2nd Civil No. B254489

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION FOUR

NICOLLETTE SHERIDAN

Plaintiff and Appellant,

v.

TOUCHSTONE TELEVISION PRODUCTIONS, LLC

Defendant and Respondent.

Appeal from the Superior Court of Los Angeles County
Case No. BC 435248, Honorable Michael L. Stern

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR	Court of Appeal Case Number: B254489
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APPELLANT/PETITIONER: NICOLLETTE SHERIDAN RESPONDENT/REAL PARTY IN INTEREST: TOUCHSTONE TELEVISION PRODUCTIONS, LLC	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Nicollette Sheridan

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) ABC, Inc.	Touchstone is a direct/indirect subsidiary
(2) ABC Enterprises, Inc.	Touchstone is a direct/indirect subsidiary
(3) Disney Enterprises, Inc.	Touchstone is a direct/indirect subsidiary
(4) The Walt Disney Company	Touchstone is a direct/indirect subsidiary
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 30, 2014

Robin Meadow ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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RULES AND STATUTES

INTRODUCTION

In response to her complaints about verbal and physical abuse, which included being hit in the head by the creator of "Desperate Housewives," Nicollette Sheridan was fired from her job. It brought an ignominious end to her hugely successful, award-winning role of "Edie."

In response to her lawsuit for retaliatory discrimination, defendants argued that Sheridan failed to exhaust an administrative remedy available to her under Labor Code sections 98.7 and 6312. These statutes provide that a wronged employee "may" file a complaint with the Labor Commissioner, who may then prosecute the claim. Based on a single decision that has since been depublished, the trial court reversed its prior overruling of Touchstone's demurrer and dismissed Sheridan's case. After the depublication of that decision and the enactment of new legislation, the trial court tried to reverse its ruling, but by then it was too late—the entry of judgment had deprived it of jurisdiction.

The trial court was right to want to reverse itself. There is no exhaustion requirement.

- So says the Labor Code. Under section 15, "'[s]hall' is mandatory and 'may' is permissive." And section 98.7, subdivision (f), states: "The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law."

- So says the Legislative history. It confirms that these statutes were meant to expand, rather than restrict, employees' rights.
- So says every reported California decision that has considered the question.
- So says the Legislature, which clarified the statutes by expressly stating that there is no exhaustion requirement.
- So says public policy.
- And so says the long-established rule that exhaustion is not required when the administrative remedy fails to comport with due process—which the Labor Commissioner has repeatedly said is true of these statutes.

The only reason Sheridan is before this Court instead of in trial is a twist of fate: Touchstone was able to get a demurrer heard during the short life of a now-depublished decision that the trial court felt constrained to follow.

The trial court erred in sustaining Touchstone's demurrer. This Court should reverse.

STATEMENT OF FACTS

Because this appeal is from a judgment following the sustaining of a demurrer, the Court "assume[s] the complaint's properly pleaded or implied factual allegations are true . . . ." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 (*Campbell*).) Accordingly, the following statement of facts is drawn entirely from Sheridan's operative Second Amended Complaint.

A. Sheridan Is Hired For "Desperate Housewives" And The Show Is An Instant Hit.

Marc Cherry created "Desperate Housewives." (1AA 3/24 (Appellant's Appendix, Volume 1, Tab 3, page 24).) The show premiered in the Fall of 2004 and was an instant hit.

The producer, defendant Touchstone Television Productions, LLC, hired Sheridan as an actor in May 2004 under an agreement with Starlike Enterprises, Sheridan's loan-out company (Agreement). (1AA 3/24; 1AA 12/143-183.) Although Touchstone had the option to renew the Agreement year by year (1AA 12/143), in order to ensure that Sheridan remained with the show for its duration Touchstone, in the Agreement and an amendment, agreed to terms for her contract for a total of eight seasons (1AA 3/25). And in June 2008 Touchstone exercised an option that among other things fully vested Sheridan with profit participation for all eight seasons. (*Ibid.*)

B. Cherry's Hostility And Physical Violence.

From the very beginning, Cherry created a hostile work environment for the cast, crew and writers, and for Sheridan in particular, especially during the show's fifth season. (1AA 3/25-26.) He consistently behaved in a dismissive, demeaning and unprofessional manner toward Sheridan, not only in front of the other cast and crew on the show but also before the public at large. (*Ibid.*) This abusive behavior included grabbing Sheridan's arm on the set and yanking her across the set. (*Ibid.*)

Cherry's hostility and aggression toward Sheridan culminated with a physical assault during a rehearsal. (1AA 3/26.) When Sheridan tried to question Cherry about something in the script, Cherry took her aside and angrily and forcefully hit her with his hand across her face and head. (*Ibid.*) Cherry's sudden violence hurt Sheridan, and it stunned and humiliated her. "[Y]ou just hit me in the head," she said. "[T]hat is not okay. THAT IS NOT OKAY!" (*Ibid.*) She left the set and returned to her trailer. (*Ibid.*)

C. Touchstone's Retaliation And Termination of Sheridan's Employment After She Reports Cherry's Assault.

Sheridan immediately reported Cherry's assault to Touchstone by speaking to the line producer, George Perkins. (1AA 3/27.) According to Touchstone's human resources policy, Perkins was the employee designated to receive complaints like this. (*Ibid.*) But Perkins immediately set about protecting Cherry and Touchstone, rather than Sheridan and the

other employees on the show. (*Ibid.*) Among other things, he sent an email asking that all personnel keep the issue quiet and confine the information to a small group of people. (*Ibid.*) These instructions were followed, and there was no investigation of Cherry's violent behavior. (*Ibid.*)

Sheridan's business lawyer, Neil Meyer, separately complained about Cherry's violence to Howard Davine of Touchstone's Business Affairs. (1AA 3/28.) Mr. Davine also did not order an investigation. (*Ibid.*) In fact, Touchstone did nothing about Sheridan's complaint until the print media reported a month later that Cherry was violent and had hit Sheridan in the face and head. (*Ibid.*)

The hurried "investigation" that Touchstone then grudgingly conducted was a sham. (1AA 3/28.) Touchstone never interviewed Cherry or Sheridan about the incident. (*Ibid.*) And, contrary to Touchstone's own internal policy that required confidentiality, Cherry—the perpetrator— was kept fully informed of the sham "investigation" every step of the way. (*Ibid.*)

Shortly after completion of the "investigation," Cherry told the show's senior writers that Sheridan would not be coming back for the following season. (1AA 3/28-29.) Then, in a series of meetings held off site, Cherry and others mapped out how and when to fire Sheridan. (1AA 3/29.)

Several months after the incident, Sheridan was subjected to a four-on-one interview in which she was told to "clear out her trailer" and

that she "would not be coming back." (1AA 3/29.) She was written out of the show with no publicity at all, on short notice, in an out-of-character and implausible triple-homicide sequence that left viewers puzzled. (*Ibid.*)

D. Sheridan Exhausts Administrative Remedies With The DFEH.

Sheridan timely filed administrative complaints against Cherry, Touchstone, ABC Studios and ABC Entertainment Group with the California Department of Fair Employment and Housing (DFEH). (1AA 3/29.) The DFEH issued Right to Sue Letters with respect to each of these defendants. (*Ibid.*)

STATEMENT OF THE CASE

A. Following A Trial That Ended With A Hung Jury, This Court Directs The Trial Court To Give Sheridan Leave To File A Claim Under Labor Code Section 6310.

Sheridan sued for wrongful termination. (1AA 1/1-19.) Following a trial in February and March 2012, the jury deadlocked 8-4 in favor of Sheridan. (1AA 2/20-21.)

