

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

FARZANA CHAUDHRY,
Plaintiff and Appellant,
v.
STATE OF CALIFORNIA et
al.,
Defendants and
Respondents.

A173501

(Solano County
Super. Ct. No. FCS056441)

Plaintiff Farzana Chaudhry appeals after the trial court granted judgment on the pleadings for the State of California; Department of Corrections and Rehabilitation (CDCR); and William Kushner, Rashad Hanif, and Lori Austin (individual defendants) on Chaudhry's causes of action for retaliation under Labor Code¹ section 1102.5 and the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.; Whistleblower Protection Act) and constructive discharge in violation of public policy. Chaudhry does not challenge the judgment on her constructive discharge cause of action but contends the trial court erred when it ruled that she failed to satisfy the claims presentation requirement of the Government Claims Act (Gov.

¹ Subsequent undesignated statutory citations are to the Labor Code.

Code, § 810 et seq.) for her claim under section 1102.5 and failed to exhaust her administrative remedies for her Whistleblower Protection Act cause of action.

We agree with Chaudhry in part. Her operative complaint adequately alleges compliance with the Government Claims Act as to one theory supporting her section 1102.5 cause of action. But she does not allege facts showing that she satisfied the exhaustion of remedies requirement for her Whistleblower Protection Act cause of action, and she does not identify any potential amendment that would remedy this defect.

The individual defendants argue, as an alternative basis for affirming the judgment in their favor, that individual supervisors are not liable for retaliation under section 1102.5. In a matter of first impression in California courts, we agree. That statute, when examined in the context of the statutory scheme of which it is a part, is ambiguous as to whether it applies to individual supervisors. In resolving that ambiguity, we take guidance from *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, which held that an employment statute worded similarly to Labor Code section 1102.5 does not apply to individual supervisors. We will therefore affirm the judgment in part and reverse it in part.

BACKGROUND²

Chaudhry began working for CDCR in 2007. She was most recently assigned to work as a dental assistant at the California

² Because this appeal concerns the trial court's ruling on a motion for judgment on the pleadings, we take our facts from

Medical Facility (CMF) in Vacaville, which provides dental care for prison inmates. In April 2018, Chaudhry told her immediate supervisor, Rashad Hanif, that certain personal protective equipment was contaminated and, a few days later, filed a complaint with the Department of Industrial Relations' Division of Occupational Safety and Health Administration (Cal-OSHA). CMF management knew that Chaudhry had complained.

In retaliation, in July 2018 Hanif issued an unwarranted letter of instruction to Chaudhry that was critical of her job performance. CMF management also retaliated by never naming her acting supervising dental assistant, which would have helped her advance in her career.

In May 2019, Chaudhry filed another complaint with Cal-OSHA about workplace safety issues. In October 2019, CMF retaliated by suspending Chaudhry without pay or benefits for one month for unprofessional conduct, with no basis in fact.

In January 2020, Chaudhry returned to work and, at the end of the month, told Cal-OSHA that CMF was still not in compliance. Cal-OSHA inspected the CMF dental clinic. Chaudhry told CMF in an email that she had prompted the Cal-OSHA inspection.

In mid-February 2020, a CMF supervising dentist, Dr. William Kushner, baselessly accused Chaudhry of having a tool discrepancy. In March 2020, Hanif issued Chaudhry an

Chaudhry's operative pleading, which is her second amended complaint. (*Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 400, fn. 2.)

employee counseling record stating that her sterilization practices violated workplace rules.³ This record had no basis in fact. In April 2020, Chaudhry called her employer to say she was ill and taking sick leave. Hanif asked her for a doctor's note. Chaudhry's union told the supervisor that a doctor's note was not required.

In May 2020, Cal-OSHA issued CMF a \$450 fine for a violation. CMF management accused Chaudhry of wearing a mask incorrectly after she raised concerns about the clinic's COVID-19 safety practices. Management also asked her for a doctor's note for taking sick leave in August 2020. Chaudhry suffered from sleepless nights and anxiety.

In June 2020, Chaudhry filed another Cal-OSHA complaint, which Cal-OSHA investigated. Chaudhry also filed an internal complaint regarding sterilization practices in the dental clinic.

In September 2020, Chaudhry presented a government claim to the State of California pursuant to the Government Claims Act. The State rejected the claim in October 2020.

In November 2020, CMF terminated Chaudhry.⁴

³ The complaint alleges this occurred in March 2019. Chaudhry represents that she can amend to state the proper date of March 2020. Like defendants, we accept her representation.

⁴ Chaudhry represents that she can amend her complaint to state that the notice of her termination stated that it was effective December 8, 2020. Nothing in our decision turns on the difference between the dates, so we use the date alleged in the operative complaint.

In April 2021, Chaudhry filed her original complaint in this action, alleging the same facts as her September 2020 government claim as well as her termination. She alleged causes of action for retaliation under section 1102.5 and common law wrongful termination.

The State Personnel Board (SPB) overturned the September 2020 dismissal, and Chaudhry was reinstated effective January 2022.⁵

In September 2021, Chaudhry filed a complaint with the SPB alleging that defendants retaliated against her in violation of the Whistleblower Protection Act. The SPB dismissed the complaint with leave to amend, and Chaudhry filed an amended complaint with the SPB in November 2021. The SPB told the parties that it would not complete its factfinding within 60 working days. Chaudhry exhausted her remedies with the SPB as of March 11, 2022.

On Chaudhry's first day back at work in January 2022, Hanif made Chaudhry wait for one and a half hours before receiving gate clearance. Thereafter, Hanif caused her to receive assignments with no clear direction and treated her rudely and combatively, such as by yelling at her about some memos without justification. He denied her request to pick up her paycheck when the rest of the clinic staff was allowed to leave work and refused to help Chaudhry get log-on access to a computer system.

⁵ Chaudhry's complaint does not give a date for this action, but Chaudhry represents that she can amend to allege it occurred in August 2021.

In February 2022, Hanif caused Chaudhry not to be added to the shared time calendar, creating a risk that management would not receive her requests for time off. He also caused delays in Chaudhry receiving her keys.

Later in February 2022, CDCR issued an unwarranted notice of adverse action dismissing Chaudhry again. This dismissal interrupted Chaudhry's pay and cut off her medical and dental insurance. Chaudhry filed an appeal with the SPB.

In May 2022, Chaudhry filed her first amended complaint in this action. She alleged causes of action for retaliation under section 1102.5 and the Whistleblower Protection Act.

CDCR withdrew the February 2022 dismissal in July 2022, and Chaudhry was reinstated as of August 29, 2022. Chaudhry involuntarily resigned on her first day back at work.

