



11 of 16 DOCUMENTS

**CONCEPCION GARCIA-HOLMES, Plaintiff and Appellant, v. LOS ANGELES
UNIFIED SCHOOL DISTRICT, Defendant and Respondent.**

B188402

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FOUR**

2006 Cal. App. Unpub. LEXIS 6348

July 20, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, (Los Angeles County Super. Ct. No. BC327831). Mary Thornton House, Judge.

DISPOSITION: Affirmed.

COUNSEL: Sullivan, Workman & Dee, Joseph S. Dzida and Theodore S. Khachaturian for Plaintiff and Appellant.

Ballard, Rosenberg, Golper & Savit, John B. Golper, Elsa Banuelos and Christine T. Hoeffner for Defendant and Respondent.

JUDGES: WILLHITE, Acting P.J. We concur: SUZUKAWA, J. HASTINGS, J. * concurred.

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: WILLHITE

OPINION

INTRODUCTION

Plaintiff Concepcion Garcia-Holmes brought the present action for wrongful termination in violation of public policy against the Los Angeles Unified School District (LAUSD) and [*2] another defendant, not a party to this appeal. She appeals from a judgment of dismissal entered by the trial court in favor of LAUSD after its demurrer to the operative third amended complaint was sustained without leave to amend. Garcia-Holmes challenges the trial court's conclusion that her administrative claim was not filed within the applicable limitations period as required by the

California Tort Claims Act (*Gov. Code, § 810 et seq.*), and therefore the present action is barred. She also challenges the trial court's ruling that she cannot state a valid cause of action for breach of contract. We conclude that the present action necessarily sounds in tort and therefore Garcia-Holmes's claim was not timely filed, and further, that her claim does not support maintenance of a cause of action for breach of contract. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Garcia-Holmes was employed by Community Outreach for Prevention and Education (COPE), a California public benefit corporation, and by LAUSD, as a parent organizer. Her duties included recruiting parents of middle school students to participate in programs and support groups, and acting as a liaison [*3] to help the parents organize and communicate their concerns to the middle school and the associated L.A. Bridges Program. Her employment was terminated after she expressed parents' concerns to the school regarding a teacher who gave failing grades to an entire class.

Garcia-Holmes filed a complaint for wrongful termination in violation of public policy on January 26, 2005. Therein, she alleged that on or around April 29, 2004, she was suspended from work without pay, and her employment was eventually terminated in June 2004. Garcia-Holmes alleged that "[t]his termination was in violation of public policy as set forth in Education Code section[s] 51101 and 51101.1 which, among other things, set forth a public policy right of parents to question anything in their child's records that they feel is inaccurate or misleading, and also in violation of the parent involvement policies contained in the LAUSD Parent-Student Handbook. The termination of plaintiff by COPE and by LAUSD violated these public policies because they were intended to chill the efforts of anyone like plaintiff who was acting to help and assist the parents to exercise their rights."

Garcia-Holmes alleged that "[a]s [*4] a direct and proximate result of this misconduct, [she] has suffered general and special damages, including lost wages, and emotional distress in an amount according to proof."

Garcia-Holmes attached to her complaint the administrative claim for damages she filed with LAUSD. The claim was not dated. In her claim, she stated: "Claimant was wrongfully terminated in violation of public policy Education Code Section[s] 51101 and 51101.1 for helping parents complaint [*sic*] about a teacher (Isenberg) who was giving blanket failing grades to all his students in bad faith and due to incompetence. (See *Education Code Section 49066.*)"

After COPE filed an answer to the complaint, Garcia-Holmes sought leave to file a first amended complaint to include LAUSD as a defendant. Attached to the motion was a letter from LAUSD dated February 3, 2005, denying Garcia-Holmes's claim for damages as untimely because it was not presented within six months. The letter indicates that Garcia-Holmes presented her claim to LAUSD on January 26, 2005 (the same date on which she filed her complaint). The letter also states that Garcia-Holmes's only recourse would be to apply to LAUSD [*5] for leave to present a late claim. Counsel for Garcia-Holmes responded that the claim could not be untimely, "because it seeks only monetary recovery for other than personal injuries and must therefore be filed within one year not six months," pursuant to *Government Code section 911.2*.¹ Garcia-Holmes's counsel further stated that if he did not receive an immediate response, he would consider LAUSD's previous letter to be a rejection of the claim, and he would proceed with filing suit.

1 All undesignated section references are to the Government Code.

COPE stipulated to Garcia-Holmes's filing of the first amended complaint, and the court thereafter granted leave to file the amended complaint. Garcia-Holmes filed the complaint, but served it only on COPE. Thereafter, Garcia-Holmes and COPE stipulated to her filing a second amended complaint, again naming COPE and LAUSD as defendants, and the court approved the filing.

