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

RICHARD M. LADDEN,

Plaintiff and Appellant,

v.

FOOTHILL-DE ANZA COMMUNITY
COLLEGE DISTRICT et al.,

Defendants and Respondents.

H042422

(Santa Clara County

Super. Ct. No. 114CV271970)

Plaintiff Richard M. Ladden sued Foothill-De Anza Community College District (District), Nancy Canter (Canter), and Michele LeBleu-Burns (LeBleu-Burns) in October 2014. (Hereafter, the District, Canter, and Burns are sometimes collectively referred to as respondents.) In his complaint, Ladden alleged 30 causes of action against respondents, including eight equitable claims (declaratory and injunctive relief), 16 claims for intentional or negligent infliction of emotional distress, and two defamation claims.

The dispute arose out of Ladden's role as a part-time student at De Anza College (College). In May 2014, he lodged a complaint concerning the ventilation of the corner music practice rooms in a building at the College. In the course of investigating that complaint, respondents learned that Ladden had potentially registered and taken music courses in his wife's name, conduct that would have violated District policies. Respondents placed a hold on Ladden's academic records, preventing him from

registering for future classes. Ladden alleged that this disciplinary action was in unlawful retaliation for his having complained about the music practice rooms, and that respondents did not follow applicable administrative procedures calling for notice of proposed disciplinary action and a right to a hearing. He also alleged that he was defamed by Canter when she wrote an email to an instructor suggesting that, if it were true that Ladden had registered for classes in his wife's name, he may have engaged in criminal conduct or civil fraud.

Respondents filed a demurrer to each cause of action of the complaint. The court sustained the demurrer without leave to amend.

We conclude that the trial court did not err in sustaining the demurrer to the complaint. All of the equitable claims and nearly all of the damage claims were barred because Ladden failed to (1) exhaust available judicial remedies, and (2) exhaust available administrative remedies. The remaining damage claims failed to state legally viable causes of action. We hold further that the court did not abuse its discretion by denying Ladden leave to amend. Accordingly, we will affirm the judgment.

PROCEDURAL BACKGROUND

I. Complaint

On October 16, 2014, Ladden, a licensed California attorney, initiated this action on his own behalf against respondents by filing a pleading captioned "Complaint for Damages, Declaratory Judgments & Prohibitory Injunctions." In his 61-page, 339-paragraph complaint, Ladden alleged 30 causes of action. He alleged eight claims for declaratory and injunctive relief. Ladden asserted 22 damage claims, consisting of causes of action for retaliatory action in violation of the California Occupational Safety and Health Act of 1973 (Labor Code § 6300 et seq.; Cal-OSHA); intentional infliction of emotional distress (IIED); negligent infliction of emotional distress (NIED); defamation; and negligent supervision. Although the complaint is lengthy, the factual allegations central to all of the causes of action are readily identifiable.

Ladden alleged in the complaint that he was a student at the College between the approximate dates of October 14, 2013, and May 23, 2014.¹ On May 20, 2014,² Ladden sent an email to Canter, the College's Dean of Creative Arts, in which he complained about the air conditioning and ventilation of the corner music practice rooms in Building A31 (the practice room HVAC issue). "Said email complaint contained an implicit threat to file a [Cal-]OSHA complaint."

Also on May 20, apparently after receiving Ladden's email, Canter sent an email to Ladden's instructor, John Russell. In that email, Canter stated: "Is that [Ladden's] legal name? [O]r is he using his wife's name[,] and if that is the case[,] that is illegal [and] to do it is fraud. [¶] . . . [¶] So let me know about the name use and I will take it from there and notify admissions."

On May 24, Ladden followed his May 20 email with a demand letter to Canter. In that letter, in addition to demanding corrective action relative to the practice room HVAC issue, Ladden noted that instead of taking corrective action in response to his May 20 email, Canter had "chose[n] to retaliate against him in violation of Labor Code § 6310 by (1) threatening to take legal action against him and his wife for allegedly fraudulently registering; and (2) planning to take unspecified administrative action against [him] and his wife." (Footnotes omitted.) Ladden stated that he would "take action with respect to his [Cal-]OSHA complaint" unless, within four days, the College, among other things, gave him (1) a commitment in writing to correct the practice room HVAC issue, (2) a statement in writing that it would not take any legal, administrative, or other action against him, and (3) a written and public apology. On May 29, Ladden sent "a copy of

¹ The allegations of a complaint are deemed true for purposes of considering a challenge to such pleading by demurrer. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 866-867) Accordingly, for that reason and for the sake of brevity, we will dispense with the prefatory "Ladden alleges" in describing the chief allegations in the complaint.

² All dates hereafter are 2014 unless otherwise specified.

his proposed [Cal-]OSHA complaint” concerning the practice room HVAC issue to various College officials. In that proposed complaint, Ladden checked the box “Employer” in reference to the College.

Ladden alleged that, as a response to his stated intention to file a formal Cal-OSHA complaint concerning the practice room HVAC issue, respondents³ “took multiple disciplinary actions against [him].” On June 9, respondents “placed a disciplinary records hold on [his] academic records.” (Hereafter, this alleged disciplinary action concerning Ladden’s academic records is referred to as the records hold.) On the same date, College Dean School of Development LeBleu-Burns notified Ladden in writing of respondents’ intention of taking disciplinary action against him. She stated that she had learned that Ladden was “allegedly involved in an academic dishonesty, impersonation and forgery incident in the Music classes [he was] enrolled in during Fall 2013, Winter 2014 and Spring 2014 quarters. Registering for music classes and earning grades under [Ladden’s] wife’s name and academic record constitute an egregious violation of the [District’s] Standards of Student Conduct.” LeBleu-Burns stated that Ladden’s “alleged involvement with this incident require[d] that [he] be brought before a disciplinary hearing board to hear the facts of the case and to determine appropriate the [*sic*] disciplinary action, if any.” LeBleu-Burns advised further that Ladden could schedule a prehearing conference with her if he desired, or, alternatively, she requested that he inform her of his availability for the formal hearing. As a result of the actions taken by respondents, Ladden was denied any access to his academic records at the College and at Foothill College which prevented him from registering for courses at either school.