In January 2023, Chaudhry presented another government claim to the State of California pursuant to the Government Claims Act. This claim alleged the facts surrounding her constructive termination. The State failed to respond within 45 days of acknowledging receipt.

In May 2023, Chaudhry filed the second amended complaint in this action. She again alleged causes of action for retaliation under section 1102.5 and the Whistleblower Protection Act. She also added a cause of action for constructive discharge in violation of public policy.

In September 2024, the trial court set a January 9, 2025, trial date. In mid-December 2024, defendants filed a motion for judgment on the pleadings. They sought to dismiss Chaudhry's

section 1102.5 retaliation claim as it related to the first termination and the alleged constructive discharge. They sought to dismiss her Whistleblower Protection Act cause of action to the extent it relied on any events following November 2021. Defendants also sought to dismiss entirely the constructive discharge cause of action. The trial court said it was granting the motion in its entirety, dismissed all of Chaudhry's causes of action without leave to amend, and entered judgment accordingly.⁶

DISCUSSION

I. Standard of Review

We review an order granting a motion for judgment on the pleadings using the same standard that governs review of an order sustaining a general demurrer. (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32.) “A defendant’s motion for judgment on the pleadings should be granted if, under the facts as alleged in the pleading or subject to judicial notice, the complaint fails to state facts sufficient to constitute a cause of action. [Citation.] We accept the complaint’s properly pleaded factual allegations as true and give them a liberal construction. [Citations.] We do not accept as true ‘any contentions, deductions or conclusions of fact or law contained therein.’ [Citation.] We review de novo, and ‘“are required to render our independent judgment on whether a cause of action has been stated” ’ [citation], without regard for the

⁶ Chaudhry does not challenge the ruling on her third cause of action for constructive discharge in violation of public policy.

trial court’s reasons for granting the motion.” (*Ibid.*) As when a demurrer is sustained without leave to amend, “ ‘ ‘ ‘ “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” ’ ’ ’ ” (*People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C.* (2023) 94 Cal.App.5th 521, 532–533.) “A request for leave to amend may be made for the first time on appeal.” (*Jensen v. The Home Depot, Inc.* (2018) 24 Cal.App.5th 92, 97.)

II. Section 1102.5 Cause of Action

A. Legal Standard

“Suits for money or damages filed against a public entity are regulated by statutes contained in division 3.6 of the Government Code, commonly referred to as the Government Claims Act.” (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 989 (*DiCampli-Mintz*); see Gov. Code, § 810, subd. (b).) With certain exceptions not relevant here, no suit may be brought against the state for money or damages for an injury for which the state is liable until the plaintiff has presented a written claim to the Department of General Services and that department has either acted upon it or the claim is deemed to have been denied. (Gov. Code, §§ 905.2, subd. (b)(3), 915, subd. (b)(1), 945.4.) A plaintiff must present a claim for “injury to person or to personal property or growing crops” within six months after accrual and within a year of accrual for any other

cause of action. (Gov. Code, § 911.2, subd. (a).) The state has 45 days to act on a claim or it is deemed to have been rejected. (Gov. Code, § 912.4, subds. (a), (c).) Causes of action against individual public employees based on acts in the scope of their employment are generally barred “if an action against the employing public entity for such injury is barred” for failure to comply with the claim presentation requirements. (Gov. Code, § 950.2.)

“‘[T]he purpose of the claims statutes is not to prevent surprise, but “to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity’s actual knowledge of the circumstances surrounding the claim.” [Citation.] The claims statutes also “enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future.” [Citations.]’ [¶] Moreover, the intent of the Government Claims Act is ‘not to expand the rights of plaintiffs against government entities. Rather, the intent of the act is to confine potential governmental liability to rigidly delineated circumstances.’ [Citations.] The claimant bears the burden of ensuring that the claim is presented to the appropriate public entity.” (*DiCampli-Mintz, supra*, 55 Cal.4th at p. 991.)

“‘The filing of a claim is a condition precedent to the maintenance of any cause of action against the public entity and is therefore an element that a plaintiff is required to prove in order to prevail.’” (*DiCampli-Mintz, supra*, 55 Cal.4th at p. 990,

italics omitted.) “[F]ailure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action.” (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.) Each cause of action in a complaint “ ‘must [be] reflected in a timely claim. In addition, the factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint; even if the claim were timely, the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.’ ” (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 376.)

“[S]ection 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be ‘demonstrated by a preponderance of the evidence’ that the employee’s protected whistleblowing was a ‘contributing factor’ to an adverse employment action. (§ 1102.6.) Then, once the employee has made that necessary threshold showing, the employer bears ‘the burden of proof to demonstrate by clear and convincing evidence’ that the alleged adverse employment action would have occurred ‘for legitimate, independent reasons’ even if the employee had not engaged in protected whistleblowing activities.” (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712.) An actionable adverse employment action is one “ ‘that materially affects the terms, conditions, or privileges of employment.’ [Citation.] ‘Minor or relatively trivial adverse actions by

employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment.’ [Citations.] This requirement “ ‘guards against both “judicial micromanagement of business practices” [citation] and frivolous suits over insignificant slights.’ [Citation.] Absent this threshold showing, courts will be thrust into the role of personnel officers, becoming entangled in every conceivable form of employee job dissatisfaction.” ’ ” (*Francis v. City of Los Angeles* (2022) 81 Cal.App.5th 532, 541.)

B. Analysis

Chaudhry alleged in her operative second amended complaint that she presented two claims to the Department of General Services, one on September 17, 2020, and another on January 23, 2023. She argues that her complaint currently alleges facts preceding those dates that support her cause of action.

1. September 2020 claim

As to the September 2020 claim, Chaudhry first argues that she alleged retaliatory acts between March 17 and September 17, 2020, that support her cause of action. The alleged retaliatory acts are the March 19, 2020, issuance of an employee counseling record accusing her of having unsafe sterilization practices; asking her to provide a doctor’s note for a day of sick leave in April 2020; accusing her of wearing a mask incorrectly; and again asking for a doctor’s note for sick leave in August 2020. None of these actions constitutes an adverse

employment action. The two instances of asking for a doctor's note and Chaudhry's union stepping in to rebuff the request are trivial, as is a single instance of accusing Chaudhry of wearing a mask incorrectly. The issuance of the counseling record comes closer, but it still falls short because Chaudhry has not alleged that such counseling records have any consequence, such as leading to the denial of benefits or privileges. (*McRae v.*

Department of Corrections & Rehabilitation (2006)

142 Cal.App.4th 377, 392 [letter of instruction was not an adverse employment action on its own because of lack of evidence that it was likely to lead to the denial of benefits or privileges].) Even considering all of the actions together, from an objective perspective, the alleged actions did not materially affect the terms, conditions, or privileges of Chaudhry's employment. (See *Francis v. City of Los Angeles, supra*, 81 Cal.App.5th at p. 543 [employee did not prove adverse employment action despite evidence that employer improperly ordered her to attend therapy, took her off high profile cases, gave her conflicting assignments, tried to disrupt her planned vacation, and told her to report perceived retaliation in a manner that violated employer policy].)