The second amended complaint was filed on July 7, 2005.² COPE [*6] filed an answer on August 1, 2005. LAUSD demurred to the second amended complaint on the ground that Garcia-Holmes had failed to exhaust her administrative remedies pursuant to *section 911.2* by failing to present a government tort claim within six months of her

termination. Garcia-Holmes filed opposition to the demurrer, contending that a one-year limitations period applied because the claim as to LAUSD was not for personal injuries or property damage, but only for "lost wages from termination."

2 Appellant alleged in the second amended complaint that COPE's misconduct caused her to suffer general and special damages, including lost wages and emotional distress. As to LAUSD, appellant alleged that its misconduct caused her to suffer only damages in the form of lost wages.

The court sustained LAUSD's demurrer, but granted leave to amend to give Garcia-Holmes the opportunity to attempt to state a cause of action for breach of contract.

Garcia-Holmes filed a third amended complaint, again alleging a first cause [*7] of action for wrongful termination in violation of public policy against COPE and LAUSD. She added a second cause of action against LAUSD for breach of contract, in which she alleged that she had entered into an oral employment contract under which LAUSD could not terminate her employment in violation of public policy.

LAUSD filed a second demurrer, contending that public employment is held pursuant to law, not contract, and Garcia-Holmes therefore could not transform her action into one for breach of contract. LAUSD also argued that the administrative claim filed by Garcia-Holmes did not allege a factual basis for recovery based on a breach of contract. Garcia-Holmes filed opposition, to which LAUSD replied.

The trial court sustained LAUSD's demurrer without leave to amend. Judgment in favor of LAUSD was entered on December 21, 2005, and this timely appeal followed.

DISCUSSION

A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based. (*Code Civ. Proc.*, § 430.10, *subd. (e)*; *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842.) [*8] For purposes of assessing the sufficiency of the demurrer, the court assumes the truth of all well-pleaded facts, and treats as having been pled relevant matters that properly are the subject of judicial notice. (*Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 716; *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1098-1099.)

I. Failure to Timely Comply With the Tort Claims Act

Under *section 911.2*, claims relating to causes of action for death or injury to a person or to personal property or growing crops shall be presented no later than six months after the accrual of the cause of action. These claims encompass negligence claims as well as intentional tort claims, including breach of a statutory duty. (See *Toscano v. County of Los Angeles* (1979) 92 Cal. App. 3d 775, 780, 155 Cal. Rptr. 146; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal. App. 3d 553, 557, 127 Cal. Rptr. 856.) *Section 911.2* also provides that claims relating to other causes of action shall be presented no later than one year after the accrual of the cause of action. (§ 911.2.) The claims covered by [*9] the one-year period generally result from breach of contract. (*Voth v. Wasco Public Util. Dist.* (1976) 56 Cal. App. 3d 353, 356, 128 Cal. Rptr. 608 [the former 100-day filing period covers tort claims, while the one-year period covers contract actions].)

Timely filing of a claim for relief is an element of the plaintiff's cause of action. "Timely compliance with the claim filing requirements and rejection of the claim by the governmental agency must be pleaded in a complaint in order to state a cause of action." (*Dujardin v. Ventura County Gen. Hosp.* (1977) 69 Cal. App. 3d 350, 355, 138 Cal. Rptr. 20.) A complaint that fails to allege facts demonstrating or excusing compliance is subject to demurrer. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239-1244.)

Garcia-Holmes contends on appeal that because her claim was not one for death, personal injury, or property

damage, and she sought only lost wages, the applicable filing deadline for her administrative claim was one year from accrual of her cause of action, not six months. We disagree.

Longstanding authority establishes that in determining which claims filing [*10] period applies to a given case, courts are called upon to decide whether the claim sounds in tort or contract. (*Voth v. Wasco Public Util. Dist.*, *supra*, 56 Cal. App. 3d at p. 356.) "Whether an action is contractual or tortious depends upon the nature of the right sued upon, and not the form of the pleading or the relief demanded. [Citations.] If the action is based on a breach of a promise, it is contractual; if it is based on a breach of a noncontractual duty, it is in tort." (*Ibid.*, italics deleted.)

Garcia-Holmes alleged that she was wrongfully discharged in violation of public policy. "Apart from the terms of an express or implied employment contract, an employer has no right to terminate employment for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094-1095.) An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee. (*Foley [v. Interactive Data Corp.]* (1988) 47 Cal.3d [654,] 665-671; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178, 164 Cal. Rptr. 839.) [*11] " (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252, italics added, overruled on other grounds in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.)