After an unsuccessful motion for a directed verdict, Touchstone petitioned this Court for a writ of mandate. It argued that Sheridan had no common-law "wrongful termination" theory because, under *Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39 (*Daly*), Touchstone had only chosen not to renew Sheridan's contract. This Court agreed, but directed the trial court to permit Sheridan to file an amended complaint alleging a cause of

action under Labor Code section 6310 to the effect that Touchstone retaliated against her for complaining about unsafe working conditions—i.e., Cherry's conduct—by not renewing her contract. (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 684 (*Touchstone I*).)[1]

B. The Trial Court Initially Overrules Touchstone's Demurrer, Which Argues That Sheridan Was Required, But Failed, To Exhaust The Administrative Remedy Provided By Section 98.7.

Sheridan filed her Second Amended Complaint in February 2013. (1AA 3/22-26.) As permitted by *Touchstone I*, she alleged that the defendants kicked her off the show in retaliation for her complaints about Cherry's violent and unsafe conduct. (1AA 3/30-32.)

Touchstone demurred, arguing that the assertion of a claim under section 6310 requires the exhaustion of an administrative remedy—specifically, a claim with the Labor Commissioner, as authorized by sections 98.7 and 6312 (see § I, *post*)—and that Sheridan had failed to do this. (1AA 4/37-42, 5/43-62.) The trial court overruled the demurrer, finding no exhaustion requirement. (1AA 6/65-67.)

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[1] Further undesignated statutory citations are to the Labor Code.

Touchstone again petitioned this Court for a writ of mandate, arguing that *Campbell, supra*, 35 Cal.4th 311 and several federal district court cases required exhaustion. (2 Civil No. B248782.)

C. Touchstone Renews Its Demurrer After A New Court Of Appeal Decision, *MacDonald*, Holds That Exhaustion Is Required.

While Touchstone's petition was pending, the Third District decided *MacDonald v. State of California* (2013) 161 Cal.Rptr.3d 520 (*MacDonald*), the first reported California decision to hold that exhaustion of administrative remedies is a prerequisite to commencing a civil action for retaliatory firing under section 6310. *MacDonald* rested its ruling squarely on the Supreme Court's decision in *Campbell, supra*, 35 Cal.4th 311. (See *MacDonald, supra*, 161 Cal.Rptr.3d at 523-526.)[2]

This Court denied Touchstone's petition without prejudice to Touchstone's seeking reconsideration of the exhaustion issue with the trial court in light of *MacDonald*. (1AA 8/78.)

Touchstone promptly filed and served a "renewed demurrer." (1AA 9/79-83, 10/84-103, 11/104-133, 12/134-228, 13/229-231.)

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[2] We do not "cit[e] or rel[y] on" this depublished opinion as support for any argument. (Cal. Rules of Court, rule 8.1115.) We refer to it only because of its role in this case's procedural history.

D. While The Parties Are Briefing The Demurrer, The Legislature Enacts Statutes Clarifying That There Is No Exhaustion Requirement.

Unknown to Sheridan (and apparently to Touchstone and the trial court), during the exact period when the parties were briefing the exhaustion issue raised in Touchstone's renewed demurrer, the Legislature was finalizing two statutes addressing the question. New section 244, subdivision (a) (section 244(a)) provides that "there is no requirement to exhaust administrative remedies unless that section under which the action is brought expressly requires exhaustion of an administrative remedy." New section 98.7, subdivision (g) (section 98.7(g)) provides that "[i]n the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures." These were chaptered on October 5 and 11, 2013 (Stats. 2013, ch. 577, § 4 and ch. 732, § 3) and became effective on January 1, 2014.

E. Relying On *MacDonald*, The Trial Court Sustains Touchstone's Demurrer Without Leave to Amend And Enters Judgment.

The trial court heard argument on the renewed demurrer on October 18, 2013. (RT 601-616.) Finding *MacDonald* controlling, the court reconsidered its prior ruling overruling Touchstone's demurrer and instead sustained the demurrer without leave to amend. (RT 614-615.)

On November 5, 2013, the court filed its order sustaining Touchstone's demurrer and dismissing Sheridan's complaint. (2AA 20/348-352.) Touchstone mailed a notice of entry of this order on November 21, 2013. (2AA 21/353-361.)

F. Just Three Weeks Later, The Supreme Court Depublishes *MacDonald*, But Despite The Depublication And The New Legislation, The Trial Court Denies Sheridan's Motion For A New Trial.

On November 26, 2013, the Supreme Court ordered *MacDonald* depublished. (2AA 22/362-368.) Sheridan filed both a motion for a new trial (2AA 24/392-396) and a motion for reconsideration (2AA 23/369-391) in which she argued that, without *MacDonald* and in light of the new statutes, it was now clear that there was no exhaustion requirement. (2AA 23/369-391, 26/398-419.)

The trial court denied Sheridan's motion for a new trial on January 16, 2014—oddly observing, given the depublication of *MacDonald* and the new legislation, that "[t]here is no new law stated." (RT 904; 8AA 37/1934.) Then, two weeks later, the court *granted* Sheridan's motion for reconsideration and overruled Touchstone's demurrer, on the basis that the *MacDonald* case it had relied upon had been depublished. (8AA 39/1938, 40/1939-1942; RT 1203.) The court then set a case management conference to select a trial date. (RT 1207-1208; 8AA 39/1938.)

On March 6, 2014, Touchstone filed another writ petition arguing that the trial court had lacked jurisdiction to grant Sheridan's motion for reconsideration. (2d Civil No. B254742.) Following this Court's issuance of an alternative writ of mandate, on September 23 the trial court vacated its January 29 Order and denied reconsideration on the ground that it lacked jurisdiction to consider the motion. (8AA 44/1963, 45/1964-1965.)

G. Appeal; Statement of Appealability.

On February 13, 2014, Sheridan filed a notice of appeal from the order of dismissal filed on November 5, 2013, notice of entry of which was mailed on November 21, 2013. (2AA 20/348-352, 21/353-361; 8AA 41/1943-1952.)

That order constitutes a final, appealable judgment under Code of Civil Procedure sections 581d and 904.1, subdivision (a)(1).

The appeal is timely. Touchstone mailed a notice of entry of the November 5 order on November 21, 2013. (2AA 21/353-361.) Sheridan filed a timely notice of intention to move for a new trial on December 2, 2013. (2AA 24/392-396.) She filed her notice of appeal on February 13, 2014, within 30 days after Touchstone's January 17, 2014 service of notice of the order denying her motion for a new trial. (8AA 41/1943-1952, 38/1935-1937; see Cal. Rules of Court, rule 8.108(b)(1)(A).)

ARGUMENT

I. OVERVIEW OF THE STATUTORY SCHEME.

A. The Underlying Statutes.

This appeal involves the interrelationship of three statutes:

Section 6310. As relevant here, subdivision (a)(1) prohibits an employer from discriminating against an employee for making "any oral or written complaint to . . . his or her employer . . . ." Subdivision (b) provides that "[a]ny employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against" because of complaining about "unsafe working conditions, or work practices" is "entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

Section 6312. In full, the statute states: "Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of Section 6310 or 6311 may file a complaint with the Labor Commissioner pursuant to Section 98.7."

Section 98.7. Subdivision (a) (section 98.7(a)) states: "Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation."

The remainder of subdivision (a) and subdivisions (b) through (e) describe the procedures to be followed when an employee files such a complaint. In essence, these require investigation of the claim; require the Commissioner to take further actions if he or she determines that a violation has occurred; require the Commissioner to file a civil action in certain circumstances; and provide that the employee may bring a civil action if the Commissioner determines there has been no violation. But, as we explain in detail below (Argument, § III.B., *post*), the statute lacks any provisions requiring an evidentiary hearing or a binding decision. Regardless of what the Commission does, a court can review an employee's claim and the employer's defenses de novo.

