*, fn. omitted.)

The *Sheppard* majority reasoned that an employer’s tort liability for a claim arising out of the termination of employment is limited to employer conduct that violates public policy. (*Sheppard, supra*, 67 Cal.App.4th at p. 344.) Because all of the plaintiff’s claims arose from his termination of employment without any suggestion of a violation of public policy, the majority believed it would be “anomalous” to allow coworker liability when the employer would not be liable. (*Id.* at p. 345.) The majority also reasoned that personnel actions are made for the benefit of the employer, and that “it is the employer, not the individual employees, that must bear the risks and responsibilities attendant to these actions.” (*Id.* at p. 346.) Further, “personnel actions are made with the input of employees, both as part of their official duties and otherwise” (*ibid.*), and there is a “vital need for all employees to have the freedom to act and exchange information relating to personnel actions without fear and risk of being sued” (*id.* at p. 347). The majority thus held that “an employee or former employee cannot sue individual employees based on their conduct, including acts or words, relating to personnel actions.” (*Ibid.*) The majority emphasized that its holding applied regardless of a defendant employee’s personal motives and did “not depend on whether [the defendant] employee is determined to have been acting within his scope of employment while engaged in conduct relating to a personnel action.” (*Id.* at pp. 347-348; see also *id.* at p. 349.)

Regarding the exception for coworker liability where the cause of action is based on a statute, the *Sheppard* majority noted that “the right to sue for libel is governed by statute, and that the Legislature has prescribed the circumstances under which this cause of action and the defenses and privileges pertaining thereto, may lie. (See Civ. Code,

§§ 43, 45, 47- 48.)” (*Sheppard, supra*, 67 Cal.App.4th at p. 342.) The plaintiff’s “causes of action other than libel [were] not based on any statute, but rather, were created by the common law.” (*Id.* at p. 342, fn. 1.) The *Sheppard* majority determined that it was therefore “proper and appropriate for the court to limit them in the employment context.” (*Ibid.*) The plaintiff was thus allowed to proceed against his former coworkers on the libel claim only. (*Id.* at pp. 342, 348-349.)

The dissent in *Sheppard* characterized the majority opinion as creating “a sweeping new immunity” that was “unnecessary, contrary to settled law and sound policy, and ultimately unworkable.” (*Sheppard, supra*, 67 Cal.App.4th at p. 352 (dis. opn. of Kremer, P.J.)) The dissent believed that “[t]he manifest practical and analytical problems engendered by the majority’s approach demonstrate[d] that creation of such broad extended immunity [was] a task more properly left to the Legislature.” (*Ibid.* (dis. opn. of Kremer, P.J.))

No published California state court decision has cited *Sheppard* for its holding regarding the bar against coworker liability. Some federal district courts have questioned whether *Sheppard* was correctly decided or remains good law, and at least one federal district court has extensively criticized *Sheppard* and declined to follow it (see *Graw v. Los Angeles County Metropolitan Transport*. (C.D. Cal. 1999) 52 F.Supp.2d 1152, 1156-1160).

### **3. Analysis**

Based on the allegations in plaintiff’s first amended complaint, we determine that *Sheppard* is distinguishable, and that it therefore does not provide a basis for precluding liability against defendant Ohlfs at the pleading stage. Consequently, we do not decide whether *Sheppard* was correctly decided regarding the bar against coworker liability.

As we explained above, *Sheppard* holds that a “former employee cannot sue individual employees based on their conduct, including acts or words, relating to personnel actions.” (*Sheppard, supra*, 67 Cal.App.4th at p. 347.) *Sheppard* set forth

examples of personnel actions, including “termination, demotion, discipline, transfers, compensation setting, work assignments, and/or performance appraisals.” (*Id.* at p. 343.) The personnel actions at issue in *Sheppard* were employees’ performance evaluations of the plaintiff that ultimately caused his termination. (*Id.* at pp. 342-343.) In this case, we assume without deciding that any decision related to plaintiff’s medical leave, including the decision to grant, extend, or end the leave of absence, constitutes a “personnel action.”