Even in circumstances in which a breach can be said to be both contractual and tortious, "if the action is predicated on a duty independent of the contract, it will be deemed to be in tort regardless of the contractual relation of the parties." (*Voth v. Wasco Public Util. Dist.*, *supra*, 56 Cal. App. 3d at p. 357. See also, *Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at p. 1252.) Here, LAUSD's purported duty was necessarily predicated on statute,³ independent of any oral contract by which LAUSD allegedly agreed not to terminate Garcia-Holmes in violation of public policy-which public policy she alleged was set forth in *Education Code sections 51101 and 51101.1.*

3 "Under the California Tort Claims Act (*Gov. Code, § 810 et seq.*), 'a public entity is not liable for injury arising from an act or omission except as provided by statute. (*Gov. Code, § 815, subd. (a)*; [citation].)' (*Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 630-631.) Thus, in California, 'all government tort liability must be based on statute [citation.]' (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785, fn. 2, 221 Cal. Rptr. 840.) "In the absence of a constitutional requirement, public entities may be held liable only if a statute . . . is found declaring them to be liable." (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481, 105 Cal. Rptr. 374.)" (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932, fn. omitted.)

[*12] Garcia-Holmes's claim of wrongful discharge in violation of public policy clearly sounded in tort. As such, Garcia-Holmes failed to comply with the applicable six-month time limit for filing a claim under the Tort Claims Act. This failure is fatal to her present action. (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal. App. 3d 1071, 1078-1080, 195 Cal. Rptr. 576.)

II. Failure to State Breach of Contract Allegations in Claim

After the trial court sustained LAUSD's demurrer to the second amended complaint with leave to amend, Garcia-Holmes amended her complaint to attempt to state a cause of action based on breach of contract. Because her administrative claim was filed within one year of her termination, her claim would be timely for purposes of a cause of action for breach of contract. However, in addition to the conclusion we reach above, that the essence of Garcia-Holmes's claim was tortious, we also conclude that in any event she could not state a cause of action for breach of contract because her initial claim did not contain facts indicating the existence of the contract upon which she purports to base her second cause of action.

Actions [*13] for breach of contract against a public entity are governed by the same claims presentation requirements of the Government Tort Claims Act as are tort actions. "Under the Tort Claims Act, "There shall be

presented in accordance with Chapter 1 [§ 900 et seq.] and Chapter 2 [§ 910 et seq.] of [Part 3] all claims for money or damages against the state: . . . (c) For money or damages (1) on express contract, or (2) for an injury for which the state is liable.' ([Former] § 905.2; [4] see also § 905.) Thus, although actions arising out of contract are not affected by the immunities and liabilities in part 2 of the Tort Claims Act (§ 814), they are nonetheless subject to its procedural requirements. [Citations.] . . .

4 Section 905.2 was amended in 2005 to read, as applicable at the time of the hearing on the demurrer here, as follows: "(b) There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) all claims for money or damages against the state: [P] . . . [P] (3) For money or damages on express contract, or for an injury for which the state is liable."

[*14] "Section 910 prescribes the contents of the claim, including the name and address of the claimant; the date, place, and circumstances of the occurrence 'or transaction' giving rise to the claim; a general description of the injury, damage, or loss incurred; and the amount of the claim. The entity must act to grant or deny the claim within a specified period, after which it is deemed denied. (§§ 912.4-912.8.) In enforcement of the claim filing requirement, 'no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 [§ 900 et seq.] or Chapter 2 [§ 910 et seq.] of Part 3 of this division [3.6] until a written claim therefor has been presented to the public entity and has been acted upon by the board or has been deemed to have been rejected by the board' (§ 945.4.)" (*Crow v. State of California* (1990) 222 Cal. App. 3d 192, 199, 271 Cal. Rptr. 349 (*Crow*), fns. omitted.)

At issue here is the adequacy, or inadequacy, of Garcia-Holmes's claim to describe the "circumstances of the occurrence or transaction which gave rise to the claim asserted" [*15] (§ 910, subd. (c)) for purposes of stating a cause of action for breach of contract. Garcia-Holmes contends that her contract cause of action is consistent with the allegations of her claim, since both the tort and contract causes of action stated in her operative third amended complaint arose out of the same facts. She maintains that under the doctrine of substantial compliance her claim was sufficient to support the cause of action for breach of contract. We disagree.