³ It is sometimes unclear from Ladden’s lengthy complaint whether each of the three respondents is alleged to be legally responsible as to each of the 30 causes of action. Since it is immaterial for purposes of our analysis whether the charging allegations of each cause of action apply to all three defendants, we will often refer to respondents, collectively, as the parties charged in the complaint with the alleged action taken against Ladden.

On June 12, Ladden responded to LeBleu-Burns' June 9 letter. In it, he stated, among other things, that "[d]ue process demands that I be advised of the specific acts allegedly committed by me involving each of these distinct accusations." (Original underscoring.)

II. The Demurrer

Respondents filed a demurrer to the complaint under Code of Civil Procedure section 430.10.⁴ They asserted that the complaint failed to state facts sufficient to constitute any cause of action (§ 430.10, subd. (e)) and was uncertain (§ 430.10, subd. (f)). Respondents contended in support of their general demurrer under subdivision (e) that Ladden's alleged claims were "based upon student discipline, implemented by final administrative action, which [he had] not internally appealed, and which [he had] not challenged through a petition for writ of mandate," and that the court therefore lacked subject matter jurisdiction over the alleged claims.

On February 26, 2015, the court sustained the demurrer without leave to amend. In its order, the court reasoned, among other things, that the damage claims for retaliation in response to Ladden's complaints concerning the practice room ventilation issue in violation of Cal-OSHA were not viable because Labor Code section 6310 applied only to employees; Ladden's claims arising out of disciplinary action threatened or taken by respondents against him were premature because he had failed to exhaust administrative remedies and any action he was challenging was not a final administrative order or decision; and the defamation causes of action were premised upon statements that were not actionable. The court decreed that, pursuant to respondents' request, after entry of the order, the case would be dismissed without prejudice to give Ladden the opportunity

⁴ Further statutory references are to the Code of Civil Procedure unless otherwise stated.

“to pursue administrative remedies and file an appropriate writ petition proceeding rather than an action for damages.” A judgment was entered on May 7, 2015.

DISCUSSION

I. Pending Motions on Appeal

A. Background

Respondents filed a motion to augment record and to take judicial notice of certain email communications and correspondence, including a letter dated July 9, 2015—nearly two months *after* Ladden filed this appeal. They acknowledge that these documents were not part of the record below. But they contend that judicial notice of them is proper because the documents are “highly relevant to explain the dates and sequence of events leading to [Ladden’s] lawsuit, and to explain the present status of the alleged College discipline against Mr. Ladden.” Citing Evidence Code sections 451, subdivision (f) and 452, subdivision (h), respondents argue that the records are “not reasonably capable of dispute.”

Ladden filed a motion to strike respondents’ appendix in its entirety. In addition to objecting to respondents’ failure to include proper alphabetical and chronological indices—a procedural matter that respondents addressed by filing a corrected appendix—Ladden asked that the appendix be stricken because of its inclusion of documents that (1) were unnecessary to the appellate court’s decision, (2) were not part of the record below, (3) were not subject to permissive judicial notice under Evidence Code section 452, subdivision (h), (4) contained matters irrelevant to the issues on appeal, and (5) were created after the filing of the appeal.

Ladden filed a request for judicial notice, asking this court to take judicial notice of three letters in which the sender or recipient was the California Department of Industrial Relations, Division of Occupational Safety and Health (Division). Ladden acknowledges that none of the letters was part of the record below.

B. Discussion

“[A]ugmentation may be used only to add evidence that was mistakenly omitted when the appellate record was prepared; the record cannot be ‘augmented’ with material that was not before the trial court. [Citations.]” (*In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1209; see Cal. Rule of Court, rule 8.155(a)(1) [court may augment record to include “[a]ny document filed or lodged in the case in superior court”].)⁵ Augmentation is not appropriate “to supplement the record with materials not before the trial court [citations],” such as documents evidencing events occurring during the pendency of the appeal. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 (*Vons Companies*)). It is within the discretion of the appellate court to grant or deny an augmentation request. (Rule 8.155(a); see *Courtell v. McEachen* (1956) 147 Cal.App.2d 219, 221.)

The documents in respondents’ appendix—as respondents admit—are not part of the record below. The same is true of the documents attached to Ladden’s request for judicial notice. Therefore, neither set of documents is a proper subject of a motion to augment the appellate record. (*Vons Companies, supra*, 14 Cal.4th at p. 444, fn. 3; *In re Marriage of Forrest & Eaddy, supra*, 144 Cal.App.4th at p. 1209.)

Respondents argue nonetheless that it is appropriate to take judicial notice of the documents pursuant to Evidence Code section 451, subdivision (f) and (h). Under Evidence Code section 451, subdivision (f), the court is required to take judicial notice of “[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.” The documents proposed by respondents and Ladden are clearly not of the kind qualifying for mandatory judicial notice under Evidence Code section 451, subdivision (f).

⁵ Further rule references are to the California Rules of Court.

Under Evidence Code section 452, subdivision (h), the court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” Neither set of documents proposed by respondents and Ladden satisfies the requirements for discretionary judicial notice under Evidence Code section 452, subdivision (h). (See *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145-1146.) Furthermore, appellate courts, absent extraordinary circumstances, do not take judicial notice of matters not before the trial court. (*Vons Companies, supra*, 14 Cal.4th at p. 444, fn. 3; see also *California School Boards Assn. v. State* (2011) 192 Cal.App.4th 770, 803 [appellate “review of the trial court’s decision must be based on the evidence before the court at the time it rendered its decision”].) No exceptional circumstances are presented here.

Respondents’ motion to augment and request for judicial notice are denied. Ladden’s request for judicial notice is denied.

II. Demurrers and Standard of Review

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) “In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*); see also *Randi W. v. Muroc Joint Unified School Dist.* (1997)

14 Cal.4th 1066, 1075; *Moore v. Regents of University of California* (1990)
51 Cal.3d 120, 125.)

“It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he [or she] describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) “[T]he facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 (*Alcorn*) [court reviewing propriety of ruling on demurrer is not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof”].)

On appeal, we will affirm a “trial court’s decision to sustain the demurrer [if it] was correct on any theory. [Citation.]” (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Thus, “we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]” (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757 (*Orange Unified School Dist.*).

