Filed 10/23/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| DAVID M. DIXON,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,<br><br>Defendants and Respondents. | B161390<br><br>(Los Angeles County<br>Super. Ct. No. BC183800) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas L. Willhite, Judge. Reversed and remanded.

Melanie E. Lomax & Associates and Melanie E. Lomax for Appellant.

Lewis Brisbois Bisgaard & Smith, Alan R. Zuckerman and Keri Lynn Bush for Respondents.

Appellant, David M. Dixon, M.D., brought this action against the Regents of the University of California (the Regents) for wrongful termination under the Fair Employment and Housing Act (FEHA)[1] based upon employment discrimination and harassment. Dixon had been employed in the UCLA School of Medicine Residency Training Program, a three-year program with reappointments made each year. At the end of Dixon's first year, he was informed he would not be rehired for a second year because of allegedly poor performance. Dixon, feeling he was the victim of racial discrimination, initially obtained a right to sue letter from the Department of Fair Employment and Housing (DFEH) and then elected to pursue the internal administrative hearing process provided by UCLA. After more than two years of hearings, Dixon notified UCLA he was abandoning the administrative hearing process, because there did not appear to be any end in sight, and would instead file his lawsuit in a court of law. The trial court granted the Regents' motion for summary judgment based on Dixon's failure to exhaust the internal remedies available to him. We reverse and remand the case for trial.

## FACTUAL AND PROCEDURAL BACKGROUND

*1. Dixon's Termination and Complaint for Wrongful Discharge*

On June 24, 1993, Dixon began his employment at the UCLA School of Medicine's Department of Family Medicine Training Program. Even though the program was for three years, the appointments were for a year at a time. After less than a year, Dixon was informed he had not satisfactorily completed his first year of residency and would not be offered an opportunity to continue for a second year.

Dixon thereafter appealed the decision within the Department of Medicine claiming he was a victim of racial discrimination. After an adhoc committee recommended the decision be upheld, appellant's counsel, Melanie Lomax, on August 15, 1994, wrote to Dr. Fogelman, Chairman of UCLA's Department of Medicine, requesting a review and threatening legal action if Dixon was not reinstated to the

[1] Government Code section 12900 et seq.

residency program. Counsel further indicated Dixon had filed a complaint with FEHA and had requested an immediate right to sue letter. On August 26, 1994, an attorney from the Office of General Counsel for the Regents wrote to Dixon and informed him he had a right to have his complaint reviewed pursuant to the UCLA Campus Appeal Procedure 140, a copy of which was enclosed.

On September 20, 1994, Dixon's counsel forwarded to Chancellor Charles E. Young, Dixon's request for an investigation of Dixon's termination in addition to alleged disparate and discriminatory treatment. On December 8, 1994, Patricia Jasper (Jasper), Campus Counsel for UCLA, wrote a letter to Dixon asking for a copy of correspondence which UCLA did not have and further stated, "In this regard I would urge forbearance in the filing of any action since [Dixon] has not yet exhausted his administrative remedies, and any such lawsuit would be subject to dismissal."

On December 20, 1994, Jasper, responding for Chancellor Young, replied to Dixon's August 15[2] letter to Chancellor Young which requested a hearing, and enclosed the university's response. On January 18, 1995, Dixon's counsel wrote to Chancellor Young and requested a hearing before a Hearing Committee composed of three officers pursuant to Procedure 140. Under Procedure 140 Dixon had been given the option of choosing between having the Chancellor appoint a single hearing officer, having the Chancellor appoint a hearing committee composed of three officers, or choosing an outside hearing officer.

The hearing was scheduled to start on July 28, 1995, but was cancelled because Dixon's counsel was in trial. Thereafter, over the next two years there were 11 days[3] of

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[2] Although the letter references an August 15 letter to Chancellor Young in which a hearing was requested, the August 15 letter was to Dr. Fogelman. The letter requesting a hearing was sent on September 20, 1994.

[3] "Days of hearing" is a misnomer. The hearing committee would only allow three hours of testimony for each session.

hearings, although 26 days had been scheduled. Of the cancellations, Dixon's counsel had cancelled five times because of her trial conflicts, once because she had suffered a broken leg and once because counsel was ill. The University had cancelled hearings on four occasions and the committee had cancelled the hearing twice. Additionally there had been one cancellation due to a family emergency of a doctor and one cancellation was for unknown reasons. Of the 11 days of hearings, Dixon had presented evidence on 10 of those days and the university on one day.