"Although a claim need not conform to pleading standards, the facts constituting the causes of action pleaded in the complaint must substantially correspond with the circumstances described in the claims as the basis of the plaintiff's injury. (*Connelly v. State of California* (1970) 3 Cal. App. 3d 744, 743, 84 Cal. Rptr. 257.) Where there has been an attempt to comply but the compliance is defective, the test of substantial compliance controls. Under this test, the court must ask whether sufficient information is disclosed on the face of the filed claim 'to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit. [*16] ' (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456, 115 Cal. Rptr. 797.) [P] The doctrine of substantial compliance, however, cannot cure total omission of an essential element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute. [Citations.]" (*Loehr v. Ventura County Community College Dist.*, *supra*, 147 Cal. App. 3d at pp. 1082-1083.)

As the court observed in *Crow*, "there is a sympathetic bond between the administrative claim and the judicial complaint. 'If a plaintiff relies on more than one theory of recovery against the [State], each cause of action must have been 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 [or a motion for judgment on the pleadings] if it alleges a factual basis for recovery which is not fairly reflected in the written claim.' (*Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal. App. 3d 431, 434, 253 Cal. Rptr. 587.)" (*Crow*, *supra*, 222 Cal. App. 3d at pp. 199-200.) [*17]

Crow involved a lawsuit by a university student against a university for failure to supervise a party in a campus dormitory where the student had been assaulted by a fellow student. The plaintiff's claim, filed in accordance with the provisions of the Tort Claims Act, described the circumstances of the occurrence as an assault by a student known to the university to be dangerous to other students and known to have a history of assaulting other students in dormitories on

campus. The claim demanded recompense for medical expenses and loss of earnings. (*Crow, supra*, 222 Cal. App. 3d at pp. 197, 201.) The plaintiff's complaint contained two "contractual" causes of action, which alleged that defendants had breached the warranty of habitability contained in a dormitory residence agreement with plaintiff, and that defendants had negligently and falsely represented that they would abide by and enforce rules and procedures for the safety of students living in the dormitories. (*Crow, supra*, 222 Cal. App. 3d at pp. 198-199.)

The trial court granted summary adjudication of the two contract causes of action on the ground that they exceeded the scope of the [*18] plaintiff's claim and were therefore barred. (*Id. at p. 198.*) The Court of Appeal agreed, holding that "these causes of action may not proceed because there were no direct or inferential facts in the claim filed with the Board of Control which would support them." (*Id. at pp. 198-199.*) The court observed that "there is absolutely no fact in this description [that plaintiff was assaulted in a dormitory] from which [the university] could determine if either (1) the plaintiff was an on-campus student seeking damages under his contract with the university, or (2) it had a duty created by the contract or a landlord/tenant 'special relationship' with the plaintiff by reason of the contract, or (3) it had made a misrepresentation of safety to him in the contract, *all of which require the contract as the necessary 'occurrence or transaction [giving] rise to the claim asserted.'* (§ 910.) This lacuna defeats the purpose of the statute, which is to give the public entity the opportunity to evaluate the merit and extent of its liability and determine whether to grant the claim without the expenses of litigation. (*Donohue [v. State of California] [*19] (1986)] 178 Cal. App. 3d [795,] 804.*)" (*Crow, supra*, at pp. 201-202, italics added.)

So it is in the present case. The existence of a contract was not included, or in any way alluded to, in the claim Garcia-Holmes presented to LAUSD. That document clearly and unequivocally asserts tort-based damages. Garcia-Holmes asserted no facts in her claim from which LAUSD could deduce the existence of a contract. Garcia-Holmes's claim, limited to allegations of wrongful discharge in violation of public policy, clearly did not constitute substantial compliance with the claim presentation and notice requirements of the Tort Claims Act for purposes of a breach of contract claim. Based on the allegations contained in the claim Garcia-Holmes presented to LAUSD, the latter would have concluded that Garcia-Holmes had presented no actionable claim for damages based on termination of an alleged oral employment contract. Garcia-Holmes's failure to allege a contract cause of action in a timely claim deprived LAUSD of the opportunity to evaluate the merit of that cause of action along with Garcia-Holmes's claim based on tort. The absence of commonality between the facts [*20] asserted in Garcia-Holmes's claim and the breach of contract claim pleaded in the third amended complaint is fatal to her lawsuit.

Finally, we note that LAUSD also asserts on appeal, as it did in the trial court, that Garcia-Holmes cannot state a cause of action for breach of contract because public employment in California is held by statute, not by contract, and therefore as a public employee Garcia-Holmes only has a right of action against her employer to the extent such right is conferred by statute. However, given the conclusions we have reached on the issues above, we need not address this issue.

DISPOSITION

The judgment is affirmed. LAUSD shall recover its costs on appeal.

WILLHITE, Acting P.J.

We concur:

SUZUKAWA, J.

HASTINGS, J. *

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.