An appellate court reviews the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*)).) When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 39; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 719.) “ ‘[W]here the nature of the plaintiff’s claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result.’ ” (*Buchanan v. Maxfield*

Enterprises, Inc. (2005) 130 Cal.App.4th 418, 421 (*Buchanan*)). The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect.

(*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 (*Campbell*)).

III. *Administrative Mandamus & Exhaustion of Administrative Remedies*

Because Ladden's complaint is comprised of claims arising out of actions taken by the District, we initially provide the groundwork of our opinion which is founded upon general law pertaining to administrative mandamus, the doctrine of exhaustion of judicial remedies, and the doctrine of exhaustion of administrative remedies.

Under section 1094.5, a party may file a petition for writ of administrative mandamus "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (§ 1094.5, subd. (a).)

Where the decision occurs as a result of a proceeding in which a hearing is required in which evidence is to be taken and the administrative tribunal is vested with discretion to determine the facts, administrative mandamus under section 1094.5 is the exclusive remedy for judicial review of the quasi-adjudicatory administrative action of state-level agencies (*People v. Tulare County* (1955) 45 Cal.2d 317, 319), of local-level agencies (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1211 (*Saad*)), and of private bodies (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722, 1729). Generally, in light of the exclusivity of administrative mandamus for challenging such administrative decisions, it is inappropriate to bring alternative actions arising out of such decision, such as actions for declaratory relief (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249; *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 448), for injunctive relief (*Board of Police Commissioners v. Superior Court* (1985) 168 Cal.App.3d 420, 432), or for damages (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 482-484 (*Westlake*); *City of Fresno v. Superior Court* (1987) 188

Cal.App.3d 1484, 1490 (*City of Fresno*.) This principle is sometimes referred to as the “exhaustion of judicial remedies.” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70 (*Johnson*.)

To assert a judicial challenge to quasi-judicial administrative action taken by a state or local agency or a private body under the circumstances provided in section 1094.5, the party aggrieved by such action must first exhaust his or her administrative remedies. (*Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 292 (*Abelleira*.) This rule requires that the party both initiate and pursue to their conclusion any delineated administrative procedures to challenge the agency’s or body’s action. (*Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 619 (*Unnamed Physician*.) A party may not bring suit to challenge “an intermediate or interlocutory action”; he or she must exhaust *all* administrative remedies before filing suit. (*Alta Loma School Dist. v. San Bernardino County Com. On School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 554.)

This exhaustion of administrative remedies “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.]” (*Campbell, supra*, 35 Cal.4th at p. 321, original italics.) As the high court has further explained: “The rule has important benefits: (1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal’s expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case. [Citation.]” (*Id.* at p. 322; see also *Westlake, supra*, 17 Cal.3d at p. 476.) Another rationale for the administrative remedies exhaustion rule is that “if a court [were] allowed a suit to be maintained prior to final administrative determination, the court would be interfering with the subject matter jurisdiction of another tribunal. [Citations.]” (*Lund v. California State Employees Assn.* (1990) 222 Cal.App.3d 174, 183.)

Exhaustion of administrative remedies and exhaustion of judicial remedies must be understood as separate principles. “Exhaustion of *administrative* remedies is ‘a jurisdictional prerequisite to resort to the courts.’ [Citation.] Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding ‘effect to the administrative agency’s decision, because that decision has achieved finality due to the aggrieved party’s failure to pursue the exclusive *judicial* remedy for reviewing administrative action.’ [Citation.]” (*Johnson, supra*, 24 Cal.4th at p. 70, original italics.)

A failure to exhaust judicial remedies is an appropriate ground for sustaining a demurrer to a complaint. (*Gupta v. Stanford University* (2004) 124 Cal.App.4th 407, 411, 413 (*Gupta*).) Likewise, a plaintiff’s failure to exhaust administrative remedies renders a complaint vulnerable to demurrer. (*Id.* at p. 411; see also *Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 523 (*Edgren*).)

IV. *Order Sustaining Demurrer to Equitable Claims*

A. Background

Generally, Ladden alleged four declaratory relief claims (Fourth through Seventh Causes of Action). He sought in his complaint a declaration of rights to the effect that the records hold imposed by respondents (a) was without notice or hearing and deprived him of his property and liberty in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution (Fourth Cause of Action); (b) was without notice or hearing and deprived him of his property and liberty in violation of the Due Process Clause of Article I, section 7(a) of the California Constitution (Fifth Cause of Action); (c) was unlawful, and AP 5500(F) is null and void in violation of the Education Code and Code of California Regulations (CCR) and is therefore unenforceable (Sixth Cause of Action); and (d) was illegal because it was imposed without notice (1) of an intention to take disciplinary action against him, (2) of the specific provision of the Code of Student Conduct allegedly violated, (3) containing a short statement of the facts supporting the accusation, (4) of the nature of the proposed discipline, (5) given within 10 days of the

date of the alleged conduct, all in violation of section II of AP 5520 (Seventh Cause of Action).

Ladden also alleged four parallel claims for injunctive relief (Eighth through Eleventh Causes of Action). He sought a prohibitory injunction restraining respondents from continuing to impose the records hold that he alleged had caused him irreparable harm due to his inability to register for classes at the College or Foothill College, because the records hold (a) violated his rights under the Due Process Clause of the Fifth Amendment of the United States Constitution (Eighth Cause of Action); (b) violated his rights under the Due Process Clause of Article I, section 7(a) of the California Constitution (Ninth Cause of Action); (c) was unlawful in that it was based upon AP 5500(F), which was null and void (Tenth Cause of Action); and (d) was illegal because it was imposed in violation of the District's own notice procedures of section II of AP 5520 (Eleventh Cause of Action).

B. The Equitable Claims Are Barred

It is clear from the allegations of the complaint that the claims asserted in the Fourth through Eleventh Causes of Action involve a challenge to, and seek equitable relief to address, administrative action taken by respondents, namely, the records hold. As such, Ladden's exclusive remedy to review such action was by a petition for writ of administrative mandamus under section 1094.5. (*People v. Tulare County, supra*, 45 Cal.2d at p. 319; *Saad, supra*, 24 Cal.App.4th at p. 1211.) Ladden may not circumvent this principle of judicial exhaustion by purporting to challenge the administrative action through either a claim for declaratory relief (*State of California v. Superior Court, supra*, 12 Cal.3d at p. 249), or a claim for injunctive relief (*Board of Police Commissioners v. Superior Court, supra*, 168 Cal.App.3d at p. 432). Moreover, the fact that Ladden asserts illegality with respect to AP 5500(F) and that his constitutional rights were violated does not absolve him of the requirement that he seek relief through administrative mandamus. "A plaintiff cannot avoid the administrative mandamus rule

by simply alleging constitutional violations. [Citation.]” (*Antebi v. Occidental College* (2006) 141 Cal.App.4th 1542, 1547.)