Chaudhry next invokes the continuing violation doctrine. "Generally, a 'cause of action accrues 'when [it] is complete with all of its elements' — those elements being wrongdoing, harm, and causation." [Citation.] This is [called] the "last element" accrual rule: ordinarily, the statute of limitations runs from "the occurrence of the last element essential to the cause of action." ' [Citation.] An exception to this rule is the continuing violation

doctrine. [Citation.] “The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them.’” (*Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1124.) Because the six-month government claim presentation requirement, like a statute of limitations, begins with a cause of action’s accrual, a continuing violation that culminates within the six-month window can satisfy the government claim presentation requirement even if some events of the violation took place outside that window. (*Ibid.*)

“For the continuing violation doctrine to apply, a plaintiff must show the defendant engaged in ‘a pattern of reasonably frequent and similar acts [that] may, in a given case, justify treating the acts as an indivisible course of conduct actionable in its entirety, notwithstanding that the conduct occurred partially outside and partially inside the limitations period.’” (*Willis v. City of Carlsbad, supra*, 48 Cal.App.5th at p. 1124.) A court should “consider ‘whether “the employer’s. . . actions [were] (1) sufficiently similar in kind — recognizing . . . that similar kinds of unlawful employer conduct . . . may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence.” ’” (*Id.* at pp. 1124–1125.) A violation achieves a degree of permanence and a cause of action accrues “‘either when the course of conduct is brought to an end, as by the employer’s cessation of such conduct or by the employee’s resignation, or

when the employee is on notice that further efforts to end the unlawful conduct will be in vain.’ ” (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402, italics omitted, quoting *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823 (*Richards*).)

Chaudhry invokes the continuing violation doctrine to argue that defendants’ acts in the spring and summer of 2020 were part of a pattern stretching back to 2018 that in the aggregate constitutes an adverse employment action. She argues the pattern began in April 2018 when CMF management began to nitpick and criticize her work performance after learning of her complaint to Cal-OSHA. In July 2018, Hanif issued Chaudhry a baseless and unwarranted letter of instruction that was critical of her job performance. CMF management also refused to name her acting supervising dental assistant, which denied her a benefit for career advancement purposes. In October 2019, CMF suspended Chaudhry for unprofessional conduct, with the suspension lasting from December 3, 2019, to January 3, 2020, and depriving Chaudhry of pay and health insurance. And in February 2020, Dr. Kushner accused her of having a tool discrepancy.

Even considering these actions together with those mentioned previously that occurred during the six-month period preceding Chaudhry’s September 2020 claim, we are not convinced that they satisfy the requirements of the continuing violation doctrine. The alleged actions are not similar, but we will assume for the sake of argument that they represent

different forms of retaliatory conduct. Yet the few acts alleged stretched over more than two years and did not occur with reasonable frequency. There was a gap of more than a year in the middle of the period, from July 2018 to October 2019, in which defendants took no allegedly retaliatory actions at all.

Moreover, Chaudhry served the full period of her suspension by January 3, 2020. The imposition of the suspension, with its attendant loss of pay and benefits, was a permanent and completed act. Certainly by that point Chaudhry was on notice that any attempts to end the unlawful retaliation would be fruitless. (See *Jumaane v. City of Los Angeles*, *supra*, 241 Cal.App.4th at pp. 1403–1404 [after serving suspension, plaintiff no longer had any hope of ending harassment and retaliation].) The end of the suspension therefore marked the accrual of her cause of action and started the six-month period for Chaudhry to present a government claim based on a continuing retaliation violation. Chaudhry’s September 2020 government claim was too late.

Chaudhry resists this conclusion, characterizing her suspension as temporary. While the period of the suspension was temporary, the fact of the suspension was permanent, as was the loss of pay. Nothing Chaudhry could do after that point would remedy her financial loss short of presenting a claim and litigating if necessary. If a temporary suspension were insufficiently permanent, then nothing but outright termination would qualify as permanent. We reject this argument.

Chaudhry also contends that the Supreme Court has said that the weight of the permanence factor is “highly variable” and should be deemphasized when the similarity and frequency factors are sufficient. (*Richards, supra*, 26 Cal.4th at pp. 814–815.) The frequency factor is not sufficient here, as noted above, since there was a gap of over a year from July 2018 to October 2019. Besides, the passages from *Richards* that Chaudhry cites are from its discussion of various federal cases’ holdings under federal law, not our Supreme Court’s holding on California law. (*Id.* at pp. 812–818.) *Richards*’ holding was that “ ‘permanence’ in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.” (*Id.* at p. 823.) Translating this into the context of retaliation claims, just as in *Jumaane*, Chaudhry’s suspension, with its attendant loss of pay and benefits, should have made clear to her that further informal conciliation to end the alleged retaliation would be futile.

2. January 2023 claim

Chaudhry’s January 2023 government claim apparently set forth the same facts as her operative claim regarding her alleged constructive discharge on August 29, 2022. The August 2022 constructive discharge was within six months of the January 2023 claim, so Chaudhry contends it can support her section 1102.5 cause of action.

Defendants do not dispute that the constructive discharge occurred within the six-month window of Chaudhry's January 2023 government claim or that constructive discharge can be a form of retaliation actionable under section 1102.5(b). Instead, they first argue that the complaint fails to allege a constructive discharge occurred because defendants' actions do not constitute a constructive discharge as a matter of law.

Constructive discharge is "a doctrine that transforms what is ostensibly a resignation into a firing." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.) "[T]o establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Ibid.*) "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." (*Id.* at p. 1247.) "The standard by which a constructive discharge is determined 'is an objective one, and the proper focus is on the working conditions themselves.'" (*Simers v. Los Angeles Times Communications LLC* (2018) 18 Cal.App.5th 1248, 1270.)

Chaudhry equates a continuous pattern for the purposes of constructive discharge with the continuing violation doctrine and contends that her complaint pleads a continuous pattern,

pointing to her allegations that from 2018 onwards she suffered unwarranted criticism of her work performance, unjustified demands, rude and disrespectful treatment, a suspension, two formal terminations, and roadblocks to efficient discharge of her duties. A continuous pattern could reasonably be viewed as an aggravated form of a continuing violation. (*Richards, supra*, 26 Cal.4th at p. 822 [referring to a pattern of harassment that constitutes a continuing violation as “not ris[ing] to the level of constructive discharge”].) But since we have concluded that Chaudhry has not alleged adequate facts to show a continuing violation leading up to September 2020, those facts also do not show a continuous pattern to that date.