Subdivision (f) states: "The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law."

B. Recent Legislation.

Two relevant enactments were chaptered in October 2013 and became effective on January 1, 2014:

Section 98.7(g). "In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures."

Section 244(a). "An individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under

any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy."

II. LABOR CODE SECTION 98.7 CANNOT BE READ TO REQUIRE A CLAIMANT TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE FILING SUIT.

A. Section 98.7 Has Never Required Exhaustion.

1. Section 98.7's express language requires treating its administrative remedy as permissive, not mandatory.

"To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. When the language of a statute is clear, we need go no further." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340, citations omitted (*Nolan*).)

Section 98.7(a)'s express language is permissive: An employee "may"—not "shall"—file a claim with the Commissioner. One needn't consult the dictionary to determine whether this means that the administrative remedy is permissive rather than mandatory, because section 15 dictates the answer: '"Shall' is mandatory, and 'may' is permissive." This alone requires a permissive reading.

But there's more. Section 98.7, subdivision (f) states: "The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law." "Other rights and remedies" necessarily include a civil action, and this subdivision makes

clear that the administrative procedure does not pose an obstacle to commencing litigation in court.

In addition, the Legislature repeatedly used both "may" and "shall" throughout section 98.7, demonstrating its understanding and intention that they mean different things. It is well settled that "'[w]hen the Legislature has, as here, used both "shall" and "may" in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively.'" (*Tarrant Bell Property LLC v. Superior Court* (2011) 51 Cal.4th 538, 542, citations omitted.)

As for section 6312, which is the statute that actually authorizes administrative claims for violations of section 6310, it, too, is permissive: The employee "*may* file a complaint with the Labor Commissioner pursuant to Section 98.7." (Italics added.) In any case, because section 6312 simply invokes the employee's rights under section 98.7, only the latter need be interpreted in connection with Touchstone's exhaustion argument.[3]

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[3] Prior versions of section 6312 contained their own procedural provisions that were, as relevant here, the same as section 98.7's—an employee "may" file a claim with the Labor Commissioner. (Stats. 1973, ch. 993, § 63; Stats. 1980, ch. 676, § 236; Stats. 1984, ch. 1317, § 2.) The procedural language was removed in 1985, when the statute was amended to its current form. (Stats. 1985, ch. 1479, § 7.)

2. Other interpretational aids require a permissive reading of section 98.7(a).

If the Court somehow concludes that "may" in section 98.7(a) is ambiguous, it will then "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan*, *supra*, 33 Cal.4th at p. 340, citations omitted.) These extrinsic aids confirm that section 98.7(a)'s administrative remedy is permissive.

Legislative history. Section 98.7 was enacted in 1978 (Stats. 1978, ch. 1250, § 2) against a background of existing law that proscribed the same kind of discrimination that section 6310 proscribes. Section 98.7 replaced Labor Code § 1196.1, enacted in 1976, which as relevant here provided that "any employee who has been discharged, threatened with discharge, or in any other manner discriminated against" as a result of testifying in an investigation or proceeding relating to enforcement of the statute "may commence a civil action, or an available administrative action . . . ." (Stats. 1976, ch. 1184, § 2, p. 5288.) The Legislative Counsel's Digest for Section 98.7 stated that "[e]xisting law" prohibited any person from discriminating against an employee who was participating in any proceeding concerning the enforcement of laws relating to wages, hours and working conditions, and "permit[ted] an employee to commence a civil or administrative action" against an employer who violated those provisions. (Stats. 1978, ch. 1250, p. 1345.) It continued: "This bill

would, *in addition*, permit any employee, who believes that he or she has been discharged or otherwise discriminated against for filing a bona fide complaint or instituting any proceeding alleging a violation of any rights under the jurisdiction of the Labor Commissioner to file a complaint with the Labor Commissioner . . . ." (*Ibid.*, italics added.) Thus, the Legislature intended to *expand* employees' existing rights to commence a civil or administrative action by *adding* an option to enlist the aid of the Labor Commissioner.

The ostensible objects to be achieved. The Court must also consider the "ostensible objects to be achieved [and] the evils to be remedied" by the legislation. (*Nolan, supra*, 33 Cal.4th at p. 340.) Those factors militate against reading "may" as "must."

The Legislative Counsel's Digest quoted above shows that the legislation was designed to enable aggrieved employees to enlist the power of the Labor Commissioner on their behalf—an *expansion* of the civil or administrative remedies otherwise available. In contrast, to read "may" as "must" requires an inference that the Legislature wanted to appoint the Commissioner as a gatekeeper for retaliation claims—creating an *obstacle* to victims of wrongful discharge or discrimination. That reading would also burden the Commissioner with the obligation to investigate every claim, since otherwise none could be initiated in the superior court.

Both results would frustrate the employee-friendly goals of providing relief from discrimination—one of the "objects to be

achieved"—and would hamper eradication of the evil of discrimination, rather than help remedy it. Courts have refused to follow even a statute's plain meaning when doing so "would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results." (*People v. Belleci* (1979) 24 Cal.3d 879, 884.) Given that section 98.7 and the other statutes enacted with it were unquestionably intended to expand employees' rights, interpreting the administrative provisions as mandatory would undermine the statutes' clear goals.

Contemporaneous administrative construction. The Labor Commissioner's office, also known as the Division of Labor Standards Enforcement or DLSE, has made clear that it regards section 98.7 as providing only a permissive remedy. While a DLSE opinion letter does not have the force of law, courts can consider the DLSE's opinions if their reasoning is persuasive. (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324; see *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 [agency interpretations of statutes are "entitled to consideration and respect by the courts"].)

The DLSE's views appear in detail in an October 12, 2007 opinion letter quoted in *Creighton v. City of Livingston* (E.D.Cal., October 7, 2009, No. CV-F-8-1507 OWW/SMS) 2009 WL 3246825, *4-6 (*Creighton*). There, the Commissioner wrote 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." (*Id.* at p. *5.) The Commissioner further observed that "[i]n 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." (*Ibid.*)

This has also been the Labor Commissioner's public view on the DLSE's website, which includes an online brochure entitled *Retaliation and Discrimination Complaints, A Summary of Procedures*. In discussing remedies for retaliation based on a protected activity, it states that "[f]iling a complaint with the Labor Commissioner does not prevent you from filing a private lawsuit." (2AA 15/258-259.) Neither the brochure, nor anything else on the DLSE website, indicates that an employee *must* file an administrative complaint before filing a private lawsuit. Rather, even before the clarifying amendments to the statute took effect on January 1, 2014, the DLSE's website repeatedly told employees that they have a choice of filing a claim with the Labor Commissioner "or" filing a lawsuit if they are the victim of many common violations. For example, the DLSE's response to questions about retaliation after an employee complained about a lack of rest breaks, about not being paid the minimum wage, or about an illegal deduction from a pay check, was that "you can file a discrimination/retaliation complaint with the Labor Commissioner's Office. *In the alternative*, you can file a lawsuit in court against your employer." (2AA 15/265, 268, 271, 274, 278, 281, italics added.)

3. Every published California opinion that has considered the issue has found there is no exhaustion requirement.

Every published California opinion that has considered whether an employee must exhaust administrative remedies under section 98.7(a) before filing a claim has rejected that proposition. (*Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320, 331 (*Lloyd*); *Daly*, *supra*, 55 Cal.App.4th at p. 46; *Jenkins v. Family Health Program* (1989) 214 Cal.App.3d 440, 449 ["the remedy under section 6312 is neither exclusive nor requisite to maintenance of a private cause of action . . ."]; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 303-304 ["section 6312 contains no requirement for exhaustion"].)