But courts have the authority to view a complaint, treating substance over form, as a petition for writ of mandamus if it appears the plaintiff has otherwise stated a claim entitling him or her to relief. (*Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, 637.) Even were we to deem Ladden’s equitable claims as ones seeking relief by mandamus, they are nonetheless not viable.

As seen from an exhibit to the complaint, the disciplinary action (i.e., the records hold) Ladden challenges is one for which he is afforded an opportunity for a hearing, pursuant to AP 5520, section II (captioned “Disciplinary Procedures”). (Capitalization and emphasis omitted.) Respondents, through the letter of June 9 from LeBleu-Burns to Ladden attached as an exhibit to the complaint, proposed a hearing before a disciplinary board to determine whether disciplinary action should be taken against him, and offered Ladden the opportunity for a prehearing meeting with LeBleu-Burns. As evidenced by his letter June 12 attached as an exhibit to the complaint, Ladden, rather than avail himself of such proceedings, objected to the form of notice given him by LeBleu-Burns. And the complaint contains nothing indicating that Ladden ever pursued a final administrative decision concerning any disciplinary action taken or proposed by respondents.

As we have noted, exhaustion of administrative remedies is a jurisdictional prerequisite to invoking the court’s powers to review the agency’s action. (*Campbell, supra*, 35 Cal.4th at p. 321; *Abelleira, supra*, 17 Cal.2d at p. 292.) A party challenging an agency’s action must plead that he or she has exhausted available administrative remedies before bringing suit. (*Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 106; *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 439.) It readily appears from the complaint that Ladden has failed to

exhaust administrative remedies available to him to challenge the administrative action (i.e., the records hold).

Although acknowledging that exhaustion of administrative remedies is generally a prerequisite to bringing suit to challenge an agency's action, Ladden offers various reasons that his complaint is not governed by this principle. He contends that where the agency does not comply with its own regulations, the agency is without jurisdiction to act. His apparent argument is that here, since respondents did not follow their own administrative procedures (AP 5520), they lacked jurisdiction to act, and, presumably, this absolved Ladden from having to exhaust administrative remedies. Ladden cites no apposite authority that supports his position. For instance, he cites *Usher v. County of Monterey* (1998) 65 Cal.App.4th 210 (*Usher*), in which a panel of this court reversed in part a trial court's judgment granting a petition for writ of mandamus that concerned a public employee's claim for disability retirement benefits. Although this court concluded the trial court had correctly held that the county had acted without jurisdiction because it conducted a hearing contrary to law by failing to appoint an administrative law judge (*id.* at pp. 216-219), we held that the trial court, rather than reaching a determination on the merits of the employee's claim, should have remanded the matter to the agency for further consideration (*id.* at pp. 219-220). *Usher* is distinguishable, since no administrative hearing of any kind was conducted in this instance. And *Usher* cannot be read as supporting the proposition that because an agency allegedly did not comply with its procedures in giving notice, the party aggrieved by an agency action may leapfrog any administrative review procedures that may be provided by law and challenge that action in court.

Likewise, *Aylward v. State Bd. of Chiropractic Examiners* (1948) 31 Cal.2d 833 (*Aylward*), cited by Ladden, does not support his position. *Aylward* concerned action taken by an agency cancelling, without notice, previously issued licenses to 40 individuals. (*Id.* at p. 835.) The Supreme Court held the trial court had properly

concluded that the agency had acted in excess of its jurisdiction by canceling the licenses without notice and hearing. (*Id.* at p. 838.) And our high court held that where an agency acts without authority, the order is void and courts will not grant mandate to enforce the void order, but mandamus will lie to compel the agency to rescind it. (*Id.* at p. 839.) *Aylward* does not support Ladden’s contention that an agency’s alleged failure to follow notice requirements before an administrative hearing justifies an aggrieved person’s bypassing administrative remedies available to challenge any preliminary action taken by the agency.

“A petition for a writ of administrative mandate under Code of Civil Procedure section 1094.5 may be brought only ‘for the purpose of inquiring into the validity of any *final* administrative order or decision . . .’” (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 974, quoting § 1094.5, subd. (a), italics added.) No final decision imposing discipline against Ladden had been made by respondents. The application of the doctrine that Ladden must first exhaust his administrative remedies subserves the goals enunciated by the Supreme Court of “(1) . . . mitigating damages; (2) [giving recognition to] the quasi-judicial tribunal’s expertise; and (3) . . . promot[ing] judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case. [Citation.]” (*Campbell, supra*, 35 Cal.4th at p. 322.) The trial court properly sustained the demurrer to the equitable claims for relief (Fourth through Eleventh Causes of Action) because (1) administrative mandamus was the exclusive method of reviewing respondents’ action, and (2) even liberally construing the complaint as one seeking administrative mandamus, Ladden failed to exhaust available administrative remedies.

V. *Order Sustaining Demurrer to Damage Claims*

A. IIED and NIED Damage Claims

1. *Causes of Action 12-17, 19-26*

Ladden alleged seven causes of action for intentional infliction of emotional distress, IIED (Twelfth through Eighteenth Causes of Action). Additionally, he alleged nine causes of action for negligent infliction of emotional distress, NIED (Nineteenth through Twenty-Seventh Causes of Action). We address in this subsection all but the Eighteenth and Twenty-Seventh Causes of Action.