However, a jury could conclude that defendants’ acts after September 2020, namely the termination of Chaudhry in November 2020, obstruction of her work in January and February 2022 after the SPB reinstated her, second dismissal of Chaudhry in February 2022, and rescission of that dismissal effective August 2022, taken together, meet the high bar of unusually aggravated conditions that were intolerable and therefore amounted to a constructive discharge. Chaudhry could reasonably be expected to return to work after the SPB reinstated her, on the assumption that defendants would be chastened by the experience of having the termination overturned and refrain from unjustified terminations in the future. Defendants are also correct that workplace criticism or discord like the yelling Chaudhry alleges in January 2022 is a common part of employment and will not, on its own, create a

constructive discharge. But defendants ignore the effect of the second termination and its rescission. Chaudhry could not reasonably be expected to continue to work for defendants after they persisted in retaliating by obstructing her performance of her duties upon her initial return to work and terminating her again less than one month later, only to rescind the second termination a few months after that. No employee should have to tolerate repeated baseless retaliatory terminations interspersed with attempts to sabotage the employee's ability to work. A jury could determine that a reasonable employee in Chaudhry's alleged position would be compelled to resign to find secure employment, rather than suffer repeated interruptions in pay and benefits. We therefore conclude that these actions could constitute a constructive discharge.

Defendants next argue that Chaudhry's constructive discharge theory is an improper attempt to revive adverse employment actions, such as the November 2020 and February 2022 terminations, that occurred more than six months before the January 2023 government claim and would otherwise not be actionable. Defendants assert that the only employment action they took within six months of the government claim was the July 2022 rescission of the February 2022 termination, which was not an *adverse* action. Defendants further argue that allowing Chaudhry to proceed on a constructive discharge theory would prevent them from proving that the alleged adverse employment action would have occurred for legitimate, independent reasons, which section 1102.6 allows as a defense.

These arguments are without merit. First, a constructive discharge cause of action is not a backdoor revival of barred employment actions or the result of an employee's delayed reaction to work conditions, as defendants posit. The Supreme Court has twice rejected this view, once in the context of a constructive discharge cause of action and again in the context of the continuing violation doctrine. (*Richards, supra*, 26 Cal.4th at p. 822, citing *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731.) *Mullins* explained, "The essence of constructive discharge is that it is a termination of employment secured *by the employer* through indirect means. The employer remains in control in that he or she coerces the employee's resignation. . . . Further, the employer, who has created or permitted the persistence of known intolerable conditions, should not be able to complain of delay when the employee retains employment in the hope that conditions will improve or that informal conciliation may succeed." (*Mullins*, at p. 740.) *Richards* quoted this language and extended it to the continuing violation doctrine. (*Richards*, at p. 822.) Because a constructive discharge is an employer's action, Chaudhry's August 2022 resignation was an adverse employment action by defendants. The conditions that created Chaudhry's August 2022 resignation may have begun outside the six-month window, but that does not mean the constructive discharge of August 2022 itself occurred earlier.

For the same reasons, it is immaterial that Chaudhry filed her initial complaint in this action in April 2021, before she presented the January 2023 government claim. A plaintiff

generally cannot cure a pre-lawsuit failure to present a government claim based on certain facts by presenting a claim after commencing litigation based on those facts. (*Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 246–247.) But the August 2022 constructive discharge occurred after Chaudhry filed her April 2021 complaint and May 2022 first amended complaint, so she cannot be faulted for failing to include it in a government claim presented before filing those pleadings. It is sufficient that Chaudhry alleges she included the constructive discharge theory in her government claim in January 2023, which she presented before alleging a cause of action based on constructive discharge in the second amended complaint in May 2023.

Second, allowing Chaudhry to proceed on a constructive discharge theory does not deprive defendants of their section 1102.6 defense. Defendants can still prove that they had legitimate, independent reasons for taking the actions that we have found sufficiently state a cause of action for retaliation by constructive discharge. For example, defendants could present evidence that they had a legitimate reason for terminating Chaudhry the first time in November 2020 or a second time in February 2022, or a legitimate basis for taking the various actions in January and February 2022 that Chaudhry alleges obstructed her ability to perform her duties. While this would involve proving defendants' reasons for actions taken outside the

six-month period, as noted *ante* that does not mean that the constructive discharge itself occurred outside the period.⁷

C. Liability of Individual Defendants

The individual defendants contend, as an alternative basis for affirming the judgment in their favor, that they cannot be liable for a section 1102.5 cause of action as a matter of law. Section 1102.5, subdivision (b) (section 1102.5(b)) states in pertinent part, “An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information” to various parties concerning reasonably suspected violations of law. The individual defendants argue that they are not liable because they are not an employer and the

⁷ Because we conclude Chaudhry’s complaint is sufficient as to her section 1102.5 cause of action based on a theory of constructive discharge and judgment on the pleadings, being the functional equivalent of a demurrer, cannot be entered as to part of a cause of action (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452), we need not decide whether Chaudhry should be allowed to amend her complaint to allege other factual bases or other theories for her section 1102.5 cause of action, such as delayed accrual of her cause of action as to her first termination in November 2020. We also need not consider the argument Chaudhry raised for the first time in her reply brief that she is prepared to plead in an amended complaint that under Government Code section 911.3, subdivision (b) defendants waived the defense that any of Chaudhry’s government claims were not timely presented by failing to give her written notice of the untimeliness. Chaudhry forfeited this argument by failing to raise it in her opening brief. (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 559.) If Chaudhry seeks leave to amend her complaint in the trial court on remand, the trial court may consider in the first instance whether to grant such leave at this point in the litigation. We express no opinion on the question.

statute’s “any person acting on behalf of an employer” language should not be construed to impose personal liability on individual supervisors or managers. We agree.

“ ‘Statutory interpretation is “an issue of law, which we review de novo.” ’ [Citation.] ‘Our overriding purpose in construing . . . any statute[] is “to adopt the construction that best gives effect to the Legislature’s intended purpose.” [Citation.] In determining that intended purpose, we follow “[s]ettled principles.” [Citation.] “We consider first the words of a statute, as the most reliable indicator of legislative intent.” [Citation.] In doing so, we give the words “their usual and ordinary meaning,” viewed in the context of the statute as a whole. [Citation.] As part of this process, “ “[every] statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.” ’ ’ ’ [Citation.]