Lloyd, *supra*, 172 Cal.App.4th 320 held that administrative exhaustion is not required under section 6310 because of the provision in section 98.7, subdivision (f) that "[t]he rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law." (172 Cal.App.4th at p. 331, italics and internal quotation marks omitted.) "Therefore, it would appear Labor Code section 98.7 merely provides the employee with an additional remedy, which the employee may choose to pursue." (*Ibid.*)

Only one reported California decision—*MacDonald*, *supra*, 161 Cal.Rptr.3d 520—has ever found an exhaustion requirement under section 98.7(a), and it is no longer a reported decision.

4. The handful of cases holding that "may" can mean "must" are both distinguishable and questionable.

We expect Touchstone to argue, as it did in the trial court (1AA 10/96; 8AA 31/1860), that "may" can indeed mean "must," relying on statements to that effect in *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 735 (*Williams*) (referring to "the well-settled principle that where an administrative remedy is available, even if couched in permissive language, it must be exhausted before turning to the courts") and *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982 (*Morton*) ("It is the rule that, if an administrative remedy is available, it must be exhausted even though the administrative remedy is couched in permissive language," citations omitted).

These statements have no application here, for several reasons.

First, and most important, is that neither *Williams* nor *Morton* involved a legislative directive that "may" is permissive. This directive leaves no room for construing "may" as "must." (*Nolan*, *supra*, 33 Cal.4th at p. 340 ["When the language of a statute is clear, we need go no further"]; Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . ."].)

Second, *Morton*, *supra*, 9 Cal.App.3d 977—*Williams*' only authority that expressly addresses the point—provides no sound basis for its statement that an administrative remedy can be mandatory even if couched

in permissive language. *Morton* cites two cases holding that losing parties in administrative proceedings before the State Personnel Board failed to exhaust administrative remedies because they did not seek rehearing within those proceedings—holdings that our Supreme Court has since abrogated. (*Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198, overruled by *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510; *Child v. State Personnel Bd.* (1950) 97 Cal.App.2d 467, 469 [citing *Alexander* and one other case relying solely on *Alexander*; see 21 Cal.4th at p. 498].) Although the Supreme Court's overruling of *Alexander* did not directly address the permissive-mandatory point (it focused on the nature of rehearing proceedings), *Alexander* did not itself purport to be stating a general principle of law: It, too, addressed a specific procedural setting. (*Alexander v. State Personnel Bd.*, *supra*, 22 Cal.2d at p. 200; see *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["an opinion is not authority for a proposition not therein considered"].)[4]

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[4] Two other cases *Williams* cites for the proposition that permissive language does not negate an exhaustion requirement—*Park 'N Fly of San Francisco, Inc. v. City of South San Francisco* (1987) 188 Cal.App.3d 1201 and *Woodard v. Broadway Fed. S. & L. Assn.* (1952) 111 Cal.App.2d 218 (cited at 121 Cal.App.4th at p. 733)—are inapposite. Neither case actually considered the impact of permissive language at all—the question was whether the available administrative procedures covered the claims asserted. (See *Ginns v. Savage*, *supra*, 61 Cal.2d at p. 524, fn. 2 ["an opinion is not authority for a proposition not therein considered"].) Neither case, as far as the opinions reveal, involved a rule or statute in which the governing body had expressly declared that "may" is permissive.

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Moreover, *Morton*'s explanation of why a mandatory provision would be couched in permissive language is at best questionable. Explaining why the governing regulation would use the word "may" even though the administrative remedy was mandatory, *Morton* says: "Understandably, a city employee is not required to file a grievance if he does not wish to do so, but he must first pursue this administrative remedy before resorting to the judicial process." (*Morton, supra*, 9 Cal.App.3d at p. 982.) As an aid to interpretation, the statement is meaningless. *Every* victim of employer retaliation *always* has the option, without needing any direction from the Legislature, to decide not to seek redress. The Legislature hardly needed to enact a statute to let employees know that they are not *required* to file a complaint for every perceived wrong.[5]

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And neither case had anything to do with the rights of employees—a factor that, as we demonstrate below (§ II.C., *post*), requires an employee-favorable interpretation of ambiguous language.

[5] In the trial court, Touchstone also cited *Marquez v. Gourley* (2002) 102 Cal.App.4th 710, but that case, which involved review of the suspension of a driver's license, also relied on *Morton*'s inapposite explanation of what "may" means (the driver can choose whether to seek relief from the suspension). *Marquez* cites *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, but it too relies on *Morton* for the proposition that exhaustion is mandatory even where the administrative remedy is couched in permissive language. (*Yamaha, supra*, 185 Cal.App.3d at p. 1240.) *Marquez* also relies on the theory that, under the Vehicle Code, the role of the courts is limited to judicial review of the DMV's administrative decision (107 Cal.App.4th at p. 713)—not the case here. (See § III, *post*.)

Finally, one must recognize how very simple it would have been for the Legislature to impose an exhaustion requirement. The Legislature well knows, for example, how to decree exclusive remedies—it simply states that the remedy is exclusive. (E.g., § 3602 [workers' compensation is exclusive remedy for certain work-related injuries].) Only a few additional words would have done the job—*if* that was what the Legislature had wanted to do.

Instead, as we next demonstrate, the Legislature has confirmed just the opposite.

B. The Legislature Has Definitively Stated That Section 98.7 Never Required Exhaustion.

1. The legislative history of newly-enacted sections 244(a) and 98.7(g) confirms that there never was an exhaustion requirement.

a. Section 244(a), enacted as part of Senate Bill 666.

Section 244 was added to the Labor Code as part of Senate Bill 666 (SB 666). As subdivision (b) shows, it ensures that immigrant workers are fully protected in the workplace to the same extent as workers born in the United States. Employers who attempt to use immigration status against workers are subject to penalties, and the statute also prohibits immigration-related retaliation against employees. (§ 244, subd. (b).)

The legislative history of SB 666 demonstrates the Legislature's belief that some courts were misinterpreting section 98.7 by implying a requirement of administrative exhaustion where none ever existed. SB 666's author, State Senator Darrell Steinberg, wrote the Assembly Committee on Labor and Employment that new section 244(a) "clarifies that an individual does not have to exhaust administrative remedies or procedures to bring a civil action under the Labor Code unless the code section expressly requires exhaustion." (5AA 28/1099.) Specifically addressing what he considered to be misreadings of the existing statute, Senator Steinberg wrote that "[s]ome state-court judges believe exhaustion is required under statutes that don't expressly provide for exhaustion, sometimes following inapposite reasoning in *Campbell v. Regents of University of California*, 35 Cal.4th 311 (2005). Since this arises repeatedly, we clarify the issue in this legislation." (*Ibid.*)

This same intention to "clarify" the law appears in the Senate Judiciary Committee Report for SB 666 prepared for the Committee hearing on April 30, 2013: "This bill would clarify that an employee or job applicant is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, unless the provision under which the action is brought expressly requires exhaustion of an administrative remedy." (3AA 28/530.)

The bill's history in the Assembly is similar. The analysis of the bill prepared for the Assembly Committee on Judiciary states that the bill "[c]larifies that an employee or job applicant is not required to exhaust

administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, unless the provision under which the action is brought expressly requires exhaustion of an administrative remedy." (4AA 28/725; see also 4AA 28/795 [Assembly Judiciary Committee Mandatory Information Worksheet, stating that "244(a) clarifies that the Labor Code does not require exhaustion of administrative remedies or procedures, unless expressly stated in the statute"].)