In each of the IIED causes of action, Ladden sought damages as a result of alleged “injury to his strength and activity . . . to his nervous system and person, . . . [causing him] great mental, physical, and nervous pain and suffering.” Ladden alleged damages for IIED due to respondents’ records hold because he claimed it (a) violated the Due Process Clause of the Fifth Amendment of the United States Constitution (Twelfth Cause of Action); (b) was a breach of a mandatory duty under Educational Code section 76320 and 5 CCR 54610 (Thirteenth Cause of Action); (c) violated respondents’ own AP 5520 (Fourteenth Cause of Action); (d) violated respondents’ own AP 5520 by failing to give notice of the specific charges and a notice of a hearing (Fifteenth Cause of Action); (e) violated respondents’ own AP 5520 by failing to give notice of the specific charges within 10 days of the alleged offense (Sixteenth Cause of Action); and (f) violated respondents’ own AP 5520 by respondents’ giving two invalid late notices of intent to take disciplinary action (Seventeenth Cause of Action).

Similarly, in each of the NIED claims, Ladden alleged “injury to his strength and activity . . . to his nervous system and person, . . . [causing him] great mental, physical, and nervous pain and suffering.” He alleged that he suffered this damage as a result of respondents’ “negligent impoundment of [his] academic records” that constituted (a) a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution (Nineteenth Cause of Action); (b) a breach of a mandatory duty under

Educational Code section 76320 and 5 CCR 54610 (Twentieth Cause of Action); (c) a violation of respondents' own AP 5520 (Twenty-First Cause of Action); (d) a violation of respondents' own AP 5520 requiring a hearing before imposing disciplinary action (Twenty-Second Cause of Action); (e) a violation of respondents' own AP 5520 by failing to give notice of the specific charges and a hearing (Twenty-Third Cause of Action); (f) a violation of respondents' own AP 5520 by failing to give notice of the specific charges within 10 days of the alleged offense (Twenty-Fourth Cause of Action); (g) a violation of respondents' own AP 5520 by respondents' giving two invalid late notices of intent to take disciplinary action (Twenty-Fifth Cause of Action); and (h) a breach of a mandatory duty under Government Code section 815.6 and AP 5520 (Twenty-Sixth Cause of Action).

Each of these six IIED claims and eight NIED claims—the Twelfth through Seventeenth, and Nineteenth through Twenty-Sixth Causes of Action, respectively—arise directly out of the disciplinary action taken by respondents (i.e., the records hold) that he claims was unlawful. As was the case with Ladden's equitable claims, these damage claims based upon IIED and NIED were precluded under the dual grounds of his failure to exhaust (1) the exclusive judicial remedy of administrative mandamus (*People v. Tulare County, supra*, 45 Cal.2d at p. 319; *Saad, supra*, 24 Cal.App.4th at p. 1211); and (2) available administrative remedies before pursuing a judicial action for damages (*Westlake, supra*, 17 Cal.3d at pp. 476-477; *Campbell, supra*, 35 Cal.4th at p. 321).

Under *Westlake, supra*, 17 Cal.3d 465, a claim for damages that “is necessarily premised on an assertion that the [agency's quasi-judicial decision] . . . was itself erroneous and unjustified” is premature, where that implicitly challenged decision has not

been set aside. (*Id.* at pp. 484.)⁶ An aggrieved party “must first succeed in overturning the quasi-judicial action before pursuing [his or] her tort claim.” (*Ibid.*)

The *Westlake* doctrine of requiring a party aggrieved by an agency’s quasi-judicial decision to successfully challenge that action by mandamus before bringing an action for damages has been applied to IIED and NIED claims. *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 122-124, held that the plaintiff’s damage claims for alleged wrongful termination by transit agency, including an IIED claim, were barred because he had not first sought administrative mandamus to challenge the agency’s action. Similarly, in *City of Fresno, supra*, 188 Cal.App.3d at pages 1488-1490, the court held that the plaintiff’s damage claims based upon his alleged wrongful removal as neighborhood service supervisor, including an NIED claim, were premature because he had not first sought a judicial decision, through mandamus, overturning the agency’s action. Therefore, Ladden may not pursue a claim for damages based upon IIED or NIED claims without first challenging successfully by administrative mandamus the agency action (the records hold) upon which the claims are based. (*Westlake*, at pp. 482-484.)

Likewise, Ladden’s claims are barred under the exhaustion of administrative remedies doctrine. As noted above, Ladden was afforded the opportunity of a hearing to address any disciplinary action proposed or taken against him under AP 5520, section II. It is plain that, although a hearing was provided for in AP 5520 and offered by respondents, no hearing took place. His objections to respondents to the adequacy of their notice notwithstanding, Ladden was required to exhaust his administrative remedies to challenge any disciplinary action before bringing suit. (*Campbell, supra*, 35 Cal.4th at

⁶ We use the term “agency” here in referring to the exhaustion of judicial remedies doctrine because a local public agency is in fact involved in this case. But we acknowledge that the doctrine also applies to persons aggrieved by quasi-judicial decisions of private associations. (*Westlake, supra*, 17 Cal.3d at pp. 482-485.)

p. 321; *Abelleira, supra*, 17 Cal.2d at p. 292.) Moreover, the fact that disciplinary action may have been taken before a hearing occurred—where Ladden was afforded the opportunity to challenge the action and potentially have it reversed—does not permit him to bypass administrative remedies and file suit on a nonfinal agency decision. “If an administrative remedy is available and has not yet been exhausted, an adequate remedy exists and the petitioner is not entitled to extraordinary relief. ‘A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law. [Citation.]’ [Citation.]” Inconvenience does not equal irreparable injury. [Citation.]” (*Unnamed Physician, supra*, 93 Cal.App.4th at p. 620.)

Because Ladden did not exhaust available judicial or administrative remedies to review the agency action before bringing suit, his IIED and NIED claims are barred, and the trial court properly sustained the demurrer to those causes of action (Twelfth through Seventeenth, and Nineteenth through Twenty-Sixth Causes of Action).

2. *Causes of Action 18 and 27*

Ladden also alleged an IIED claim based upon the respondents’ having accused him of criminal conduct, namely, impersonation, forgery, and academic dishonesty (Eighteenth Cause of Action). He alleged a parallel NIED claim based upon respondents’ having negligently accused him of the same criminal conduct. (Twenty-Seventh Cause of Action).

