STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
320 W. 4th Street, Suite 430
Los Angeles, CA 90013
Tel.: (213) 897-1511
Fax: (213) 897-2877

David Lawrence Bell, *Staff Attorney*

July 2, 2007

Melanie Rasic Savarese, Esq.
Savarese Law Firm
37 West Sierra Madre Boulevard
Sierra Madre California 91024

Re: *Sierra Schoonard v. Diamond Bar Montessori*

Dear Ms. Savarese:

I have been instructed to respond to your June 14, 2007, letter to Hearing Officer Martha Huerta, regarding exhaustion of administrative remedies in the above-referenced case. As we discussed over the telephone, to the extent you intend to raise a common law claim of wrongful termination in violation of public policy, as expressed in Labor Code section 1102.5 or Health and Safety Code section 1596.881, you are correct that exhaustion of remedies is not required prior to raising such a claim in a civil action. *See Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1706.

With respect to a statutory claim under Health and Safety Code section 1596.881, there is no real authority regarding exhaustion of remedies with the Labor Commissioner. Although Section 1596.881 does establish specific timelines for the Labor Commissioner's investigation of such claims, it is not clear whether a court would require your client to exhaust those remedies before proceeding on a statutory claim under Section 1596.881 in a civil action.

As you know, several *federal* courts have held that Labor Code section 1102.5 requires exhaustion of remedies before the Labor Commissioner prior to commencing a statutory claim in a civil action. (*See Neveu v. City of Fresno* (E.D.Cal. 2005) 392 F.Supp.2d 1159, 1179-1180; *Guttierez v. RWD Technologies* (E.D.Cal. 2003) 279 F.Supp.2d 1223, 1225-1228; *Fenters v. Yosemite Chevron* (E.D.Cal.) 2006 WL 2016536, *21-23; *Romaneck v. Deutsche Asset Mangagement* (N.D.Cal.) 2006 WL 2385327, *6-7.)

These federal courts all base their determination that Section 1102.5 requires exhaustion before the Labor Commissioner upon the California Supreme Court's decision in *Campbell v. Regents of the Univ. of California* (2005) 35 Cal.4th 311, 333. *Campbell*, however, did not explicitly rule that Section 1102.5 requires exhaustion of the Labor Commissioner's procedures. Rather, *Campbell* held that a former employee of the Regents of the University of California was required to exhaust the Regents *internal* administrative process for handling whistleblowing claims before filing a civil action for violations of Section 1102.5.

There is some disagreement, even on the federal bench, concerning whether litigants who

wish to pursue a statutory claim under Section 1102.5 must first exhaust before the Labor Commissioner. For example, Judge Morrison, of the U.S. District Court for the Eastern District of California has ruled that "[t]o the extent that *Neveu* interprets *Campbell* as requiring that remedies before the Labor Commissioner must necessarily be exhausted as a prerequisite to suit under § 1102.5, this Court disagrees."

There are no published state court opinions addressing whether the Labor Commissioner's procedures must be exhausted prior to raising a statutory claim under Section 1102.5 in court. In *Murray v. Oceanside Unified School Dist.* (2000) 79Cal.App.4th 1338, 1359-1360, the court held that compliance with the procedure established by Labor Code section 98.7 was not required before an employee could pursue a statutory claim under former Labor Code section 1102.1. In reliance on the *Murray* case, the California Court of Appeal for the Fourth District, in an unpublished opinion, held that Section 1102.5 did not require exhaustion before the Labor Commissioner. *See Cates v. Division of Gambling and Control* (2007) 2007 WL 702229, *11.

The DLSE's position is that the wiser course is not to require exhaustion of Labor Code section 98.7 procedures prior to raising a statutory claim in a civil action.

Labor Code section 98.7 sets forth a statutory scheme whereby any person may file a complaint with the Labor Commissioner if that person believes that he or she as been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner. The provision explicitly provides that filing with the Labor Commissioner is discretionary on the part of an aggrieved employee, who "*may* file a complaint" with the Labor Commissioner within six months of the alleged adverse action. The Labor Commissioner is charged with investigating such discrimination complaints and issuing a report and determination of his or her findings. Subsection(c) of Labor Code section 98.7 provides that if the Labor Commissioner makes a finding of discrimination and the employer does not comply with the Labor Commissioner's Determination, then the Labor Commissioner "shall" bring an action in an appropriate court against the employer. In other words, the decision of the Labor Commissioner is not self-executing, but requires the Labor Commissioner to bring an action in court to enforce its findings if and when an employer refuses to comply with the Labor Commissioner's determination. If the Labor Commissioner finds in favor of the employee, the employee is free to pursue his or her claim in court.

Unlike the procedures at issue in *Campbell*, the Labor Commissioner's procedures under Section 98.7 are not quasi-judicial in nature. An employee, for example, will not be able to challenge an adverse finding by the Labor Commissioner in a writ of administrative mandate under Code of Civil Procedure section 1094.5. The ultimate issue in a DLSE investigation pursuant to Section 98.7 is whether or not the Labor Commissioner is going to bring a civil action to enforce the relevant statutory provision. In light of the large volume of retaliation claims processed by the DLSE, it does not make any sense to require a complainant, who is represented by counsel, and is ready and able to bring a claim in court, to file a claim with the Labor Commissioner.

The Legislature appears to have recognized this fact in its enactment of the Private

Attorneys General Act (Labor Code section 2699), which provides a procedure for private litigants to enforce certain provisions of the Labor Code. Section 2699.3 contains an exhaustion provision, but it merely requires the litigant to give written notice to the Labor Workforce Development Agency, which then must decide whether or not it intends to investigate the alleged violation. Labor Code section 2699.5 lists the Labor Code sections subject to the procedures described in Section 2699.3, and it includes Section 1102.5.[1]

Since you are seeking to pursue both a common law claim for wrongful termination (which you are free to pursue directly without exhaustion of remedies) and statutory claims under Labor Code section 1102.5 and Health and Safety Code section 1596.881, in the interest of judicial economy and to preserve scarce resources, it is the DLSE's position that you are free to proceed in civil court on those claims, and the DLSE will not, therefore, pursue an investigation in this matter.

If you have any questions or need any further assistance, feel free to call me.

Very truly yours,

_____

DAVID LAWRENCE BELL
Attorney for the Labor Commissioner

[1] Labor Code section 2699 provides that the procedures described therein apply "[n]otwithstanding any other provision of law ...." Such language by the Legislature indicates an intent to override all contrary law. *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 383, n.17.