In giving the first amended complaint a reasonable interpretation and reading it in context (*Schifando, supra*, 31 Cal.4th at p. 1081), we determine that plaintiff’s invasion of privacy claim does not seek to hold defendant Ohlfs liable “based on [his] conduct, including acts or words, relating to personnel actions” (*Sheppard, supra*, 67 Cal.App.4th at p. 347).

Plaintiff alleges that defendant Ohlfs is the executive director of PACE. She also alleges that “each of the defendants . . . was the agent, servant, and employee of the other defendants and was acting at all times within the scope of his/her agency and employment, and with the knowledge and consent of his/her employer,” and that all alleged conduct was “done by defendants or any of them . . . as agents for each other, as well as in their respective individual capacities, to advance their own individual interests.”

However, there is no allegation in the first amended complaint indicating that defendant Ohlfs’s conduct in seeing plaintiff in the hospital was “*relating to*” a “*personnel action*[.]” (*Sheppard, supra*, 67 Cal.App.4th at p. 347, italics added.) Plaintiff alleges that Ohlfs went to the hospital on the first occasion “not to visit [her] but rather to substantiate and verify that [she] was indeed hospitalized and that a surgery had taken place, and to learn the nature of [her] illness.” However, according to the express allegations of the first amended complaint and those facts that may be implied or inferred (*Guerrero, supra*, 213 Cal.App.4th at p. 925), plaintiff was *already* on a pre-approved

medical leave of absence at the time Ohlfs first came to see her in the hospital. Further, there were no more than 10 days remaining on her leave of absence and she had *not* given any “indication . . . as to any need to extend her medical leave.” Moreover, Ohlfs did not have “any reason to doubt the authenticity of [her] request for leave . . . .” A reasonable interpretation of these allegations is that Ohlfs’s conduct in seeing plaintiff in the hospital was unnecessary and otherwise *unrelated* to any pending or future personnel action or decision.

Similarly, regarding the second time Ohlfs went to plaintiff’s hospital room, plaintiff alleges that she had been “placed . . . off work” by her doctor through late August 2011. “Again, however, . . . with no known reason to do so, [Ohlfs] went to plaintiff’s private hospital room . . . to check on plaintiff’s status, and to verify that she was indeed hospitalized as stated as well as to again ascertain the condition which compelled plaintiff’s second hospitalization.” Plaintiff further alleges that her leave of absence was extended twice more by her doctor until she eventually returned to work in or about mid-September 2011. A reasonable interpretation of plaintiff’s allegations is that Ohlfs and PACE already had the requisite information needed for the decision to extend her leave of absence each time, and that Ohlfs’s conduct in going to plaintiff’s hospital room this second time was again unnecessary and otherwise *unrelated* to any pending or future personnel action or decision. In contrast, the personnel actions at issue in *Sheppard* were employees’ performance evaluations of the plaintiff that ultimately caused his termination. (*Sheppard, supra*, 67 Cal.App.4th at pp. 342-343.)

In sum, in view of plaintiff’s allegations in the first amended complaint concerning Ohlfs seeing her in the hospital, we determine that defendant Ohlfs’s alleged liability is not “based on [his] conduct, including acts or words, relating to personnel actions.” (*Sheppard, supra*, 67 Cal.App.4th at p. 347.) Consequently, we determine that the limitation on coworker liability set forth in *Sheppard* does not apply to Ohlfs with respect to plaintiff’s invasion of privacy claim in the first amended complaint.

Defendant Ohlfs cites other cases in support of his argument that he may not be held individually liable for plaintiff's invasion of privacy claim, but he does not persuasively articulate how these cases support his argument. (See *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1081-1083, 1087-1088 [corporate agents not liable for corporate employer's failure to pay statutory overtime compensation to employee]; *Reno v. Baird* (1998) 18 Cal.4th 640, 643, 663 [individual supervisors may not be held liable for discrimination under FEHA or for wrongful discharge in violation of public policy]; *Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 678, 683-687 [former employee's claim against corporate officers for conspiracy to interfere with his contractual relationship with corporate employer was barred by manager's privilege, which allows a manager or agent to induce what otherwise would appear to be a tortious breach of contract].)