Touchstone's effort in the trial court to show contrary statements in the legislative history proved unsuccessful. In its opposition to Sheridan's motion for a new trial (8AA 31/1851, 1858), Touchstone cited a heading "Changes to Existing Law" in Senate Judiciary Committee Reports on SB 666 and AB 263 (3AA 28/528-530; 6AA 29/1475-1476), but those headings refer to the *entire bill*, which indeed did make substantial changes in the law to protect immigrants. Nothing in those reports suggests a change *as to exhaustion*. Just the opposite: The section in the report for SB 666 that specifically addresses section 244(a), which we quote above, uses the word "clarify" to describe the purpose of the amendment, as does the section in the report for AB 263 that addresses the amendment to section 98.7. (3AA 28/530; 6AA 29/1476.)[6]

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[6] Touchstone's citations to certain places in the legislative history where it was generally stated that the bill would "strengthen" or "add to" labor law protections (8AA 31/1858, citing Sheridan's request for judicial notice; 2AA 28/520; 3AA 28/613) suffer from the same problem. The bill *did* add

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Touchstone also cited a Senate Analysis dated August 2013, which made reference to a separate analysis of the bill's effect on administrative costs. (8AA 31/1858, citing 4AA 28/833.) But the conclusion Touchstone cited was not an expression of the *Legislature's* intent. It was, rather, the belief of *the Department of Industrial Relations* that section 244(a) would reduce administrative costs. (4AA 28/833.) Touchstone offered nothing to suggest that anyone in the Legislature shared the Department's opinion. And even that document states that "[t]he bill would also *clarify* that an employee or job applicant is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, unless the provision under which the action is brought expressly requires exhaustion of an administrative remedy." (4AA 28/835, italics added.)

Thus, section 244(a) "clarifies" that the Labor Code does not require exhaustion of administrative remedies or procedures, unless a statute expressly so states. It was specifically intended to address cases like *MacDonald*, which *imply* an exhaustion requirement based on the reasoning in *Campbell*. The Legislature's unmistakable message is that courts interpreting "may" as "must" have gotten it wrong.

(. . . Continued)

new protections for *immigrant workers*. But with respect to administrative exhaustion, legislators repeatedly and consistently used the term "clarify," and subdivision (a) of section 244 applies to all employees and to the entire Labor Code.

b. Section 98.7(g), enacted as part of Assembly Bill 263.

Assembly Bill 263 added subdivision (g) to section 98.7: "In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures." Thus, in addition to section 244's broader clarification that applies to all provisions in the Labor Code creating administrative remedies, the Legislature clarified that section 98.7 in particular does not require a claimant to proceed under that statute before commencing a civil action under section 6310.

The legislative history of AB 263 shows the same intent to clarify existing law as appears for SB 666: The bill "would clarify that an employee is not required to exhaust administrative remedies or procedures to enforce the above prohibition [against discrimination]." (6AA 29/1476 [Report of Senate Judiciary Committee on Assembly Bill 263, prepared for July 2, 2013 hearing].) In the same report, the Senate Judiciary Committee stated: "This bill would also clarify that an employee or job applicant is not required to exhaust administrative remedies or procedures before bringing a civil action to enforce the prohibition against discriminating, retaliating, or taking adverse action against an employee making a claim under the Labor Code." (6AA 29/1485.)

AB 263 made no changes to section 98.7(a), which created an administrative remedy before the Labor Commissioner, or to subdivisions (b) through (e), which described the limited scope of the

administrative remedy. AB 263 did clarify, in new subdivision (g), that an employee like Sheridan can *choose* whether to use the administrative remedy or proceed directly to court.

2. Because they represent clarifying legislation, the new statutes apply to Sheridan's claims.

a. The statutes clarified existing law.

It is well established in California that "the retroactive application of an amendment that merely clarifies a statute is not prohibited merely because it applies to facts in existence before the effective date of the amendment . . . ." (*Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 859.) Although statutes generally operate only prospectively, there is an exception for a clarification: "'Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.'" (*Huson v. County of Ventura* (2000) 80 Cal.App.4th 1131, 1136, quoting *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [finding amendment to be a clarification on the basis of legislative history].)

The courts have also recognized that the Legislature can clarify existing statutes by enacting new or different language. Indeed, "[l]egislative clarifications inevitably involve a revision or change in statutory language." (*Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1150.)

A clarifying enactment need not expressly state that it clarifies existing law; courts regularly look to legislative history to determine whether the Legislature intended an amendment or addition to a statute as a clarification. (E.g., *Huson v. County of Ventura*, *supra*, 80 Cal.App.4th at pp. 1136-1138; *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 400-401.)

Reliance on legislative history is particularly appropriate where it appears, as it does here (see § II.B.1.a., *ante*), that the Legislature is reacting to erroneous interpretations of the statute in recent lower court decisions. (*In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 257 ["The Legislature indicates an intent to merely clarify existing law where, as here, it 'promptly reacts to the emergence of a novel question of statutory interpretation' caused, for instance, by 'the disruptive effect of [a] Court of Appeal's decision'"]; *Noggle v. Bank of America*, *supra*, 70 Cal.App.4th at p. 859 [amendment applied to facts in existence before its enactment where it corrected a misinterpretation of the statute in an appellate decision]; *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 976 [amendment only clarified law and thus was exception to general rule against retroactive application because Legislature said it was in response to confusion created by appellate decision].)

b. Touchstone's arguments against retroactive application are meritless.

In the trial court, Touchstone cited *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 (*McClung*) for the general rule against the retroactive application of new laws. (8AA 31/1853.) But, as we have shown, that rule doesn't apply here. *McClung* itself states that "'[a] statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment' 'because the true meaning of the statute remains the same.'" (*Id.* at pp. 471-472, italics in original, citation omitted.) *McClung* further confirms that the Legislature may clarify the law, as the Legislature did here, unless and until the Supreme Court has *finally and conclusively* stated the true meaning of the statute. "If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration." (*Id.* at p. 473.)

Here, there is no basis for arguing that *Campbell*, which neither involved nor even mentioned sections 98.7, 6310 or 6312, "finally and conclusively" determined that these statutes required exhaustion of remedies before one could bring a section 6310 claim in court. As a federal district court recently stated, in noting that it was not bound by any California Supreme Court decision with respect to exhaustion, "[s]ection 98.7 has not yet been interpreted by the California Supreme Court, and California appellate courts are split [citing *MacDonald*] on the

issue of whether plaintiffs must exhaust the administrative remedy provided in the statute." (*Fernandes v. TW Telecom Holdings, Inc.* (E.D.Cal., Dec. 16, 2013, No. 2:13-cv-02221-GEB-CKD) 2013 WL 6583970, *2.)[7] With the depublication of *MacDonald*, California appellate courts are *not* split. Indeed, what made *MacDonald* unique was that it was the only California decision to apply *Campbell*'s general reasoning to a section 6310 claim.

Touchstone also cited *McClung*, *supra*, 34 Cal.4th 467, in support of an argument that the use of the term "clarify" in legislative history does not necessarily mean that that the amendment will apply retroactively. (8AA 31/1855.) In the passage Touchstone cited, *McClung* notes: "[T]hese references may have been intended only to demonstrate that clarification was necessary, not as positive assertions that the law always provided for coworker liability." (34 Cal.4th at p. 476.) True enough. But here, the author of SB 666 wrote that the clarification was necessary because some courts had *misinterpreted* existing law on the basis of *Campbell*'s reasoning (5AA 28/1099)—a statement that is consistent only with the view that exhaustion was *never* intended. In other words, the Legislature *did* make a "positive assertion" that the statute never required exhaustion and that clarification was necessary because some courts had mistakenly concluded otherwise.