Unlike the other IIED and NIED claims, these two claims do not arise directly from the agency’s disciplinary action challenged by Ladden. Rather, they arise indirectly out of the records hold, in that respondents’ alleged intentional/negligent accusation of criminal conduct arose from the assertion that Ladden’s registration for courses in his wife’s name may have been improper, an accusation that resulted in the records hold and the attendant notice to him of his right to a hearing concerning the taking of disciplinary action. While it is arguable that these two claims, like the other IIED and NIED claims,

were barred because of Ladden’s failure to exhaust judicial and administrative remedies, the claims were subject to demurrer for reasons other than those offered by the trial court. (See *Orange Unified School Dist.*, *supra*, 54 Cal.App.4th at p. 757 [review is of propriety of demurrer order, not of trial court’s reasoning]; see also *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [appellate court’s “only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action”].)

An IIED claim requires a showing of “ ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.’ ” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903; see also CACI No. 1602.) The conduct to be actionable “must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]” (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 (*Davidson*); see also *Alcorn*, *supra*, 2 Cal.3d at p. 498 [recovery for IIED available where only emotional injuries are suffered “in cases involving extreme and outrageous intentional invasions of one’s mental and emotional tranquility”].)

It is established that “[o]rdinarily mere insulting language, without more, does not constitute outrageous conduct.” (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7.) Liability under an IIED claim “ ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ [Citation.]” (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122, overruled on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. 19.)

The plaintiff’s burden of establishing severe emotional distress is “a high bar. ‘Severe emotional distress means “ ‘emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.’ ” [Citation.]” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 (*Hughes*).)

The determination of whether it can reasonably be concluded that the defendant's conduct is outrageous is a question of law; only if the court decides that reasonable people could differ, the jury would then determine if the conduct was, in fact, outrageous. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 534, citing *Alcorn, supra*, 2 Cal.3d at p. 499.)

The sole basis of Ladden's claim for IIED in the Eighteenth Cause of Action is the June 9 letter from LeBleu-Burns to Ladden in which she stated: "It has been brought to my attention that you were allegedly involved in an academic dishonesty, impersonation and forgery incident in the Music classes you were enrolled in during the Fall 2013, Winter 2014 and Spring 2014 quarters. Registering for music classes and earning grades under your wife's name and academic record constitute an egregious violation of the Foothill-De Anza Community College District Standards of Student Conduct." The letter goes on to advise that Ladden's "alleged involvement with this incident requires that [he] be brought before a disciplinary hearing board to hear the facts of the case and determine the appropriate the [*sic*] disciplinary action, if any."

The allegations of the Eighteenth Cause of Action of the complaint do not support an IIED claim. As a matter of law, the conduct of respondents alleged by Ladden did not constitute extreme and outrageous conduct. It was not "so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]" (*Davidson, supra*, 32 Cal.3d at p. 209.) Likewise, the allegations presented by Ladden do not show the existence of " '[s]evere emotional distress[, i.e.,] 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " [Citation.]" (*Hughes, supra*, 46 Cal.4th at p. 1051.)

Negligent infliction of emotional distress is not a valid cause of action under California law. It is in actuality a claim for emotional distress damages based upon the tort of negligence. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984 (*Potter*)). "The tort is negligence, a cause of action in which a duty to the plaintiff is an

essential element. [Citations.] That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship. [Citation.]” (*Id.* at pp. 984-985.) As the California Supreme Court explained: “[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant’s breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests. [Citations.]” (*Id.* at p. 985.)

Thus, since Ladden’s purported NIED claim is merely “a species of negligence” (*Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1046 (*Wooden*)), the better question to ask in appraising his NIED allegations is: “What are the circumstances under which a plaintiff can recover damages for emotional distress as a matter of the *law of negligence*?” (*Lawson v. Management Activities, Inc.* (1999) 69 Cal.App.4th 652, 657, original italics.) The purported claim, in other words, may more properly be called “damages for emotional distress under a negligence theory.” (*Id.* at p. 654.)

In *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, the California Supreme Court made it clear that to recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was “serious.” (*Id.* at pp. 927-930; see also *Potter, supra*, 6 Cal.4th at p. 999; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1073, fn. 6 (*Burgess*)). As this court has stated: “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress.’” Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 (*Wong*)).

As is the case with the Eighteenth Cause of Action for IIED, the Twenty-Seventh Cause of Action for NIED is founded upon the June 9 letter from LeBleu-Burns, which Ladden characterized as “negligently accusing” him of the crimes of impersonation and forger and of academic dishonesty, an act of moral turpitude. Ladden has failed to state a purported NIED claim, i.e., a claim for the negligent causing of emotional distress. This is not an instance in which respondents are alleged to have committed “a breach of the duty [that] threaten[ed] physical injury, not simply damage to property or financial interests. [Citations.]” (*Potter, supra*, 6 Cal.4th at p. 985; cf. *Wooden, supra*, 61 Cal.App.4th 1035 [NIED claim permitted where plaintiff, although not struck, feared for her life when defendant collided with another vehicle and defendant’s vehicle was propelled into yard where plaintiff was standing].) As explained by one court,—rejecting an employee’s claim for emotional distress damages allegedly caused by negligent misrepresentations by his employer: “Where . . . the misrepresentation is merely negligent, rather than intentional, we believe the recovery should match that available in negligence actions, generally. On this principle, employee here, incurring neither physical impact nor physical damage, and whose loss (other than emotional distress) is solely economic, is entitled neither to punitive damages nor to a recovery for emotional distress.” (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 799-800.) The trial court properly sustained the demurrer to Ladden’s purported NIED claim (Twenty-Seventh Cause of Action) because it failed to state facts sufficient to constitute a cause of action.

B. Negligent Supervision Damage Claim

In the Thirtieth Cause of Action of the complaint, Ladden alleged that the District was negligent in failing to adequately train and supervise its agents and employees, including Canter and LeBleu-Burns, and that this negligence resulted in the “improper and unlawful impoundment of [his] academic records, other efforts of disciplinary action against [him] and defamation of [him].” These actions taken against him caused him extreme emotional distress and other damages.

Like the IIED and NIED claims for damages, this claim is also demurrable. It was precluded because Ladden failed to exhaust the exclusive judicial remedy of administrative mandamus (*People v. Tulare County, supra*, 45 Cal.2d at p. 319), and failed to exhaust available administrative remedies before pursuing a judicial action for damages (*Westlake, supra*, 17 Cal.3d at pp. 476-477). The doctrine of exhaustion of administrative remedies is one that applies to a derivative negligence claim such as the one alleged here. (See *Edgren, supra*, 158 Cal.App.3d at p. 520 [damage claims, including one based on negligent hiring, were precluded because plaintiff had not exhausted administrative remedies].) And the negligent supervision claim, to the extent it is based upon the allegation that Ladden suffered emotional distress as a result of respondents' accusations of criminal conduct, is barred for the same reasons as discussed, *ante*, with respect to the Twenty-Seventh Cause of Action for purported NIED. (See *Potter, supra*, 6 Cal.4th at p. 985.)