On June 5, 1997, Dixon's counsel wrote to the hearing coordinator complaining the hearing was taking too long because of three problems: (1) the difficulties of coordinating the schedules of seven people, (2) the extraordinary difficulty in scheduling given the availability of witnesses, and (3) the short hearing days of only three hours per day. She then provided the hearing officers with 10 days during the month of July when her schedule was clear. UCLA responded by citing the numerous delays attributable to Dixon's counsel and pointed out two significant facts: (1) the three-hour hearing days could only be lengthened by hearing officers and (2) the hearing officers had indicated they would not be available during the summer months of 1997. Finally, the university also indicated that since Dixon had chosen to have a university hearing committee instead of an inside or outside hearing officer, all delays should be attributable to Dixon.

On June 27, 1995, a hearing was held and the matter was apparently continued until October 10, 1997. On October 6, 1997, Dixon's counsel wrote the hearing office coordinator that the hearing process had gone on for more than two years without any end in sight, and because the hearing officer was refusing to schedule hearings any closer than months apart, the administrative appeal had become an exercise in futility. Therefore, Dixon had elected to file a complaint in a court of law and was not going to participate in any further hearings.

Dixon then filed his complaint in the superior court alleging various torts including employment discrimination, harassment and termination because of race in violation of FEHA as well as intentional infliction of emotional distress, breach of the

implied covenant of fair dealing and intentional interference with prospective contract and employment.

*2. The Regents First Motion for Summary Judgment*

The trial court granted the Regents' initial motion for summary judgment. On appeal, in an unpublished opinion, we reversed the grant of summary judgment. (*Dixon v. Regents of the University of California* (June 6, 2001, B183800 [nonpub. opn.]) We found Dixon had presented sufficient evidence to establish a prime facie case of discrimination under FEHA and held the trial court had improperly weighed the evidence in granting the motion. We further found Dixon had presented the following issues of material fact: (1) Dixon satisfied the requirements for admission into the program; (2) Dixon was only the third African-American physician admitted into the program, and the last African-American resident was admitted over a decade before Dixon's admission; (3) No one connected with the program knew Dixon was African-American until he first appeared on campus for orientation; (4) Dixon's performance reviews were not uniformly poor, as some of the physicians who evaluated Dixon found his performance "good" or "satisfactory" and some of them recommended him for further training at UCLA; (5) Some of the physicians who rated Dixon's performance as "poor" had no basis to evaluate him because they did not see him perform the tasks for which he was being evaluated; (6) At least some of the negative feedback about Dixon was solicited by the program; (7) Despite the fact that the House Staff Manual states interns should be "notified within a reasonable time if an evaluation for a given rotation indicates an unsatisfactory performance, Dixon did not receive any counseling about his performance, or even any notification of the unsatisfactory ratings placed in his file, until the meeting at which he was placed on probation; (8) A non-African-American intern who was having problems was assigned a mentor/role model to assist him in improving his performance, while at the same time Dixon was given no mentor/role model, was placed on probation, and was ultimately dismissed from the program; and (9) After Dixon was discharged from the residency program, the resulting vacant spot was filled by a

White woman. We reversed the judgment and the matter was remanded for further proceedings not inconsistent with the opinion.

*3. The Second Summary Judgment Motion for Failure to Exhaust Administrative Remedies*

On remand the Regents once again moved for summary judgment asserting Dixon's claim was barred by his abandonment of the administrative remedy process and his failure to obtain a writ of mandate overturning the Chancellor's decision. (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61.) Dixon opposed the motion contending (1) the trial court was without jurisdiction to hear the motion because this court had remanded the case for trial, (2) *Johnson* was not new law and therefore the new motion for summary judgment was really a motion for reconsideration and (3) the futility doctrine applies in this case and Dixon was entitled to proceed directly to court without having to proceed through the writ of mandate procedure.

The trial court again granted the Regent's motion for summary judgment holding essentially that once Dixon started the internal review procedure, he was required to complete it before bringing an action at law.

**DISCUSSION**

*1. The Regents Were Entitled to Bring a Second Motion for Summary Judgment*

Dixon argues that because this court had remanded the case for trial the trial court was without jurisdiction to rule on a second motion for summary judgment. He is mistaken. In reversing the previous grant of summary judgment we remanded the case for further proceedings consistent with our opinion. We did not in any way restrict the trial court's authority to rule on further matters, such as another properly brought motion for summary judgment. Had we meant to restrict the trial court's discretion we could have simply ordered the trial court to set the matter for trial such as the court did in *Bagley v. TRW, Inc*. (1999) 73 Cal.App.4th 1092, 1098.