Similarly, defendant Ohlfs attempts to rely on agency principles, but the cases he cites do not support the proposition that the allegations of plaintiff's first amended complaint are insufficient to hold him individually liable for an invasion of privacy. (See *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [supervisory employee not personally liable under FEHA for failing to take action to prevent sexual harassment]; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 59, 80 [individual supervisory employees may not be held personally liable for discrimination under FEHA when they make a personnel decision]; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512 & fn. 4 [setting forth the "agent's immunity rule" that "employees cannot be held liable for conspiring with their own principals," which is based on the concept that employees cannot conspire with their employer where they act in official capacities and not for their individual advantage, and derives from the principle that employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract].) Moreover, although plaintiff alleges that each defendant was the agent of the other and was acting within the scope of the

agency, she also alleges that each defendant acted “in their respective individual capacities, to advance their own individual interests.” “[A] party may plead in the alternative and may make inconsistent allegations. [Citations.]” (*Adams v. Paul* (1995) 11 Cal.4th 583, 593; accord, *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402 [if the plaintiff “is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations”].) Thus, at the pleading stage, plaintiff’s agency allegations do not preclude Ohlfs’s potential liability for an invasion of privacy.

Lastly, we are not persuaded by defendant Ohlfs’s reliance on *Shoemaker v. Myers* (1990) 52 Cal.3d 1 (*Shoemaker*) at page 24, for proposition that he may not be held individually liable.

In *Shoemaker*, the plaintiff sued his supervisors and his employer after his employment was terminated. The plaintiff’s causes of action included “inducement of breach of contract.” (*Shoemaker, supra*, 52 Cal.3d at p. 10.) In determining that a demurrer was properly sustained to this cause of action, the court explained: “[T]here can be no action for inducement of breach of contract against the other party to the contract. [Citation.] It is also well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation’s contract. [Citations.] [¶] Here, the parties against whom plaintiff seeks recovery on this cause of action are plaintiff’s supervisors: agents of the employer who are vested with the power to act for the employer (rightly or wrongly) in terminating plaintiff’s employment. For purposes of this cause of action, then, these defendants stand in the place of the employer, because the employer—the other party to the supposed contract—cannot act except through such agents. [¶] Thus, there is no viable ‘inducement of breach of contract’ . . . that is distinguishable from a cause of action for breach of contract. As we have held, however, plaintiff, a state civil service employee,

does not have a contract of employment. Plaintiff improperly seeks to cast this cause of action in tort to obtain recovery to which he is not entitled.” (*Id.* at pp. 24-25.)

In the present case, defendant Ohlfs makes no argument that plaintiff’s invasion of privacy claim more properly sounds in contract. Ohlfs also does not contend that there can be no invasion of privacy claim by an employee against an employer. Under the circumstances, we find *Shoemaker* inapposite.

Accordingly, in view of plaintiff’s allegations in the first amended complaint, we determine that she is not barred from seeking individual liability against defendant Ohlfs at the pleading stage for an invasion of privacy.

Regarding whether the trial court therefore erred in its ruling, we observe that defendants PACE and Ohlfs both demurred to the invasion of privacy claim. The court sustained the demurrer *without* leave to amend as to Ohlfs on the ground that he could not be sued individually. As we have explained, this ground is not a proper basis for sustaining the demurrer as to Ohlfs. As to PACE, the trial court sustained the demurrer *with* leave to amend on the ground that plaintiff failed to “allege that Ohlfs intentionally meant to intrude on Plaintiff’s solitude or seclusion.” None of the parties have raised any argument concerning this aspect of the court’s ruling. Because this ground must necessarily also apply to the cause of action as alleged against Ohlfs, we determine that the court erred in sustaining the demurrer without leave to amend as to Ohlfs, and that the demurrer should be sustained with leave to amend as to Ohlfs on the same basis as PACE.

## V. DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to (1) vacate its order sustaining defendant Pacific Autism Center for Education’s demurrer to the second cause of action for violation of the Labor Code and to enter a new order overruling the demurrer to the second cause of action; and (2) vacate its order sustaining defendant Kurt Ohlfs’s demurrer to the fourth cause of action for invasion of privacy without leave

to amend and to enter a new order sustaining Ohlfs's demurrer to the fourth cause of action with leave to amend. Costs in this original proceeding are awarded to petitioner Rhoda Austin.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MÁRQUEZ, J.

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GROVER, J.