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CAN FEDERAL COURTS RULE ON STATE LAW WRIT PETITIONS?

A New Case Explores Potential Traps for Litigators

By

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California public employee terminations and disciplinary actions are regularly reviewable by means of a petition for writ of mandate filed in Superior Court, which ordinarily must be filed within 90 days of notification of the final administrative decision. See *California Code of Civil Procedure* ["CCP"], section 1094.6. Where the employee alleges that the termination violates a constitutional right, such as denial of due process or retaliation for free speech, the termination may also give rise to a federal civil rights claim. In such cases, the writ petition can be combined with a civil rights complaint in state court, or can be followed with a separate civil rights complaint in federal court. See, e.g., *Mata v. City of Los Angeles* (1993) 20 Cal. App. 4th 141, 147-148.

But these cases also raise a rather tantalizing legal issue: can the combination pleading containing a writ petition and civil rights complaint be filed directly in federal court, enabling the federal judge to decide both the writ and the civil claim? Under 28 U.S.C., section 1367, federal courts may exercise "supplemental jurisdiction" over state law claims if the claim has a close factual relationship to a federal law claim. The scope of federal "supplemental jurisdiction" does not clearly include or exclude state law writ petitions, but federal courts have discretion to decline to exercise supplemental jurisdiction for several specific reasons, including the reason that the state law claim entails resolution of a highly specialized state law issue. See, e.g., *Clemes v. Del Norte County Unified School Dist*. (N.D.Cal. 1994) 843 F.Supp. 583, 596.

This issue whether a federal court can and should exercise supplemental jurisdiction over a petition for writ of mandate is significant for at least two reasons: First, it is usually preferable to have a set of factually related legal claims heard in the same forum; and secondly, many public employees, especially in outlying districts, have greater confidence of a fair hearing in federal court than in the local superior court.

Several California public employees have attempted to bring such combination pleadings in federal court. No federal appellate court has condemned the practice. The above-cited *Clemes* case furnishes one example of a published district court ruling

that a federal court should not accept jurisdiction over a state law petition for writ of mandate because the petition raises specialized issues of state law. Several unpublished district court decisions have followed *Clemes* and rejected the idea of federal jurisdiction over a writ petition, including an early ruling in the prominent California Supreme Court *Spielbauer* case. See *Spielbauer v. County of Santa Clara* (N.D.Cal. 2004), 2004 WL 2663545.

Our research has not disclosed any precedent where a public employee has persuaded a federal court to exercise supplemental jurisdiction over a state law petition for writ of mandate to review a termination or other employment discipline. But a recent decision of the California Court of Appeal in one of our cases has given public employees a glimmer of hope that this litigation option remains open and is reasonable to attempt. In that decision, *Guevara v. Ventura County Community College District*, 2008 DJDAR 18359 (December 16, 2008), the Court of Appeal of course could not rule that a federal court must or should exercise its supplemental jurisdiction, but it did rescue our client from a state court dismissal based on the 90-day CCP section 1094.6 statute of limitations for the filing of the writ petition.

The new officially published California appellate ruling also cannot improve the chances that a federal court will actually accept supplemental jurisdiction over a state court writ petition. But the ruling now gives California public employees an improved comfort level that if they attempt to persuade a federal court to accept jurisdiction over a writ petition, and the federal court does not accept jurisdiction, at least they will be able to refile the writ petition in state court and keep their case alive. If not for this ruling, an employee could not attempt to file a writ petition in federal court without accepting a risk that if the federal court declined jurisdiction, the ruling would come too late to protect the 90-day statute of limitations for state court.

The statute that grants the federal courts supplemental jurisdiction over state law claims contains a tolling provision, in essence a fail-safe measure, and provides that when a federal court dismisses a state law claim that the plaintiff sought to bring within the court's supplemental jurisdiction, the plaintiff has at least 30 days after the dismissal to refile the action in state court. See 28 U.S.C., section 1367(d). But in *Guevara*, after the employee filed a timely petition for writ of mandate in federal court, combined with a federal civil rights complaint based on termination in retaliation for free speech, then re-filed his writ petition in state court within 30 days after the federal court dismissed the petition without prejudice, Judge Frederick H. Bysshe of the Ventura County Superior Court refused to apply the federal tolling provision, and sustained a demurrer to the refiled state court writ petition without leave to amend, based on the 90-day statute of limitations under CCP section 1094.6!