Dixon also seems to be arguing that Code of Civil Procedure Section 437c prohibits more than one motion for summary judgment. What section 437c subd. (f)(2)

states is "a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." Here the prior motion was based upon whether the evidence was sufficient to create a triable issue for determination by the trier of fact. The second motion for summary judgment was based upon the failure to exhaust administrative remedies. This was a different issue and thus not barred by section 437c. (See e.g., *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899.) Contrary to Dixon's position, a party may bring as many motions for summary judgment under 437c as there are different facets of the case, as long as different issues are involved.

*2. Johnson v. City of Loma Linda, supra, 24 Cal.4th 61 is Retroactive*

Dixon next argues that *Johnson v. City of Loma Linda* was not new law and even if it was, it should not be applied retroactively. This argument is actually a subset of the prior argument concerning whether more than one motion may be brought pursuant to section 437c.

The normal rule is that decisions apply retroactively. (*Penn v. Prestige Stations, Inc.* (2000) 83 Cal.App.4th 336.) In any event, *Johnson v. City of Loma Linda* has been determined to be retroactive. (See *Risam v. County of Los Angeles* (2002) 99 Cal.App.4th 412, 421.) We see no reason to differ with *Risam*.

*3. Dixon Was Entitled to Abandon His Administrative Hearing Because of the Futility Doctrine*

*A. Dixon Was Required to Use the UCLA Grievance Procedure.*

In *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 the California Supreme Court held that a party to a quasi-judicial administrative agency proceeding must challenge adverse findings made in that proceeding, by means of a mandate action in superior court, or those findings are binding in later civil actions. In *Johnson v. City of Loma Linda, supra,* 24 Cal.4th at p. 65 the court held the same rule

applied to FEHA claims made by a city employee whose FEHA claim was denied in a city administrative hearing. In *Johnson* the plaintiff lost before an administrative board which found Johnson had been discharged for economic reasons and not because he had opposed discriminatory practices as Johnson contended. Johnson did not bring a writ of mandate to overturn the administrative determination; instead he filed suit alleging he had been fired in retaliation for opposing sexual harassment. The City contended Johnson was bound by the ruling of the administrative board that he had been terminated for economic reasons. When Johnson attempted to seek a writ of administrative mandamus (Code Civ. Proc., § 1094.5) to overturn the administrative hearing, the trial court held he was barred by the doctrine of laches. The net effect of failing to attempt to overturn the administrative findings proved fatal to Johnson because, "[W]hen, as here, a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA." (*Johnson v. City of Loma Linda, supra,* 24 Cal.4th at p. 76.)

What about a FEHA claimant who chooses to totally bypass the administrative hearing, file a FEHA claim, obtain a right to sue letter and proceed directly to court? Two cases have held that if there is a FEHA remedy and an administrative remedy, the plaintiff may pursue the FEHA remedy to the exclusion of the administrative remedy. *Ruiz v. Department of Corrections* (2000) 77 Cal.App.4th 891 and *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271 both hold that plaintiffs alleging FEHA causes of action need not exhaust state civil service requirements before filing suit. This appears to be contrary to other cases such as *Palmer v. Regents of University of California, supra,* 107 Cal.App.4th 899 and *Edgren v. Regents of the University of California* (1984) 158 Cal.App.3d 515, which hold the existence of an internal grievance procedure requires the claimant to exhaust his or her administrative and judicial remedies prior to bringing an action at law. (See also *Johnson v. City of Loma Linda, supra*, 24 Cal.4th at pp. 70-71 and cases cited therein.)

The California Supreme Court is obviously aware of the FEHA problem. In *Johnson v. City of Loma Linda, supra,* 26 Cal.4th at pp. 72-73 the Supreme Court recognized the apparent conflict and stated, "It is clear from the quoted language that the Court of Appeal in *Watson* faced the issue of whether a plaintiff must exhaust non-FEHA administrative remedies as a prerequisite to initiating a lawsuit, including a FEHA claim. That issue is not before us." (*Id* at. p. 73.) However, *Johnson* did disapprove *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896 which had held a FEHA right to sue letter was an alternative administrative avenue to the city's internal grievance procedure.[4] The law is unclear on this issue; the Supreme Court has presently pending before it the issue of whether a plaintiff who has a claim under FEHA and an internal grievance procedure from his or her employer is required to exhaust both procedures prior to filing a lawsuit.[5]

For purposes of this appeal we reject *Ruiz* and *Watson,* which appear to be at odds with most of the other reported cases. Thus, since Dixon did not exhaust his administrative or judicial remedies, the trial court's ruling on the summary judgment must be upheld, unless the futility doctrine excuses his noncompliance.