“ ‘When the language of a statute is ambiguous — that is, when the words of the statute are susceptible to more than one reasonable meaning, given their usual and ordinary meaning and considered in the context of the statute as a whole — we consult other indicia of the Legislature’s intent, including such extrinsic aids as legislative history and public policy. [Citations.] If there is no ambiguity, “ “ ‘we presume the Legislature meant what it said and the plain meaning of the statute governs.’ ” ’ ” ’ ” (*Make UC a Good Neighbor v. Regents of University of California* (2024) 16 Cal.5th 43, 55.) “Text may sometimes seem unambiguous in isolation, even as it harbors greater complexity when considered

in the context of surrounding provisions and the overall statutory structure.” (*People v. Garcia* (2017) 2 Cal.5th 792, 805.)

Chaudhry argues that on its face section 1102.5(b) imposes liability on individuals like supervisors, since it prohibits retaliation by “any person acting on behalf of the employer.” She cites the definition of “person” in section 18, which applies unless the context requires otherwise (§ 5) and states that “person” means “any person, association, organization, partnership, business trust, limited liability company, or corporation” (§ 18). She notes that section 1103, which is in the same chapter as section 1102.5, states that “[a]n employer or any other person or entity that violates this chapter is guilty of a misdemeanor” (§ 1103.) We agree that the language of section 1102.5(b) is susceptible of Chaudhry’s interpretation. But consideration of the statute’s larger context undercuts her position.⁸

Section 1104, contained in the same chapter as section 1102.5, remains unchanged from its enactment in 1937 and states, “In all prosecutions under this chapter, the employer is responsible for the acts of his managers, officers, agents, and employees.” (§1104.) Section 1105, also in the same chapter, states, “Nothing in this chapter shall prevent the injured

⁸ Chaudhry also cites section 1102.5, subdivision (i), which states, “For purposes of this section, ‘employer’ or ‘a person acting on behalf of the employer’ includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.” Section 6400 categorizes employers at multiemployer worksites by their different roles and responsibilities. Section 1102.5, subdivision (i)’s definition is not helpful here.

employee from recovering damages *from his employer* for injury suffered through a violation of this chapter.” (Italics added.) While these provisions do not foreclose the possibility of managers, agents, or employees also being individually liable, they do suggest that the Legislature has focused on imposing liability on employers for actions by supervisors that violate section 1102.5, not the supervisors themselves. Section 1102.6, which as discussed *ante* establishes the shifting burdens of proof in an action brought pursuant to section 1102.5, further suggests that the Legislature did not intend to impose liability on individual supervisors. That statute states, “In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, *the employer* shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.” (§ 1102.6, italics added.) Section 1102.6 does not mention persons acting on behalf of an employer or give them the same affirmative defense as employers. There is no conceivable reason to treat employers more leniently in a section 1102.5 cause of action than an individual supervisor. The absence of any reference to persons other than employers in section 1102.6 suggests that the Legislature intends for

employees to be able to sue only employers, not individual supervisors, under section 1102.5.

To resolve the ambiguity in this statutory scheme, we consider the legislative history of section 1102.5. (*Make UC a Good Neighbor v. Regents of University of California, supra*, 16 Cal.5th at p. 55.) Prior to 2014, section 1102.5(b) only prohibited retaliation by an “employer.” (Former § 1102.5(b), as amended by Stats. 2003, ch. 484, § 2.) On its face, this language did not impose liability on individual supervisors acting for an employer. One California decision held that only employers, not individual supervisors, could be liable for claims of retaliation under various statutes including former section 1102.5, although it did not discuss the language of section 1102.5 and its reasoning was that the plaintiff employee alleged retaliation by discharge and only an employer could discharge an employee. (*Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 330.) Several federal district court decisions held more clearly that the language of section 1102.5 at the time did not allow plaintiffs to assert a cause of action against individual supervisors. (E.g., *Vierria v. California Highway Patrol* (E.D.Cal. 2009) 644 F.Supp.2d 1219, 1244 [“The relevant portions of the statute clearly indicate that the statute is meant to establish prohibited activity by employers, rather than individuals.”]; *Kun Ma v. Pall Corporation* (C.D.Cal., Sept. 7, 2010, No. CV 10-4324-JFW (JCGx) 2010 U.S. Dist LEXIS 154273, 2010 WL 11601192 at *3 [plaintiff could not assert former section 1102.5 cause of action

against an individual supervisor so defendant supervisor was fraudulently joined].)

In two separate bills enacted in 2013, the Legislature added to section 1102.5(b) the “any person acting on behalf of an employer” language on which Chaudhry relies. (Stats. 2013, ch. 577, § 5; Stats. 2013, ch. 732, § 6.) The Legislature also added identical “any person acting on behalf of the employer” language to subdivisions (a), (c), and (d) of section 1102.5 and made other changes. (Stats. 2013, ch. 577, § 5; Stats. 2013, ch. 732, § 6.) The legislative history explains that the impetus for both bills was the Legislature’s concern that employers and unscrupulous attorneys representing them were threatening to report workers to immigration authorities when the workers attempted to exercise their employment law rights. (E.g., Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 666 (2013–2014 Reg. Sess.) as amended April 11, 2013, pp. 5–6; Assem. Com. on Judiciary, Analysis of Assem. Bill No. 263 (2013–2014 Reg. Sess.) as amended April 11, 2013, pp. 4–5.) The legislative history does make clear that the Legislature intended to extend the prohibition on retaliation by employers to “all persons and entities.” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 263 (2013–2014 Reg. Sess.) as amended April 11, 2013, p. 6; see also, e.g., Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 666 (2013–2014 Reg. Sess.), as amended April 11, 2013, p. 3.) However, the Legislature provided no explanation for its motivation for this specific change, and nothing in the legislative history suggests the Legislature

intended it to allow employees to sue individual managers or supervisors personally.

The Legislature's silence regarding supervisors and the purpose of the "any person" language is noteworthy when considered against the backdrop of our Supreme Court's jurisprudence regarding liability of individual supervisors under other employment statutes. *Jones v. Lodge at Torrey Pines Partnership, supra*, 42 Cal.4th at p. 1160 (*Jones*) held that the California Fair Housing and Employment Act (Gov. Code, § 12900 et seq.; FEHA) does not make non-employer individuals such as supervisors individually liable for retaliation. The statute at issue, Government Code section 12940, subdivision (h), stated then (as it still does) that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.'" (*Jones*, at pp. 1161–1162.) The Supreme Court recognized that the statute's use of "person" lent itself to the plaintiff's interpretation that it extended to individuals. (*Id.* at pp. 1162–1163.) But it found this language not plain and far less clear than subdivision (j)(3) of the same statute, which said that "[a]n employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee" (*Id.* at p. 1162.) The court also compared subdivision (h) to subdivision (a), which

addressed prohibited discrimination by an “employer.” (*Id.* at pp. 1162–1163.)