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[7] By the time *Fernandes* was decided, *MacDonald* had actually been depublished.

More analogous to the present case is *Carter v. Caifornia Dept. of Veteran Affairs* (2006) 38 Cal.4th 914. There, two years after *McClung*, the Supreme Court considered an amendment to Government Code section 12940 that expressly imposed liability on employers for harassment of employees by non-employees. Concluding that the amendment merely clarified existing law and so could apply to conduct preceding its enactment, the Court observed that the Legislature very clearly expressed its intent to clarify because "[t]he amendment was made promptly in response to the Courts of Appeal opinions in *Salazar I* and the present case, in order to clarify the ambiguities that caused confusion in the appellate courts and among litigants." (*Id.* at p. 930.) "In light of our conclusion, therefore, we do not address retroactivity and related due process concerns. 'Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.'" (*Ibid.*, citation omitted.)

During 2014, several federal courts have held that the Labor Code amendments apply retroactively, consistent with Sheridan's analysis presented above.[8] To our knowledge, no case, state or federal, has held otherwise.

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[8] *Reynolds v. City and County of San Francisco* (9th Cir. 2014) 576 Fed.Appx. 698, 701 ("[Plaintiff] contends that the legislative amendments relieve him of the duty to exhaust because they clarify instead of change existing law. We agree"); *Melgar v. CSK Auto, Inc.* (N.D.Cal., Feb. 7, 2014, No. C-13-3769) 2014 WL 546915, *4 ("section 244 . . .

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C. If The Court Concludes That "May" In Sections 6312 And 98.7 Is Ambiguous, Public Policy Requires Construing The Statutes In Favor Of Protecting Employees.

A further aid in the interpretation of statutes is public policy. (*Nolan*, *supra*, 33 Cal.4th at p. 340.) Here, public policy dictates construing section 98.7 broadly, to further the protection of employees.

1. California public policy in favor of protecting employees requires reading "may" as permissive.

Touchstone's interpretation of sections 6310 and 98.7 ignores long-settled law in California under which statutes involving the rights of employees must be construed broadly and in favor of employees. As our Supreme Court recently said, "[i]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting

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would simply have altered the procedure by which plaintiff could file suit . . . . Accordingly, because section 244 does not create new rights on Plaintiff or impose new liabilities on CSK, the Court finds that it applies to this case"); *Gonzalez v. City of McFarland* (E.D.Cal., Jan. 24, 2014, No. 1:13-cv-00086) 2014 WL 294581, *2 (granting motion to reconsider order of May 2013: "Here, the Court does not find that § 244 creates new rights or imposes new liabilities. Thus, it has little hesitation in holding that § 244 applies here and should apply at trial," internal quotation marks and citations omitted); *Howard v. Contra Costa Cnty.* (N.D.Cal., Feb. 28, 2014, No. 13-cv-03626) 2014 WL 824218, *17; *Stone v. Walgreen Co.* (C.D.Cal., March 26, 2014, No. 13-cv-2838-w) 2014 WL 1289470 (adopting reasoning of *Melgar*, *Gonzalez* and *Howard*).

such protection." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026-1027, internal quotation marks and citations omitted; see also *Colonial Ins. Co. v. Industrial Acc. Com.* (1945) 27 Cal.2d 437, 442 [interpreting the workers' compensation statute "in light of the rule that a construction favorable to the employee should be followed in preference to an unfavorable one"]; cf. *Meinheit v. Berkeley* (1960) 179 Cal.App.2d 492, 494-495 [referring to "well settled rules that pension statutes are to be liberally construed in favor of the applicant and to effectuate their beneficent purposes"].)

Here, favoring the victim of retaliation has to mean providing more, rather than fewer, choices for the assertion of a claim. So if the Court concludes that there remains any question about whether "may" means "must" in sections 6312 and 98.7, California public policy requires resolving that ambiguity in favor of the employee, Sheridan.

2. Mandatory exhaustion would contradict the legislative intent under the Private Attorneys General Act.

Several courts, both state and federal, have noted that requiring exhaustion of administrative remedies would be inconsistent with the Legislature's intent under the California Private Attorneys General Act, sections 2699-2699.5 (PAGA). As relevant here, these statutes allow an aggrieved employee to bring an action to recover any civil penalty that

could be "assessed and collected by the Labor and Workforce Development Agency." (§ 2699, subd. (a).)[9]

As noted earlier, *Lloyd, supra*, 172 Cal.App.4th 320, is one of the decisions holding that there is no exhaustion requirement under section 98.7. In reaching that result, the court observed that PAGA's approach of "enlisting aggrieved employees to augment the Labor Commissioner's enforcement of state labor law, undermines the notion that Labor Code section 98.7 compels exhaustion of administrative remedies with the Labor Commissioner." (172 Cal.App.4th at p. 332.) Several recent federal decisions have followed *Lloyd*'s reasoning. (*Turner v. City & County of San Francisco* (N.D.Cal. 2012) 892 F.Supp.2d 1188, 1202 [noting that PAGA "indicates a legislative emphasis on private enforcement of the Labor Code that would be undercut by a mandatory exhaustion requirement before the Labor Commissioner"]; *Creighton, supra*, 2009 WL 3246825 at p. *11 [discussing controlling California authorities, including *Lloyd*, and stating: "We see no reason to differ with these decisions and to impose an administrative exhaustion requirement on plaintiffs seeking to sue for Labor Code violations"].)

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[9] In full, section 2699, subdivision (a) states: "Notwithstanding any other provision of law, any provision of this Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this Code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3."

3. That some federal district courts have required exhaustion is irrelevant, given the decisions' lack of reasoning. In any event, the more recent decisions decline to find an exhaustion requirement.

In the trial court, Touchstone cited some unpublished federal court decisions from the Northern and Eastern Districts of California in support of its argument for an exhaustion requirement. Even if published, these decisions would have only persuasive, not precedential value. (See *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1156 [giving no weight to a line of decisions that "merely followed" a decision with unpersuasive reasoning; "we do not decide cases based on trends"]; *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 770 ["'(w)hile decisions of federal courts in matters of state law are not binding on state courts, they may be persuasive,'" brackets in original, citations omitted].)

However, if the Court decides to consider federal rulings, it should also consider the plethora of recent decisions supporting Sheridan's position.[10]