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[4] In *Swartzendruber* the plaintiff was fired because she refused to obey an order of a superior. Her administrative appeal had dealt with the issues surrounding her termination. Rather than seeking to overturn the administrative determination which was adverse to her, she brought a FEHA action that was broader than the issues that had been litigated before the administrative board. As to the causes of action that had been litigated, the court of appeal applied the rule that the administrative findings which have not been set aside are binding upon the claimant. However, as to one claim for sexual discrimination which predated her termination and was not litigated before the administrative board, the Court of Appeal held obtaining a FEHA letter was an alternative to the city's internal review procedures.

[5] *Schifando v. City of Los Angeles*, review granted July 10, 2002, S106660.

*B. Dixon Was Not Required to Endlessly Litigate at a Snails Pace Before Being Allowed to Bring an Action at Law*

It is now more than nine and one-half years since Dixon was notified he would not have his employment renewed for a second year. Dixon's counsel wrote to UCLA, in September 1994, requesting an investigation. A response by the Chancellor was due within 30 days. That letter was apparently lost by UCLA and it was more than three months before Jasper, as counsel for the university, filed a response rejecting Dixon's claim and inquired if Dixon would be filing an appeal in accordance with the UCLA Campus Appeal Procedure. Within a month, in January 1995, Dixon's counsel wrote a letter to the Chancellor indicating that, since the informal resolution could not be worked out, Dixon was requesting a formal hearing.

The hearings were not able to commence immediately because Jasper had commitments through July. Thereafter, starting six months later in July 1995, the hearings proceeded in fits and starts until they were finally terminated in October 1997 by Dixon. During that period of time there had only been 11 partial days of hearings.

In June 1996 the hearing coordinator notified the parties that the hearings scheduled for June 13 and June 25, 1997, had been cancelled and hearings would not resume prior to September 1997. Dixon's counsel immediately wrote back indicating Dixon was desirous of having a firm commitment as to when the hearing would conclude. She further wrote, "Dr. Dixon is now nearly four years away from the original termination decision and is not prepared to continue with this process indefinitely into the future." Finally, counsel wrote, "I am by this letter requesting on behalf of Dr. Dixon that a deadline be set by the Dean of U.C.L.A., its general counsel, the Chief of the Medical Center, or by whatever other body has the power and authority to do so."

On July 9, 1997, the Regents, with new counsel, responded by questioning Dixon's motives in making the demands after he had completed his case, but before the Regents had completed its cross-examination of Dixon or had a chance to present its

case. The resolution of this problem was to schedule the next hearing for October 10, 1997.

On October 7, 1997, Dixon's counsel wrote, "In this regard, please be advised that due to the time delay in completing the hearings and your unwillingness to schedule the hearing dates that are not months apart, Dr. Dixon had elected to file a complaint in a court of law. This administrative appeal has been going on for almost two years without an end in sight, and has become an exercise in futility. [¶] Therefore we will not participate in any future hearings in this matter." Jasper responded for the Regents within two days alleging bad faith on the part of Dixon and further stated, "The University does not believe that it should be denied the opportunity to present its case simply because you client has decided – just as the University is putting on its case – that he no longer wants to participate in the process which he invoked in the first place. By copy of this letter and attachment to Professor Robert Goldstein, Chair of the Hearing Panel in this matter, the University requests that tomorrow's hearing go forward as scheduled, whether or not you or Dr. Dixon choose to attend." On October 12, 1997, a hearing was not held and the matter was continued until November 17, 1997 for a telephone conference to allow the University to decide what it was going to do. On October 24, 1997 Jasper wrote a letter to the hearing officers indicating the University would not be presenting any evidence and considered the matter unresolved.