If that ruling had been upheld, a future employee seeking to have a writ petition heard in federal court would certainly face an unacceptable risk that a discretionary federal court dismissal would not leave time to refile in state court within the permissible 90-day period. That is precisely the risk the federal tolling provision is designed to avoid, but it would fail of its sole purpose if the state courts were not bound to respect it.

The Court of Appeal was unanimous in its reversal of the trial court's ruling. Examining why the trial court erred in this case yields some interesting observations about the labyrinthine procedures that have evolved from the interplay of administrative and judicial remedies for disciplinary actions by public employers.

Federal supplemental jurisdiction is codified in 28 U.S.C., section 1367(a),

which provides that federal courts may exercise subject matter jurisdiction over factually related claims "in any civil action of which district courts have original jurisdiction...." Section 1367(c) sets forth certain reasons why a federal court may decline to exercise this supplemental jurisdiction. The fail-safe clause, 28 U.S.C., section 1367(d), provides essentially that "for any claim asserted under subsection (a)" over which the federal court declines to exercise its supplemental jurisdiction, the statute of limitations for refiling in state court is extended until 30 days after the federal court dismissal.

Officer Guevara presented a crystal clear case applying the fail-safe clause. Guevara's complaint alleged that he was terminated by a governmental employer in retaliation for exercising his First Amendment rights, a constitutional claim that is made civilly actionable by 42 U.S.C., section 1983. This is certainly a claim over which a district court has original jurisdiction.

But the College District argued, and Judge Bysshe agreed, that in this instance, the federal district court did not have original jurisdiction over Guevara's federal civil rights claim! This argument was based on an analysis of certain language in the federal court's dismissal order, which became the subject of disputed interpretations in the appeal.

The case should not have become difficult or complex. Guevara believed the fail-safe clause applies to "any claim asserted under" section 1367(a), which should mean that as long as the plaintiff's federal court complaint "asserts" that the federal court has original jurisdiction over a claim in the case, and that there is a factually related state law claim within the federal court's supplemental jurisdiction, then if the federal court dismisses the state law claim because it declines to exercise its supplemental jurisdiction, the plaintiff has 30 days after the dismissal to refile the state claim in state court. Under this reading, the phrase "any claim asserted" in section 1367(d) means "asserted" *by the plaintiff* to be within the court's supplemental jurisdiction.

The College District, however, argued that the fail-safe clause does not apply unless the *federal court* actually "asserts" its federal subject matter jurisdiction. Seizing on certain reasoning in the federal court's dismissal order in the case, the College District argued that the federal court did not assert its subject matter jurisdiction in this case, and consequently, the fail-safe clause could not be given effect to permit the refiling of the writ petition in state court.

Under Guevara's position that the fail-safe clause is applicable whenever the plaintiff "asserts" jurisdiction under section 1367(a), a state court ruling on the timeliness of a writ petition filed within 30 days after the federal dismissal does not need to look at the federal court's stated reasons for dismissal, and does not need to examine the federal court's dismissal order at all, except to take note of its filing date. The fail-safe clause applies as long as the pleading contained the necessary assertion of jurisdiction. That plain-language reading of the statue leads to a predictable, common-sense outcome, in which the parties and the court will easily be able to know whether the fail-safe clause applies.

But the College District argued that the federal court's dismissal order was based on a finding that the federal court lacked original subject matter jurisdiction over Guevara's federal civil rights claim. While the College District appeared to recognize that it seemed strange for a federal court to lack jurisdiction over a claim brought under federal law, it also argued that after the federal court's dismissal order said the court lacked federal subject matter jurisdiction, Guevara had not appealed from that order,

so the order was binding, and therefore, in this case at least, the federal court truly did say that it lacked federal subject matter jurisdiction over a federal civil rights action, and Guevara was prohibited from arguing otherwise.

The federal court's statement that it lacked subject matter jurisdiction was a prime example of confusion over a doctrine known as "exhaustion of judicial remedies." For several decades there has been a firmly established doctrine known as failure to exhaust *administrative* remedies, under which a court *cannot exercise subject matter jurisdiction* over a dispute if the aggrieved person has failed to first exercise and exhaust any available administrative remedy.