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[10] See, e.g., *Gwin v. Target Corporation* (N.D.Cal., Sept. 27, 2013, No. 12-05995) 2013 WL 5424711, *13 (plaintiff not required to exhaust administrative remedies before suing for wrongful termination; "California law does not require exhaustion of the administrative procedure under § 98.7" before suing for violation of Section 98.6); *Pinder v. Employment Development Dept.* (E.D.Cal. Aug. 20, 2013, No. CIV. 5-13-817) 2013 WL 4482955, *11 ("This court . . . reads the text of Cal. Labor Code § 98.7 and *Campbell* to stand for the proposition that, while Section 98.7 does not obviate any existing requirements that administrative remedies be exhausted before filing a suit, it also does not require a plaintiff to exhaust administrative remedies . . . before suing based on Labor Code violations . . . Plaintiff was therefore not required to file a charge with the Labor Commissioner before bringing suit on his §§ 98.6 and 1102.5 claims"); *Ortiz v. Permanente Medical Group, Inc.* (N.D.Cal., April 23, 2013, No. C 18-00460) 2013 WL 1748049, *3 ("the permissive language of section 98.7, coupled with the reasoning in the decisions in *Lloyd, Creighton, Turner* and *Thompson*, warrants a conclusion that exhaustion of administrative remedies to the Labor Commissioner is not required under section 98.7"; plaintiff may proceed on Section 6310 retaliation claim); *Thompson v. Genon Energy Services, LLC* (N.D.Cal., March 12, 2013, No. C18-0187) 2013 WL 968224, *3-*4 (employee terminated for complaining about unsafe working conditions may sue for Section 6310 violation without first exhausting administrative remedies; "a California court would be well within its bounds to follow *Lloyd*, a published appellate decision following *Campbell* and expressly finding that exhaustion was not required under § 98.7"); *Dowell v. Contra Costa County* (N.D.Cal., Mar. 1, 2013, No. 3:12-CV-05743-JCS) 2013 WL 785533, *11-*12 (exhaustion not required before suing employer under California's whistle-blower statute: Labor Code § 98.7's language "is permissive, not mandatory"); *Turner v. City & County of San Francisco, supra*, 2012) 892 F.Supp.2d at pp. 1201-1203 ("the statutory language of § 98.7 indicates that exhaustion is permissive" and "the plain language of § 98.7(f) provides that the administrative remedies provided in § 98.7 are not exclusive and do not

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In any case, the tide has turned against Touchstone even in the federal courts. For example, in *Layton v. Terremark N. Am., LLC* (N.D.Cal., June 5, 2014, No. 5:13-cv-03093-PSG) 2014 WL 2538679, the court observed that in light of the amendments to the Labor Code, district courts have since revisited the exhaustion question and have held that a plaintiff filing suit for violations of the Labor Code need not exhaust administrative remedies by filing a complaint with the California Labor Commissioner before filing a complaint in federal court. "Section 244(a) can be applied retroactively because the revision merely clarified existing law and did not amend or change it. This court finds these cases persuasive." (*Id.* at p. *3; but see *Williams v. Gyrus ACMI, LP* (N.D.Cal., Sept. 24, 2014, 14-CV-00805-BLF) 2014 WL 4771667, *5 [relying on *MacDonald* nearly a year after its depublication and on an October 2013 district court decision that preceded both *MacDonald*'s depublication and the new legislation].)

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preclude remedies provided elsewhere in the Code"); *Mango v. City of Maywood* (C.D.Cal., Oct. 5, 2012, No. CV 11-5641-GW) 2012 WL 5906665, *13 ("there are no California decisions requiring exhaustion of a section 1102.5 claim under section 98.7. *Campbell* involved exhaustion of *internal* administrative procedures, as the opening paragraph of that decision makes clear, and makes no mention of section 98.7," italics in original); *Creighton v. City of Livingston, supra*, 2009 WL 3246825 at pp. *12-*13 ("*Campbell* only held that exhaustion of internal administrative remedies is required; there is no discussion in *Campbell* of exhaustion of administrative remedies before the Labor Commission").

D. *Campbell* Cannot Support Implying An Exhaustion Requirement In The Face Of A Statute That Is Expressly Permissive.

The preceding arguments demonstrate that section 98.7 cannot be read to require exhaustion, either because the statute expressly negates any such requirement or because application of extrinsic interpretational aids requires that reading.

This conclusion provides a complete response to Touchstone's expected argument, repeatedly urged in the trial court, that cases like *Campbell*, *supra*, 35 Cal.4th 311 require the Court to imply an exhaustion requirement. (See, e.g., 1AA 51-57, 94-12.) Implication may be appropriate where the governing legislation is silent. (See *Campbell*, *supra*, 35 Cal.4th at p. 328 [rejecting the plaintiff's contention that *Hentzel* "holds that courts will not impose an administrative remedies exhaustion requirement unless the statute specifically mandates one"].) But if the legislation *says* there is no exhaustion requirement, courts can't create one. (See Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . ."]; *Scottsdale Indemnity Company v. National Continental Insurance Company* (2014) 229 Cal.App.4th 1166, 1172 [referring to "the elementary principle that a court cannot add or subtract words to or from the statute"].)

Even if the Court were to conclude that the statute is ambiguous and requires interpretation, *Campbell* still would not mandate exhaustion. At most, its rule of implication would become only one of multiple interpretational aids. And it definitely would not be the most important one—the public policy favoring employee protection would hold that position.

III. ALTERNATIVELY, BECAUSE THE PROCEEDINGS BEFORE THE LABOR COMMISSIONER UNDER SECTION 98.7 DO NOT MEET THE REQUIREMENTS OF DUE PROCESS, NO EXHAUSTION REQUIREMENT CAN BE IMPLIED UNDER *CAMPBELL* OR OTHERWISE.

There is a separate, independent reason why the Court cannot imply an exhaustion requirement here: the well-established rule that a claimant need not exhaust administrative remedies unless those remedies meet the requirements of due process. As the Labor Commissioner herself has acknowledged (see § III.B.2., *post*), the section 98.7 process does not meet those requirements. An exhaustion requirement therefore cannot be implied.[11]

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[11] Sheridan acknowledges that she did not raise this precise argument in the trial court, although she did argue that the administrative remedies were inadequate. (1AA 14/251.) But the Court has discretion to consider a newly-raised issue "where the theory presented for the first time on appeal involves only a legal question determinable from facts which not

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A. Exhaustion Cannot Be Required If The Administrative Remedy Does Not Meet Due Process Requirements.

It has long been settled that "if the remedy provided does not itself square with the requirements of due process the exhaustion doctrine has no application." (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 688.) As our Supreme Court has explained, this means that exhaustion does not apply unless "the statute or regulation under which such review is offered 'establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.'" (*Endler v. Schutzbank* (1968) 68 Cal.2d 162, 168, internal citation omitted.) The Court has also said that in the administrative context, "'[d]ue process requires a fair trial before an impartial tribunal and that requires that the person or body who decides the case must know the evidence . . . .'" (*Cooper v. State Bd. of Medical Examiners* (1950) 35 Cal.2d 242, 245, internal citation omitted.)

Decades of cases echo these requirements. (E.g., *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342-343 [Court rejected argument that plaintiff union was required to exhaust administrative remedies because they were inadequate; "(a) procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an

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(. . . Continued)

only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.)

impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of the instant case . . . ."]; *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 744-745 [no exhaustion requirement where administrative procedure did not provide for a hearing]; *Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal.App.4th 449, 452 [rejecting application of *Campbell*; "Because Ahmadi–Kashani had no right to an evidentiary hearing as part of her grievance process—and certainly never participated in one—the authorities relied upon by the trial court in concluding she was bound to complete that process, and then to challenge its result through a writ of mandate proceeding, are inapposite"]; *Sunnyvale Public Safety Officers Assn. v. City of Sunnyvale* (1976) 55 Cal.App.3d 732, 735-736 [exhaustion not required because statute did not provide for a hearing before the administrative body charged with final determination of the matter and made no provision for the taking of testimony or the submission of legal briefs].)

B. Section 98.7's Administrative Procedures Do Not Provide Due Process.

1. On its face, section 98.7 does not provide due process.

Section 98.7 does not provide for *any* administrative adjudication in the usual sense of the term—an evidentiary hearing followed by a determination on the merits subject to review by mandamus.

Rather, filing a claim under section 98.7 triggers a mandatory *investigation* by the Commissioner. "[T]here is usually no hearing and the Labor Commissioner's order does not become 'final' without further action by the Labor Commissioner." (*American Corporate Security, Inc. v. Su* (2013) 220 Cal.App.4th 38, 45 (*American Corporate Security*). While the Commissioner can make an order against the employer, "[u]nless the employer voluntarily complies with the order, the Labor Commissioner must 'bring an action promptly in an appropriate court against the respondent.' (§ 98.7, subd. (c).)" (*Ibid.*) That action "by its very nature is a de novo procedure." (*Id.* at p. 46.)