C. Cal-OSHA Retaliation Damage Claims

Ladden alleged in the first three causes of action of the complaint that the records hold by respondents was in retaliation for his having made complaints regarding the practice room HVAC issue. He asserted that under California Constitution, article I, section 1, and Labor Code section 6310, the public policy of this state is that its citizens are to be protected from dangers to public health and affords them the right to pursue and obtain safety. He averred that Government Code section 53298 protects public employees from retaliation for disclosing a danger to public health or safety, and Labor Code section 1102.5 prohibits retaliation against employees who disclose violations of the law. Ladden claimed that the public policy of Labor Code section 6310 of preventing retaliation against persons making good-faith reports of unsafe conditions concerning health and safety applies to students. Ladden alleged further that his complaints on May 20 and May 24 regarding the practice room HVAC issue were implicit and explicit threats that he would “file a[] [Cal-]OSHA complaint,” and that as a response thereto and

to his sending a proposed Cal-OSHA complaint on May 29 to College officials, respondents took disciplinary action against him, including implementing the records hold. He alleged that he was damaged by respondents' retaliatory acts in response to his "making a complaint about unsafe health and safety conditions," and that such actions violated Labor Code section 6310 (First Cause of Action), violated California Constitution, article I, section 1 (Second Cause of Action), and that said constitutional provision made Labor Code section 6310 applicable to students (Third Cause of Action).

Labor Code section 6310 provides that "[n]o person shall discharge or in any manner discriminate against *any employee* because the *employee*" has asserted a Cal-OSHA complaint or taken other action related to workplace safety or health. (Italics added.)⁷ The statute represents confirmation by the Legislature of "the protected status of certain activity on the part of employees in relation to safety and health matters, by

⁷ "(a) No person shall discharge or in any manner discriminate against any *employee* because the *employee* has done any of the following: [¶] (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to *employee* safety or health, his or her *employer*, or his or her representative. [¶] (2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the *employee* on behalf of himself, herself, or others of any rights afforded him or her. [¶] (3) Participated in an occupational health and safety committee established pursuant to Section 6401.7. [¶] (b) Any *employee* who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of *employment* by his or her *employer* because the *employee* has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to *employee* safety or health, his or her *employer*, or his or her representative, of unsafe *working* conditions, or *work* practices, in his or her *employment* or place of *employment*, or has participated in an *employer-employee* occupational health and safety committee, shall be entitled to reinstatement and reimbursement for *lost wages and work benefits* caused by the acts of the *employer*. . . . [¶] (c) An *employer*, . . . shall not retaliate against an *employee* because the *employee* is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section. [¶] (d)" (Lab. Code, § 6310, italics added.)

prohibiting discharge or discrimination because of such activity [citation], [and] by declaring victims of discharge or discrimination to be entitled to reinstatement and reimbursement for lost wages and work benefits [citation].” (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298.) Labor Code section 6310 “reflects a significant public policy interest in encouraging employees to report health and safety hazards existing in the workplace without fear of discrimination or reprisal. [Citation.]” (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350 (*Ferrick*).

As Ladden admits, no reported decisions have addressed whether the protections of Labor Code section 6310 apply to students. Further, we are aware of no decisions that have extended Labor Code section 6310’s protections against retaliation to *any nonemployee* who has asserted a complaint regarding health and safety conditions. (See *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1048-1049 [assuming, without deciding, that Lab. Code, § 6310 would not apply if complaining party were an independent contractor, rather than an employee].) But the clear intent of the statute is to promote the good-faith reporting by *employees* of unsafe health and safety conditions that exist *in the workplace*. (See Lab. Code, § 6310, subd. (b) [protecting “[a]ny *employee*” from discriminatory treatment “in the terms and conditions of *employment by his or her employer*” resulting from his or her complaints “of unsafe *working* conditions, or *work* practices, in his or her *employment* or place of *employment*”], italics added.) We have carefully considered Ladden’s various constitutional and public policy arguments that Labor Code section 6310 should apply to the reporting of health and safety conditions by nonemployees such as himself. In the absence of any authority to support his contentions, we decline to apply the statute in a manner that is so plainly at odds with how it is written. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [appellate court “ ‘has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed’ ”].) Therefore, the First through Third Causes of Action of the complaint were subject to general demurrer

(§ 430.10, subd. (e)) because they failed to state facts sufficient to constitute a cause of action.

Even if it were theoretically possible that Ladden could allege a viable claim for damages under Labor Code section 6310, he nonetheless could not assert such a claim here. Because he did not exhaust available judicial remedies (*People v. Tulare County, supra*, 45 Cal.2d at p. 319) or administrative remedies at the agency level (*Westlake, supra*, 17 Cal.3d at pp. 476-477), the trial court properly sustained the demurrer to First, Second, and Third Causes of Action of the complaint.

D. Defamation Damage Claims

In the Twenty-Eighth Cause of Action that is captioned as a claim for “libel per se” (capitalization and underscoring omitted), Ladden alleged that on May 20, Canter sent an email to Ladden’s instructor, Russell, in which she “accused [Ladden] of fraud.” He asserted that this communication constituted libel per se. He alleged that it “exposed [him] to hatred, contempt, ridicule and obloquy,” that he did not commit criminal fraud and Canter knew or should have known this, and he was damaged by the accusation. He also alleged as a separate count that the statement constituted an accusation that he had committed civil fraud that was libel per se. Ladden alleged in the Twenty-Ninth Cause of Action—incorporating by reference essential allegations of the prior cause of action—that Canter’s accusation of criminal fraud constituted slander per se.

“The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” (*Wong, supra*, 189 Cal.App.4th at p. 1369, citing *Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) “It is an essential element of defamation that the publication be of a false statement of *fact* rather than opinion. [Citations.]” (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181, citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340.) “[C]ourts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally

protected and imposing on the other civil liability for its abuse.” (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601 (*Gregory*).