Additionally, there are firmly established legal doctrines known as "claim preclusion" and "issue preclusion," under which a final decision on the merits of a claim or issue in dispute precludes relitigation of the same claim or issue in a subsequent proceeding. Where an aggrieved person files a court action seeking to relitigate a dispute that has already reached the stage of final decision in a prior proceeding, the subsequent action is regarded as being *precluded* by the prior litigation.

In that situation, a court *does exercise jurisdiction* over the subsequent action, but it does so by first, receiving evidence from the defendant showing that the matter in dispute has in fact been finally decided in a prior litigation, and then, on that basis, ruling that the party that brought the action loses as a matter of law, because the preclusion doctrine has the legal effect that the matter cannot be relitigated.

Any dispute that has been fully litigated by an administrative body, and reached a final decision, can usually be taken before a court for judicial review by a petition for writ of mandate, or sometimes by a civil action. The time for seeking judicial review of a final administrative decision is nearly always established by a statute of limitations, such as the 90-day limit for writ petitions established by CCP section 1094.6 in Guevara's case. Within the past generation, courts everywhere have emphatically ruled that a judicially reviewable final administrative decision that is not brought before a court for judicial review within the statute of limitations for such review is entitled to preclusive effect. In applying the preclusion doctrines, a court will give an unappealed administrative decision the same preclusive effect as a court judgment.

In other words, if an issue was decided by an administrative body, and became final because the aggrieved party did not bring a writ petition or other court appeal within the statute of limitations for bringing such a petition or appeal, and the aggrieved party then attempts to raise the same claim or issue in a subsequent court action, the court in the subsequent court action will give preclusive effect to the administrative decision by receiving evidence that the administrative body issued its decision on the matter, and that the time for judicial review has expired, and that the aggrieved party did not seek that available judicial review. On that basis, the court will rule that the aggrieved party loses as a matter of law, because under the preclusion doctrine, the matter cannot be relitigated. *Eilrich v. Remas* (9th Cir. 1988) 839 F.2d 630, cert. den. (1988) 488 U.S. 819.

During the evolution of the legal principle that a reviewable but unreviewed administrative ruling is entitled to the same preclusive effect as a court judgment, the courts began to compare the effect of that procedural situation with the failure to exhaust administrative remedies, and adopted the term "failure to exhaust judicial remedies." See *Knickerbocker v. City of Stockton* (1988) 199 Cal. App. 3d 235, 240. The term seemed apt, since in those situations, the aggrieved party had exhausted

an administrative remedy, then failed to seek timely *judicial* review of the adverse decision. But around the time the term first appeared in judicial decisions, a concurring opinion by California Supreme Court Justice Kathryn Werdegar predicted that the term would cause confusion, because courts using the term would treat the doctrine as a jurisdictional bar to litigation, and would thus lose sight of the fact that in applying the doctrine of failure to exhaust judicial remedies, the court is not finding a lack of jurisdiction, but is actually exercising jurisdiction and deciding that the action is substantively defeated by the effect of the preclusion doctrine. See *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 82, Werdegar, J., concurring.

Justice Werdegar's prediction precisely came true in Guevara's action. Guevara filed a combined state law writ petition and federal civil rights complaint. The federal court's dismissal order observed that if the state law writ petition is ultimately denied, that decision would have the effect of finally validating the administrative decision terminating Guevara's employment, and that administrative decision would then be entitled to preclusive effect. Though Guevara's combined pleading contained a state law petition for administrative mandamus, and acknowledged that a favorable ruling on the writ petition was prerequisite to his ability to prevail on the federal civil rights claim, the federal court had the discretion to decline to exercise supplemental jurisdiction, and elected to decline and to permit the writ petition to be decided by the state court.

If the petition for mandamus were denied and the termination consequently were held legally valid, then a subsequent claim that Guevara was terminated in retaliation for exercise of free speech would be precluded because it would amount to an attempt to relitigate the termination in a subsequent action. In reciting that situation, however, the federal court stated, "to the extent that Plaintiff's section 1983 claims are barred by the doctrines of claim and/or issue preclusion, there is no viable federal cause of action and therefore no original jurisdiction in this court." Accordingly, the federal court dismissed Guevara's complaint, but did so without prejudice to renewing the federal claims if they were still viable after Guevara exhausted his state court judicial remedy of a mandamus petition.