Similarly, the employee's remedy for the Commissioner's finding of no violation is to "bring an action in an appropriate court, which shall have jurisdiction to determine whether a violation occurred" and to "order all appropriate relief." (§ 98.7, subd. (d)(1).)[12] This, too, will necessarily be de novo. (*American Corporate Security, supra*, 220 Cal.App.4th at p. 46.)

This process includes few if any of the due-process elements that courts have uniformly required. It is far more like non-binding arbitration. An employee dissatisfied with a no-claim finding can go to court. An employer dissatisfied with an order against it need do nothing—it can simply wait for the Commissioner to take it to court (or for the employee to

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[12] These procedures also govern after an administrative appeal to the Director of Industrial Relations, since "[t]he director's determination [of the appeal] shall be the determination of the Labor Commissioner." (§ 98.7, subd. (e).)

seek a writ of mandate to force the Commissioner to commence an action against the employer if the Commissioner does not do so). In either situation, the court will hear the matter de novo.

2. The Labor Commissioner Has Acknowledged That The Section 98.7 Procedures Do Not Afford Due Process.

The Labor Commissioner has expressly confirmed the absence of binding, quasi-judicial determinations under section 98.7.

In the letter quoted in *Creighton, supra*, 2009 WL 3246825 (see § II.A.2., *ante*), the Commissioner stated: "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." (*Id.* at p. *5.)

The Commissioner took the same position in *American Corporate Security, supra*, 220 Cal.App.4th 38. That appeal arose from an employer's petition for a writ of mandate to command the Labor Commissioner to retract an adverse determination. (*Id.* at p. 41.) While the petition was pending, the Commissioner filed a superior court action against the employer to enforce the order. The Commissioner successfully demurred to the employer's petition on the basis that the employer had an adequate remedy at law in the superior court action, which the Commissioner had

brought because her order "was not self-executing": The employer could litigate all its defenses in that action. (*Id.* at p. 42.)

In affirming, the Court of Appeal examined the procedures under section 98.7 in light of the employer's claim that the Commissioner's order deprived it of due process because it had been ordered to pay the employee without a hearing. The court rejected the due process argument—not because section 98.7 afforded due process, but rather because it *didn't.* The court accepted the Commissioner's argument that the superior court action—not section 98.7—would provide the necessary due process: "The Labor Commissioner agrees that depriving [the employer] of its money without a hearing and other protections would violate due process, but contends there is no due process violation because the pending superior court action provides ACS with full due process protection. We agree; indeed, due process requires that we interpret section 98.7 to permit the employer to raise all applicable defenses in the superior court action to enforce the Labor Commissioner's order." (*American Corporate Security, supra*, 220 Cal.App.4th at p. 47.)

Consistent with the Commissioner's litigation position, the DLSE's published procedures confirm the absence of the required evidentiary hearing and final determination. The filing of a complaint with the DLSE triggers an investigation by a Retaliation Complaint Investigator, who can contact witnesses and "request" that the parties meet "to explore the possibility of settlement." (2AA 15/258.) If no settlement is reached, the investigator prepares a "written summary of findings" to be forwarded to

the Labor Commissioner. (*Ibid.*) The Summary of Procedures also notes that "[*o*]*n rare occasions*, the Labor Commissioner *may* decide a hearing is necessary to fully establish the facts of the complaint" (*ibid.*, italics added)—in other words, far from being mandatory, the hearing is not only discretionary but "rare." And it is not an evidentiary hearing that leads to a binding decision—it is "an informal investigative proceeding to obtain more facts relevant to the case." (*Ibid.*; see *Ahmadi-Kashani v. Regents of University of California*, *supra*, 159 Cal.App.4th at p. 452 ["While the grievance process offered to Ahmadi-Kashani allowed her an opportunity for informal resolution of her grievances, it did not provide for a 'quasi-judicial' hearing with sufficient due process to generate a legally binding result"].) Finally, as noted earlier (§ II.A.2., *ante*), the DLSE Summary of Procedures expressly states that "[f]iling a complaint with the Labor Commissioner does not prevent you from filing a private lawsuit." (2AA 15/258-259.)

C. Nothing In *Campbell* Or Its Predecessors Detracts From The Due Process Requirement; Rather, They Affirm It.

The seminal exhaustion case, cited in countless later decisions including *Campbell* itself, is *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 (*Abelleira*). It arose from a dispute between employers and employees over the payment of unemployment benefits. (17 Cal.2d at pp. 283-284.) The dispute was subject to an administrative procedure by the California Employment Commission that involved an initial determination by an "adjustment unit"; an appeal to a referee; and a further

appeal to the Commission for a final decision. (*Ibid.*) Following the adjustment unit's and referee's determination that the employers were required to pay benefits, but before appealing to the Commission, the employers sought a writ of prohibition from the Court of Appeal, arguing that payment of the benefits would violate the governing statute. (*Id.* at p. 285.) When the Court of Appeal restrained the payments, the employees sought prohibition from the California Supreme Court. (*Ibid.*) The Supreme Court held that the Court of Appeal had no jurisdiction because the employers had failed to exhaust their administrative remedies. (*Id.* at pp. 287-297, 306.)

In describing the case, the Supreme Court observed that "[t]he Unemployment Insurance Act, summarized above, contains *a complete administrative procedure*, with provision for one original determination and two appeals, *fulfilling every requisite of due process of law*." (*Abelleira*, *supra*, 17 Cal.2d at p. 291, italics added.) It was, in other words, a true adjudicative proceeding that would yield an initial decision followed by an appeal that would yield a final decision within the administrative process, subject to review by mandamus.

The presence of a similar adjudicative administrative process is the common thread in decisions that imply an exhaustion requirement. The key language from *Campbell* about implying an exhaustion requirement states: "[*Hentzel*] held that '[w]here a statute creates a right that did not exist at common law, *and provides a comprehensive system of administrative enforcement*, a requirement that administrative remedies be exhausted may

be implied.'" (*Campbell, supra*, 35 Cal.4th at p. 328, quoting *Hentzel, supra*, 138 Cal.App.3d at p. 301, italics added.) *Williams, supra*, 121 Cal.App.4th 708—the "may" can mean "must" case—describes a similar adjudicative process: "The administrative tribunal is created by law *to adjudicate the issue* sought to be presented to the court. The claim or 'cause of action' is within the special jurisdiction of the administrative tribunal, and *the courts may act only to review the final administrative determination.*" (121 Cal.App.4th at p. 722, internal quotation marks omitted, italics added.)

In short, none of these decisions even suggests an exception to the well-settled rule that conditions an exhaustion requirement on the administrative remedy's compliance with due process. None of the courts were even called upon to consider the issue. The decisions therefore cannot stand as authority for implying an exhaustion requirement where, as here, the administrative procedure doesn't comply.

CONCLUSION

The question of whether an employee bringing a claim under sections 6310 and 6312 must exhaust administrative remedies under section 98.7 is settled in California. There is not, and has never been, such a requirement. Even if the statute were unclear, there is no basis on which the Court could properly imply one.

The Court should reverse the judgment with directions to overrule Touchstone's demurrer and proceed to trial.

Dated: October 30, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached **APPELLANT'S OPENING BRIEF** was produced using 13-point Times New Roman type style and contains **11,246 words** not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: October 30, 2014

Robin Meadow

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 30, 2014, I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on the parties in this action by serving:

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Charice L. Lawrie