The determination of whether the statement the plaintiff claims to be defamatory constitutes fact or opinion is a question of law decided by the court. (*Gregory, supra*, 17 Cal.3d at p. 601.) The inquiry is based upon “a ‘totality of the circumstances’ test . . . First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. [Citations.] Where the language of the statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion. [Citation. ¶] Next, the context in which the statement was made must be considered . . . [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. [Citation.] ‘ “[T]he publication in question must be considered in its entirety; . . . It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader [citations], and construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning which may have been fairly presumed to have been conveyed to those who read it. [Citation.] If the publication so construed is not reasonably susceptible of a defamatory meaning and cannot be reasonably understood in the defamatory sense pleaded, the demurrer was properly sustained. [Citations.]” ’ [Citations.]” (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261 (*Baker*).

A statement that appears in the form of an opinion may not be protected by the First Amendment and thus may be actionable as defamation “ ‘if it implies factual assertions.’ ” (*Baker, supra*, 42 Cal.3d at p. 266.) This principle is founded upon the Restatement: “A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” (Rest.2d Torts, § 566; see

Okun v. Superior Court (1981) 29 Cal.3d 442, 451-452 (*Okun*) [reciting Restatement rule].) Thus, in *Baker*, the high court held nondefamatory a statement in a television program review containing the beginning phrase, “ ‘My impression is.’ ” (*Baker, supra*, 42 Cal.3d at p. 256.) It based this conclusion, in part, upon the reasoning that it had “used flashy hyperbole,” and “did not imply the existence of any undisclosed facts.” (*Id.* at p. 267; see also *Okun, supra*, 29 Cal.3d at pp. 451-452 [letter opposing repeal of ordinance that would have permitted plaintiff to build condominium project not defamatory; “letter seems ‘cautiously phrased in terms of apparency’ ” rather than implying additional unstated facts].)

Here, the allegedly defamatory statement in Canter’s May 20 email to Russell was: “Is that [Ladden’s] legal name? [O]r is he using his wife’s name_[,] and if that is the case_[,] that is illegal [and] to do it is fraud.” Canter’s email, which referenced Ladden’s complaint about the practice room HVAC issue, resulted from his email complaint to her on the same day. Far from being an assertion of fact, Canter’s statement was premised upon a hypothetical or surmised fact that Ladden *might be* using his wife’s name to enroll in classes, and *if* he were doing so, it would be “illegal” and “fraud.” The speculative nature of the statement is borne out by the concluding passage of the email, where Canter asked Russell to “let [her] know about the name use and [she would] take it from there and notify admissions.” Moreover, the email contains no implication that there were additional, unstated facts supporting any opinion concerning Ladden’s conduct. (*Baker, supra*, 42 Cal.3d at p. 267; see also *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 386-387; Rest.2d Torts, § 566.)

Taking the statement as a whole and considering its entire context, Canter’s email as “ ‘so construed is not reasonably susceptible of a defamatory meaning and cannot be reasonably understood in the defamatory sense pleaded.’ ” (*Baker, supra*, 42 Cal.3d at

p. 261.) The court therefore properly sustained the demurrer to the Twenty-Eighth and Twenty-Ninth Causes of Action.⁸

VI. Order Denying Leave to Amend

As we have noted, we review the trial court's order denying leave to amend under an abuse of discretion standard. (*Schifando, supra*, 31 Cal.4th at p. 1081.) Ladden contends that the court abused its discretion here, citing *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240, for the principle that it is only in a rare instance that a trial court should deny leave to amend after sustaining a demurrer to an initial complaint. But this view must be tempered with the countervailing principle that no abuse of discretion will be found unless the plaintiff demonstrates a reasonable possibility that an amendment to the complaint would have cured the defect. (*Blank, supra*, 39 Cal.3d at p. 318.)

Ladden did not raise any suggestion below in his opposition to the demurrer as to the manner in which the complaint could be amended to cure the defects identified above.⁹ And—other than the statement in his opening brief that, assuming arguendo the existence of any defects in the complaint, his appellate arguments “demonstrate more than a reasonable possibility they have been cured by amendment”—Ladden offers nothing to this court. In view of the fact that all of the equitable claims and most of the damage claims are barred by both the judicial and administrative remedies exhaustion doctrines, and because the remaining damage claims substantively do not state viable

⁸ It is apparent that Canter's email, as the trial court concluded, was also not actionable based upon the conditional common-interest privilege provided in Civil Code section 47, subdivision (c), which protects “communications made in good faith on a subject in which the speaker and hearer share[] an interest or duty.” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 727.) Since we have concluded, however, that the communication is not defamatory, it is unnecessary for us to address this issue. (See *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 655 [appellate courts generally “decline to decide questions not necessary to the decision”].)

⁹ Ladden elected to not order a reporter's transcript from the hearing on demurrer, so there is no record of what he may have argued at that hearing.

causes of action (and through amendment, cannot be cured), we conclude that Ladden has failed to meet his burden of showing the trial court abused its discretion by denying leave to amend. (*Campbell, supra*, 35 Cal.4th at p. 320.)

DISPOSITION

The judgment is affirmed. Each party shall bear his/her/its own respective costs on appeal.¹⁰

¹⁰ Respondents' brief is noncompliant in that fails to include proper citations to the appellate record, referring to paragraphs of and exhibits to the complaint rather than to the appellant's appendix (see rule 8.204(a)(1)(C)); and includes citation to material that is not part of the record below (see rule 8.124(g)). Of more significance to this court—in light of its impact upon this court's ability to efficiently address the issues on appeal—is the absence of substantive argument in respondents' brief. Respondents (1) cite to a mere three cases, all ones having been cited by the trial court in its order; (2) do not discuss *any* of the legal authorities (68 cases and 16 statutes) cited by Ladden in his opening brief; and (3) fail to address substantively virtually *any* of the legal arguments made by Ladden in his 55-page opening brief. Although respondents are the prevailing parties, in light of the lack of guidance or substantive argument provided in their appellate brief, we exercise our discretion under rule 8.278(a)(5) to deny costs in the interests of justice.

Walsh, J. *

WE CONCUR:

Rushing, P.J.

Premo, J.

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H042422

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.