The federal court thus envisioned that Guevara would be permitted to refile his mandamus petition in state court, but phrased its order in a way that made it appear as if the federal court's own *jurisdiction* depended on the state court's decision on the writ petition. When Guevara refiled his writ petition in state court, the College District argued that the federal court had never taken jurisdiction over Guevara's federal civil rights claim, and therefore, the fail-safe clause did not apply. Judge Bysshe essentially agreed with both propositions.

Guevara responded to the College District's arguments by pointing out first that it was unnecessary and improper to examine the federal court's reason for dismissing the case, since all he was required to do to receive the benefit of the fail-safe clause was to "assert" that he had a claim within original federal subject matter jurisdiction and that he had a factually-related state law claim. Guevara next argued that even if it was proper to examine the federal court's reason for dismissal, and even though the federal court's dismissal order did contain some language that could arguably be construed to mean it found a lack of present subject matter jurisdiction, the fact that Guevara did not appeal from the district court's stated reasons for dismissal should not result in giving legally binding effect to those reasons.

Among other grounds for not giving legally binding effect to the reasons for

dismissal stated by the federal court, the appealability of an order dismissing a complaint without prejudice was questionable. Secondly, although Guevara did not agree with the federal court's stated *reason* for dismissing the case, the federal court clearly had the discretion to dismiss the complaint without prejudice, and Guevara did not have any realistic argument to ask an appellate court to reverse the *outcome* of the federal court order.

An appeal solely to correct a court's reasoning is not proper if the appellant does not also seek to change the outcome. Thus, even if Guevara's assertion of jurisdiction were treated as insufficient to automatically trigger the fail-safe clause, and if it were proper to examine the federal court's reasons for dismissing the claim, Guevara should be free to argue in state court that the federal court did not truly lack subject matter jurisdiction, and its words to the effect that it lacked jurisdiction did not actually express a definite lack of jurisdiction that would make the fail-safe clause inapplicable.

Guevara also argued that there is nothing in the supplemental jurisdiction statute that conditions the applicability of the fail-safe clause upon whether the federal court actually exercises its subject matter jurisdiction. But even if the fail-safe clause were interpreted as if it contained such a restriction, the federal court here did not actually find an unconditional lack of subject matter jurisdiction, because its statement that it lacked original jurisdiction was couched in the prefatory phrase, "to the extent" that the section 1983 claims were barred by the preclusion doctrines, an extent that had not at that point been decided by any court. Guevara disputed that the administrative decision terminating his employment could properly be found final, since he was in fact petitioning for writ relief in the federal court, and only by utterly disregarding his federal pleading could it be said that he had not timely filed for writ relief.

Yet the College District and Judge Bysshe were fully prepared to treat Guevara's writ petition contained in the federal pleading as a complete nullity. Guevara was thus also constrained to argue that even if the state courts were to finally decide that the section 1983 claims were barred, the federal court would still not lack original jurisdiction over the section 1983 claims, but would need to exercise jurisdiction, receive the evidence of the finality of the termination, and find the preclusion doctrine applicable to that evidence. Finally, Guevara returned to the plain-language argument that the applicability of the fail-safe clause does not depend on the federal court's stated reasons for dismissal, nor on its actual reasons for dismissal, and that these dimensions need not be explored because the only test for the applicability of the fail-safe clause is that the plaintiff "assert" federal and supplemental jurisdiction.

As shown by the Court of Appeal's clear and succinct opinion, treating the word "asserted" in the fail-safe clause as referring to a federal court's actual assertion of jurisdiction leads to detailed examination of the federal court's reasons for dismissal, and to careful parsing of the statute to determine whether there is a prerequisite to the applicability of the fail-safe clause based on whether the court finds that it has subject matter jurisdiction, and if so, exactly what that prerequisite is. On the other hand, treating the statutory term "asserted" as requiring no more than that the pleader "assert" the existence of federal and supplemental jurisdiction avoids this entire line of inquiry into the federal court's reasons for dismissal, and produces predictable, common-sense, and fair outcomes.

Perhaps the strongest point that can be made in favor of the position taken by the

College District and Judge Bysshe is that a California legal rule depriving employees who seek federal court review of public employment disciplinary decisions of the benefit of the fail-safe clause will effectively prevent public employees from attempting to bring administrative mandamus petitions in federal court, and will force these petitions to be brought only in state court. It is questionable whether that is a desirable goal. And if it is a desirable goal, it remains questionable whether that goal should be achieved in this indirect manner.