In *Reno v. Baird* (1998) 18 Cal.4th 640, 643, 645 (*Reno*), the court had held that Government Code section 12940, subdivision (a) did not make individual supervisors liable for discrimination even though another statute defined “‘employer’” as including “‘any person acting as an agent of an employer, directly or indirectly.’” It construed the statute as meaning only that an employer would be liable for a supervisor’s discrimination and could not argue that the supervisor failed to follow instructions or deviated from the employer’s policy. (*Reno*, at pp. 645, 647.)

The *Jones* court determined that the anti-retaliation provision in Government Code section 12940, subdivision (h) had to be interpreted like the anti-discrimination provision at issue in *Reno*. (*Jones, supra*, 42 Cal.4th at p. 1163.) It then found *Reno*’s reasons for not holding individuals personally liable for discrimination equally applicable to retaliation claims. (*Id.* at pp. 1164, 1167.)

As *Jones* summarized, *Reno* had explained that while FEHA made individuals personally liable for harassment, it treated discrimination and retaliation differently because harassment is a type of conduct not necessary to a supervisor’s job performance while discrimination claims “arise out of the performance of necessary personnel management duties.” (*Jones, supra*, 42 Cal.4th at p. 1164.) *Reno* had noted that FEHA exempted employers with fewer than five employees and had found it inconceivable that the Legislature simultaneously

intended to burden individual supervisors with the burdens of defending discrimination suits. (*Jones*, at p. 1165.) *Reno* had found that imposing discrimination liability on individual supervisors would do little to enhance recovery by plaintiffs but would severely impair the judgment of supervisors, who would be reluctant to place their own assets at risk with every personnel management decision. (*Jones*, at pp. 1165–1166.) This dynamic would create a conflict of interest between supervisor and employer. (*Id.* at p. 1166.) *Reno* had also observed that corporate decisions are often made by multiple individuals, some of whom may have acted innocently even when the decision was discriminatory. (*Jones*, at pp. 1166–1167.) *Reno* had emphasized that it was deciding not just whether individuals should be liable for their own wrongdoing, but also whether even innocent supervisors should have to bear the threat of costly litigation for every personnel decision. (*Jones*, at p. 1167.)

In addition to relying on *Reno*'s rationale, *Jones, supra*, 42 Cal.4th at pages 1168–1169, found it hard to conceive why the Legislature would not impose individual liability for acts of discrimination under Government Code section 12940 but would impose individual liability for retaliating against an employee for opposing such discriminatory acts. *Jones* further found the legislative history of the amendment that added the word “person” to Government Code section 12940, subdivision (h) supported its interpretation. (*Jones*, at p. 1169.) That history indicated that the addition of “person” was intended to be a mere technical and conforming change. (*Id.* at pp. 1169–1173.)

Chaudhry does not attempt to distinguish *Jones* or explain why its concerns do not apply here. Most of *Jones*' reasoning for construing FEHA as not imposing individual liability for retaliation applies with equal force to section 1102.5(b). Section 1102.5 lacks any exemption for small employers, so *Jones*' concern with the incompatibility between such an exemption and individual liability for supervisors does not apply here. The addition of the "any person" language was also intended to change the substance of the law, not just as a technical change as in *Jones*. But the rest of *Jones*'s and *Reno*'s concerns apply to section 1102.5(b). Supervisors necessarily have to make the types of management and personnel decisions that may give rise to retaliation claims under section 1102.5(b), and subjecting supervisors to individual liability offers little additional recovery to plaintiffs while creating an in terrorem effect for supervisors and a conflict of interest between them and their employers. It would be remarkable for the Legislature to impose personal liability in section 1102.5(b) and create a departure from FEHA without mentioning these concerns. It would be equally unusual for the Legislature to try to use "any person" language to impose personal liability on supervisors after *Jones* found such language insufficiently clear and contrasted it with the explicit language in FEHA regarding individual liability for harassment. Imposing such liability without making any conforming changes to section 1102.6 would also be odd. If the Legislature nevertheless did intend to impose individual liability on supervisors, one would expect some mention of the issue in the legislative history, given

Jones’s concerns. In light of section 1102.5’s legislative history and the Supreme Court’s interpretation of similar employment statutes, we will follow *Jones* and not construe section 1102.5(b) as applying to the individual defendants.

We are apparently the first California court to consider this issue. But our conclusion is consistent with the overwhelming consensus of federal district courts that have addressed the issue. We need not cite each of the more than 30 decisions that have held section 1102.5 does not create individual liability, but a few merit mention. *Dawson v. Caregard Warranty Serv., Inc.* (C.D.Cal., Jan. 12, 2024, No. 5:23-cv-01139-SB-SP) 2024 U.S. Dist. LEXIS 33737, 2024 WL 661198, granted summary judgment on a plaintiff’s claims under section 1102.5(b) against two individual defendants because the statute did not create individual liability. *Tillery v. Lollis* (E.D.Cal., Aug. 13, 2015, No. 1:14-cv-02025-KJM-BAM) 2015 U.S. Dist. LEXIS 106845, WL 4873111 and *Friedman v. Jenkins* (N.D.Cal., Mar. 19, 2024, No. 23-cv-05036-JSW) 2024 U.S. Dist. LEXIS 48645, 2024 WL 1182878 reached the same conclusion in the context of motions to dismiss. All three courts reviewed *Jones*, *Reno*, and the context and legislative history of section 1102.5 and concluded the “any person” language does not impose individual liability on supervisors. (*Dawson*, at WL *1–*6; *Tillery*, at WL *8–*10; *Friedman*, at WL *5–*7.)

We have discovered only two federal cases that could conceivably support Chaudhry’s interpretation of section 1102.5(b) as imposing individual liability, both discussed in

Dawson. (*Dawson v. Caregard Warranty Service, Inc.*, *supra*, 2024 WL 661198, at *2, fn. 1.) *Hanson-Poulsen v. California* (C.D.Cal. June 26, 2018) No. 17-CV-6628-DMG (AFMx), 2018 WL 11462103 at *4, refused to dismiss a section 1102.5(b) claim against an individual defendant because it found it unclear whether the statute imposed liability on supervisors. The court provided no reason for construing the statute to impose individual liability beyond the mere use of the phrase “any person,” so we do not find it persuasive in the face of the rest of the statutory scheme, *Jones*’s concerns, and the statute’s legislative history. *Cordell v. PICC Lines Plus LLC* (N.D.Cal. Sept. 8, 2016) No. 16-cv-01814-TEH, 2016 U.S. Dist. LEXIS 121708, 2016 WL 4702654 at *6, similarly relied primarily on the plain language of the statute and said the addition of the “any person” language would be futile if it did not impose individual liability. *Cordell* did not discuss other statutes like section 1102.6, that make section 1102.5(b) ambiguous, or *Jones*. We also disagree with *Cordell* that the “any person” language is pointless if not applied to supervisors. That language could be read to impose liability on individuals who are not supervisors, such as the unscrupulous attorneys mentioned in the legislative history, or, if construed in light of section 1102.6, to impose liability on employers for such persons’ actions.