The Regents argue before this court, as they did before the trial court, that Dixon was required to exhaust both his administrative and judicial remedies before he could bring an action at law. "'"While, of course, it is the general rule that *mandamus* will not lie to control the discretion of a court or officer, meaning by that it will not lie to force the exercise of discretion in a particular manner . . . [it] will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, *when the law clearly establishes the petitioner's right to such action*."' (*Thelander v. City of El Monte* [(1983)] 147 Cal.App.3d [736,] . . . 748 first italics original, second italics added.)" (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1124.)

However, having mandamus available as a remedy would have been of no practical assistance. What relief could Dixon have sought: Make the hearing officers hold hearings more often and when the hearings were held make them longer? The problem, and one that no one appeared to appreciate from the outset, was that the hearing officers were practicing doctors who felt they owed more to their patients than to the quasi judicial process in which they were involved. To have a court order them to effectively abandon their practices to complete the hearing probably would have had a devastating effect on Dixon's right to a fair hearing. Finally, how much more time would have been wasted in seeking a writ of mandate, holding a hearing on the writ, going back to the administrative hearing, completing the hearing and then waiting for the decision to be made?

In some circumstances, the exhaustion doctrine serves an important function. It permits organizations to resolve factual issues by applying their expertise, rules and regulations to resolve a dispute. It usually affords a less formal and more economical forum to resolve disputes and mitigate damages. Finally, even if the dispute is not finally resolved at the hearing stage, the above-mentioned factors may still promote judicial economy in handling the dispute once it reaches court. (*Rojo v. Kliger* (1980) 52 Cal.3d 65, 86-87.) A two-year hearing can hardly be considered less formal and more economic. Nor is there any special expertise that is needed for resolving the issues involved. What is alleged and what is being fought over is whether UCLA and its medical school engaged in plain old-fashioned bigotry and racial discrimination. No special administrative board is needed for this determination. If it is true, and there is no rational explanation, then a jury is fully capable of making a proper determination as to whether UCLA had engaged in a policy of racial discrimination. Here, Dixon had clearly exhausted his available remedies. Anything further would have been idle, futile and practically useless. He was in the position almost akin to that of someone trying to punch a hole through the "Pillsbury Doughboy." It is now almost 10 years since the events that

precipitated this lawsuit occurred. What was and is required is exhaustion of the administrative and judicial remedies, not exhaustion of Dixon.

Additionally, to require Dixon to proceed further in this seemingly never-ending quagmire carries its own dangers to his right to be free from discrimination. Under FEHA, Dixon has the right to be free from racial discrimination. To vindicate the rights, Dixon was forced to litigate the issues under a procedure set up by the Regents. If the hearing was ever completed and Dixon lost, he would have to bring an action for administrative mandamus (Code Civ. Proc., § 1094.5) and seek to overturn the findings. If there were substantial evidence to support that finding, then the trial court would have to uphold the administrative decision. Requiring Dixon to go through the administrative procedure may mean that he may never obtain his right to a jury trial on a basic public policy issue: the right to be free from discrimination.[6]

**DISPOSITION**

The judgment is reversed and the matter is remanded for trial.

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MUNOZ (AURELIO), J.*

I concur:

WOODS, J.

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[6] See the dissenting opinion of Justice Johnson in *Palmer v. Regents of the University of California, supra,* 107 Cal.App.4th at pp.919-920.

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

PERLUSS, P.J., Concurring.

I fully agree with both the analysis and conclusion in part 1 (holding the Regents was entitled to bring a second motion for summary judgment) and part 2 (holding *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 is retroactive) of the majority's opinion. I also agree the trial court erred in granting the Regents's motion for summary judgment, but for somewhat different reasons than the majority.

Dixon pursued to completion two steps of the general University of California grievance procedure for academic appointees other than members of the University's academic senate: informal review (step I) and formal review (step II). The formal review resulted in a six-page written response that concluded, based on "documented evidence," that "[t]he decisions made by the Division of Family Medicine with respect to Dr. Dixon's residency are amply supported by the record, as is Dr. Fogelman's determination, following independent review by an ad hoc committee of physicians, that there was no reason to set aside Dr. Dixon's termination as a Family Medicine resident; [¶] . . . [¶] There is no evidence that Dr. Dixon was evaluated differently from other residents in the program. There is no evidence that Dr. Dixon was discriminated against on the basis of his race or for any other reason . . . ." Had there been no further appeal or internal review procedure available to Dixon, if Dixon failed to seek timely judicial relief from that decision pursuant to Code of Civil Procedure section 1085 or section 1094.5, under *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th 61, the step II administration determination would normally have "achieved finality" and had the effect of establishing the propriety of Dixon's termination, thereby defeating his discrimination claim under the Fair Employment and Housing Act (FEHA). (*Id*. at p. 71.)[1]