As mentioned above, almost all federal courts that have been asked to take supplemental jurisdiction over California law writ petitions have declined. A clear rule making state court the exclusive forum for administrative mandamus would relieve some burden that the federal courts face in evaluating and rejecting assertions of supplemental jurisdiction over this type of proceeding. But there is no indication that federal courts consider this a burden, and even if the federal courts tend to decline to exercise this potential jurisdiction, the preservation of at least a theoretical potential for an exercise of supplemental jurisdiction stands consistent with the overall protection of federal court jurisdiction to hear federal claims.

If it were the intention of the state legislature to make state courts the exclusive forum for hearing petitions for administrative mandamus, the legislature could seek to accomplish this goal through explicit statutory language. A Hawaii state court adopted such a statute, and it was upheld by the Ninth Circuit in *Misischia v. Pirie* (9th Cir. 1995) 60 F.3d 626, 628. It should be noted that some federal courts have invalidated such state statutes under the constitutional Supremacy clause, as an unconstitutional encroachment on the jurisdiction of the federal courts. *Davet v. City of Cleveland* (6th Cir. 2006) 456 F.3d 549, 554; *Thompkins v. Stuttgart School Dist*. (8th Cir. 1985) 787 F.2d 439, 441.

The College District in *Guevara* cited approximately ten cases that in its view held state court is the exclusive forum for administrative mandamus, but Guevara successfully distinguished each of those cited authorities, showing that no court has definitively adopted such a rule.

Of course, if the federal courts were categorically deprived of supplemental jurisdiction over administrative mandamus, it would mean that an employee desiring to bring a federal claim in federal court could not proceed until first filing and prevailing in state court. The result would be, the dispute would be heard separately in two courts instead of together in one court. Another result would be that the writ petition could no longer be combined with a civil complaint, and it would become necessary to file and prevail in the writ petition before even filing the civil complaint.

As stated above, it has been recognized at least since the *Mata* decision in 1993 that a pleading combining administrative mandamus with civil rights relief is proper, at least in state court. A few cases, cited by the College District, contain language to the effect that the civil complaint should not be filed until after the employee prevails in the writ petition. See, e.g., *Williams v. Housing Authority* (2004) 121 Cal. App. 4th 708.

On balance, there appears to be no compelling reason to eliminate federal court jurisdiction over administrative mandamus. If this is done, then any employee who wants to bring a federal civil rights claim against the employer in federal court will be forced to litigate successively in two separate courts. The employee could file a combined claim in state court, but would be giving up the right to have a federal forum to decide claims that arise under federal law, one of the most valuable rights that are created by the existence of federal civil rights statutes.

There is no compelling reason either for legislation to ban the practice of combining a writ petition with a civil complaint, or to require the employee to wait until the writ petition is finally resolved before filing the civil action. By means of the presently tolerated combined pleading, an employee who may be entitled to civil relief on the same facts that will be reviewed in the writ proceedings is able to give notice to the employer of its need to prepare to defend the civil claim at the same time as giving notice of judicial review of the disciplinary action. If employees were forced to await final appellate resolution of writ proceedings before filing related civil claims, the statute of limitations for the civil claims would be tolled during the pendency of the writ proceedings, but this would mean that the employer would often not receive formal notice of the civil claim until four or five years after the relevant events.

The *Guevara* case, if the decision had gone the other way, would have channeled all similar cases into two separate stages of pleadings, often in different courts. The actual decision that was handed down will preserve at least a theoretical right to continue to file combined pleadings in federal court. But what happened to Guevara in this case, and the willingness of a superior court judge to accept the College District's jurisdictional arguments in the case, may well deter some employees from seeking the vindication of their rights in federal courts, and may result in more cases being channeled into multiple streams of litigation in different bodies examining the same set of facts.

This may or may not be a desirable result. But it should not be left to the vagaries of litigation to establish this type of procedural regime. State legislators are obviously aware that various procedural options for review of administrative decisions currently co-exist, and should expect that unless they act to clarify the validity of these various options, employees and employers alike will face a convoluted and interlocking set of procedural rules and deadlines that create an unnecessary side show to the process of reviewing public employment discipline decisions. Meanwhile, the authors herein will continue to strive for greater clarification of the procedural requirements and options in this burgeoning field of litigation.

STAY SAFE

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