As *Dawson v. Caregard Warranty Service, Inc.*, *supra*, 2024 WL 661198 at *1 noted, a line of federal decisions has denied motions to remand cases to state court based on the allegedly fraudulent joinder of individual defendants under section 1102.5.

(E.g., *Jones v. Greyhound Lines, Inc.* (N.D.Cal., Aug. 25, 2025, No. 25-cv-05150-JD) 2025 U.S. Dist. LEXIS 165059, 2025 WL 2437995 at *2; *Moren v. Nat'l Express Transit, Inc.* (E.D.Cal. Nov. 30, 2021) No. 1:21-cv-01206, 2021 U.S. Dist. LEXIS 229379, 2021 WL 5602820 at *2; *De La Torre v. Progress Rail Servs. Corp.* (C.D.Cal. July 31, 2015) No. CV15-4526 FMO (GJSx), 2015 U.S. Dist. LEXIS 1007844, 2015 WL 4607730 at *4.) These cases held that because no California court had expressly held that section 1102.5 does not create individual liability, it remained an open question and the assertion of section 1102.5 claims against individuals was not improper. These cases do not outright hold that section 1102.5 does impose individual liability, merely that the statute is ambiguous or might create such liability, so they are of little assistance here.

In sum, the language of section 1102.5(b) is ambiguous when construed in the context of the larger statutory scheme. Nothing in section 1102.5's legislative history indicates the Legislature intended to impose individual liability upon supervisors, even after the California Supreme Court held that language similar to that used in section 1102.5(b) did not create individual liability for retaliation under FEHA whereas other, more explicit language did create individual liability for harassment. *Jones's* reasoning for construing a retaliation statute not to impose personal liability on supervisors applies with much the same force to section 1102.5(b), and nothing in section 1102.5's legislative history gives reason to depart from *Jones* here. We therefore hold that a plaintiff cannot sue an

individual manager or supervisor for retaliation under section 1102.5.

III. Whistleblower Protection Act Cause of Action

A. Legal Standard

Government Code section 8547.8, subdivision (c) “imposes liability ‘in an action for damages’ on ‘any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee’ for disclosing improper governmental activities or unsafe conditions.” (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 971.) This liability is subject to “an important caveat” (*ibid.*), also in Government Code section 8547.8, subdivision (c), that states, “However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has issued, or failed to issue, findings pursuant to Section 19683.” Government Code section 8547.8, subdivision (a) requires an injured party to file a complaint with the SPB “within 12 months of the most recent act of reprisal complained about.” Government Code section 19683, subdivision (a) requires the SPB to initiate a hearing or investigation within 10 working days of a complaint and complete the hearing or investigation within 60 days thereafter. This requirement of administrative exhaustion effectively takes the place of the claims presentation requirement in the Government Claims Act. (Gov. Code, § 8547.15 [“An action for damages

pursuant to this article shall not be subject to the claims presentation requirements of the Government Claims Act”].)

“The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is ‘not . . . available’ to persons who have not complied with the procedure.” (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1113.) Failure to allege compliance with the exhaustion requirement in Government Code section 8547.8(c) or an excuse makes a complaint subject to demurrer. (*Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 439, 441.) It may therefore also be grounds for judgment on the pleadings.

B. Analysis

1. Operative Complaint

Chaudhry alleged in her operative second amended complaint that she filed a complaint with the SPB on September 17, 2021, and an amended complaint on November 24, 2021. She further alleges that the period for the SPB to act under Government Code section 19683, subdivision (a) expired on March 11, 2022, and she first asserted a Whistleblower Protection Act claim in her first amended complaint on May 4, 2022. She contends she has adequately alleged that her September 2021 complaint to the SPB exhausted her administrative remedies as to her first termination in November 2020. She further contends she adequately exhausted her

administrative remedies as to all of defendants' conduct preceding November 2020 under the continuing violation doctrine.

Chaudhry ignores the fact that she filed her initial complaint in this matter in April 2021, before she had filed her complaints with the SPB. This initial complaint did not allege a Whistleblower Protection Act cause of action, but it did allege other causes of action based on the same November 2020 termination and acts preceding it that Chaudhry now contends support her Whistleblower Protection Act cause of action. Because Chaudhry could have filed a Whistleblower Protection Act cause of action with the initial complaint but did not, she did not comply with the statutory instruction that her action for damages "shall not be available" until she has "first filed" a complaint with the SPB. (Gov. Code, § 8547.8, subd. (c).) Chaudhry cannot defeat the purpose of the statute by filing a placeholder pleading based on the same facts but without a Whistleblower Protection Act cause of action while she complies with the exhaustion requirement and then later amending the pleading to add a Whistleblower Protection Act cause of action. If Chaudhry's procedure were acceptable, it would make the exhaustion requirement meaningless and defeat its purpose, which is to promote settlement or resolve minor disputes with minimal expense. (*State Bd. of Chiropractic Examiners v. Superior Court*, *supra*, 45 Cal.4th at p. 977; cf. *Le Mere v. Los Angeles Unified School Dist.*, *supra*, 35 Cal.App.5th at pp. 246–247 [filing a complaint, presenting a government claim, and then

filing an amended complaint alleging compliance with the claims presentation requirement does not comply with the Government Claims Act; such procedure “does not satisfy the purpose of the Government Claims Act, which is to give the public entity the opportunity to investigate and settle the claim without the cost of litigation”].)