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[1] The Regents's personnel grievance proceedings are quasi-judicial and subject to review by writ of mandate. (*Palmer v. Regents of the University of California* (2003) 107 Cal.App.4th 899, 906; *Edgren v. Regents of the University of California* (1984) 158

Of course, there was one more internal appeal available to Dixon: step III, a hearing before a hearing officer or committee. Dixon attempted to pursue this right to an evidentiary hearing, a process described in detail by the majority, for more than two and one-half years without an end in sight. Some of the delay may well be attributable to Dixon (or his counsel); other parts of the delay appear to be the consequence of having selected as hearing officers busy physicians who cannot be expected to abandon their practices to devote full attention to the University grievance process. It is not necessary to calibrate the relative degrees of fault of the various participants in step III to conclude, as does the majority, that under the peculiar facts of this case the appeal procedure proved to be inadequate for adjudication of Dixon's claim of discriminatory termination.

If step III stood alone as the only internal grievance procedure available to Dixon, I would agree fully with the majority's conclusion that he was free to abandon it when it proved inadequate and proceed to file his civil lawsuit for damages. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 217 ["It is settled that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable [citation] or inadequate [citation]."][2] But, as the Regents argues, the practical insufficiency of the hearing process in step III does not render nugatory the Chancellor's decision in step II, which had concluded that Dixon's termination was nondiscriminatory. To comply with the mandate of *Johnson v. City of Loma Linda, supra,* 24 Cal.4th 61, and exhaust available judicial remedies, Dixon should have filed a petition for writ of mandate challenging the result in step II, while arguing further pursuit of the hearing procedure provided for in step III was unnecessary in this case because of the excessive delays that made the process inadequate.

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Cal.App.3d 515, 520-522; see *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1728-1729.)

[2] The "futility" exception to the exhaustion requirement applies only when the agency's decision is certain to be adverse. (See, e.g., *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 690.)

This analysis would generally lead to the conclusion the trial court properly granted summary judgment because the unchallenged, adverse decision at step II is determinative of Dixon's discrimination claim under FEHA. However, strictly construing the Regents's evidence while liberally construing the evidence presented by Dixon in his opposition to the motion for summary judgment, as we must (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839),[3] the record indicates the existence of a material issue of fact as to whether step II of the University's grievance procedure, as actually conducted in this case, provided Dixon an adequate opportunity to present his claim of discriminatory termination. If Dixon can prove at trial that the University failed to provide him a "full and fair opportunity to litigate" at step II, the adverse decision made at that stage is not binding on the court; and he remains free to pursue his FEHA claim. (*Johnson v. City of Loma Linda, supra,* 24 Cal.4th at p. 71, fn. 3; *People v. Sims* (1982) 32 Cal.3d 468, 479.[4])

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[3] "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment . . . are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors.' [Citation.]" (*Binder v. Aetna Life Ins. Co., supra,*75 Cal.App.4th at p. 839.)

[4] The Court in *People v. Sims, supra*, 32 Cal.3d 468, explained the importance of providing a fair opportunity to present evidence and argument during internal grievance proceedings: "In seeking to determine whether a [California Department of Social Services] fair hearing decision may have collateral estoppel effect, this court also finds appropriate guidance in *United States v. Utah Constr. Co*. (1966) 384 U.S. 394 [16 L.Ed.2d 642, 86 S.Ct. 1545]. There, the United States Supreme Court stated: 'Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. [Fn. omitted.]' [Citation.] Collateral estoppel may be applied to decisions made by administrative agencies '[when] an administrative agency is *acting in a judicial capacity* and *resolves disputed issues of fact* properly before it which the parties have had an *adequate opportunity to litigate* . . . .' [Citation, fn. omitted.] This standard formulated by the Supreme Court is sound, and it comports with the public policy underlying the collateral estoppel doctrine 'of limiting litigation by preventing a party who has had one

On this more limited basis I agree with the majority that the trial court erred in granting the Regents's motion for summary judgment and concur in reversal of that judgment and remand for further proceedings in the trial court.

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PERLUSS, P. J.

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fair trial on an issue from again drawing it into controversy. [Citations.]' [Citation.]" (*Sims*, at p. 479.)