Bjorndal v. Superior Court, supra, 211 Cal.App.4th 1100, supports this conclusion. The plaintiff there filed complaints in California and federal courts without a Whistleblower Protection Act cause of action, litigated the federal lawsuit for over nine years, filed a complaint with the SPB, and then filed an amended complaint in the California court with a Whistleblower Protection Act cause of action. (*Bjorndal*, at pp. 1104–1106.) *Bjorndal* held that the 12-month deadline to file a complaint with the SPB was not equitably tolled while the plaintiff pursued the federal litigation, so the plaintiff did not timely satisfy Government Code section 8547.8, subdivision (c)’s administrative exhaustion requirement. (*Bjorndal*, at p. 1109.) While Chaudhry alleges she complied with section 8547.8, subdivision (c)’s 12-month deadline and does not argue that her filing of the initial complaint in court tolled that deadline, *Bjorndal*’s rationale for rejecting equitable tolling applies equally to Chaudhry’s argument. As *Bjorndal* explained at page 1110, “The typical administrative claim procedure, exemplified by sections 8547.8 and 19683, is intended as a precursor to an adversarial proceeding, ideally to render the judicial proceeding unnecessary. . . . This type of administrative claim procedure is a familiar feature of California law, favored

because, in addition to providing notice to the affected agency, it allows the agency to evaluate its potential liability and resolve the matter amicably [citation], thereby avoiding the expense of litigation [citation]. If . . . a plaintiff could file a lawsuit, litigate for an extended period of time, and only then file his or her administrative claim, any investigation by the administrative agency would long since have been superseded by the process of civil discovery, and the objective of resolving meritorious claims without the cost of litigation would be entirely frustrated.”

Chaudhry argues to the contrary, noting that Government Code section 8547.8, subdivision (f) states that the Whistleblower Protection Act is not intended “to diminish the rights, privileges, or remedies of any employee under any other federal or state law.” She then posits a hypothetical scenario in which an employee submits a Labor Code section 1102.5 claim to the state to satisfy the Government Claims Act and receives a rejection notice. The employee then needs to file a complaint in court within six months to preserve the section 1102.5 cause of action. (Gov. Code, § 945.6, subd. (a)(1).) But when that six-month deadline is looming, she still has time to file a complaint with the SPB. Chaudhry argues that the interpretation of the Government Code section 8547.8, subdivision (c) exhaustion requirement that we endorse here would force the employee to risk forfeiting either the section 1102.5 or Whistleblower Protection Act causes of action, contrary to section 8547.8, subdivision (f).

The simplest solution to the dilemma that Chaudhry imagines is for the employee to file the complaint with the SPB before or at the same time that the employee presents the Labor Code claim under the Government Claims Act. She offers no reason why those steps must be taken sequentially, and prompt action under both statutes would allow the employee to comply with both without losing rights under either. But even if the employee follows the sequence that Chaudhry posits, the employee need not forfeit any causes of action if she files a complaint with the SPB promptly after receiving the rejection of the government claim. The SPB needs to rule within 70 working days of the filing of a complaint, which is approximately three and a half months. (Gov. Code, § 19683, subd. (a).) If the employee were to file with the SPB soon after the denial of the government claim (instead of waiting for an unspecified length of time, as Chaudhry hypothesizes), the employee would still have about two and a half months after the exhaustion of the SPB process (six months of the period after rejection of the government claim minus three and a half months spent waiting for the SPB) in which to file a complaint in court asserting both section 1102.5 and Whistleblower Protection Act causes of action. Chaudhry's hypothetical does not give reason to doubt our interpretation of Government Code section 8547.8, subdivision (c).

2. Proposed Amendment

Chaudhry contends that she could amend her complaint to remedy any defect regarding administrative exhaustion under

the Whistleblower Protection Act concerning her first termination in November 2020. However, she does not identify any specific facts she could allege that would remedy the defect, instead merely reiterating her existing allegations that she submitted complaints to the SPB and exhaustion occurred. She did not file any additional complaints with the SPB, so she cannot amend to allege any acts after the first termination as the basis for her Whistleblower Protection Act cause of action. Because Chaudhry has not carried her burden of proving a reasonable possibility of curing her pleading defect through amendment (*People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C.*, *supra*, 94 Cal.App.5th at pp. 532–533), Chaudhry’s request for leave to amend her Whistleblower Protection Act cause of action is denied.

IV. State of California as Defendant

The State of California finally argues as an alternative basis to affirm the judgment on the pleadings in its favor that the State is not a proper party. The State asserts that when it is named as a defendant, the agency with a direct institutional interest is the interested party. According to the State, CDCR was Chaudhry’s employer and is therefore the only proper defendant here. Chaudhry meanwhile insists that she was employed simultaneously by both CDCR and the State and she can provide evidence that the State of California issued her award of backpay after the SPB overturned her first termination (which we treat as an offer that she could amend her complaint to allege this).

The State cites Code of Civil Procedure section 416.50, which concerns the method for service of summons on public entities and does not address which entity is a proper party. The other authority the State cites, *Templo v. State* (2018) 24 Cal.App.5th 730, 736, held only that state officers with statewide administrative functions are the proper party to defend suits for declaratory and injunctive relief challenging the constitutionality of state statutes. The State cites nothing to establish that an employee cannot be jointly employed by both the State and CDCR as Chaudhry contends, and the law appears to be to the contrary. (See *McLean v. State of California* (2016) 1 Cal.5th 615, 629 [“[I]n the context of public employment, as in other contexts, an individual may have multiple employers, both direct and indirect. In this case, one might say that [the plaintiff’s] employer was the Department of Justice and also that her employer was the State of California; the Department of Justice is, after all, a department of the state government.”].) At the same time, neither party cites anything to suggest that naming the State as a defendant is any different than naming CDCR. (*Id.* at p. 629, fn. 8 [noting that “when a plaintiff names the State as a defendant in a suit alleging wrongdoing by one of its agencies, it ordinarily will respond to the complaint in the name of the State of California, ‘by and through’ the allegedly responsible agency. This practice is consistent with the understanding that, in the context of government litigation, courts must sometimes ‘look behind names that symbolize the parties’ to determine the real parties in interest.”].) We therefore

decline to affirm the judgment as to the State on the basis that it is not a proper party. (See *id.* at pp. 630–631 [rejecting argument that plaintiff improperly sued the State because the court could not “categorically conclude that a state employee who alleges wrongdoing on the part of the State Controller’s Office, rather than focusing solely on the conduct of the department or agency in which she works, has necessarily failed to state a claim under [Labor Code] section 203”].) The State may raise this issue anew in the trial court on remand to the extent it has some legal significance not readily apparent in its briefing here.

DISPOSITION

The judgment in favor of individual defendants William Kushner, Rashad Hanif, and Lori Austin is affirmed. As to the other defendants, the judgment is affirmed as to Chaudhry’s second cause of action under Government Code section 8547.8, subdivision (c) and her third cause of action for constructive discharge in violation of public policy. The judgment is reversed as to the other defendants as to Chaudhry’s first cause of action under Labor Code section 1102.5(b). No party shall recover its costs on appeal.

BROWN, P. J.

WE CONCUR:

STREETER, J.
GORDON, J.*

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

Chaudhry v. California (A173501)

Trial Court: Solano County Superior Court

Trial Judge: Hon. Stephen Gizzi

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