

RAJESH GAUR, Plaintiff and Appellant,
v.
CITY OF HOPE et al., Defendants and Respondents.

No. B231343.

Court of Appeals of California, Second District, Division One.

Filed November 30, 2011.

Siegel & Yee, Dan Siegel and Dean Royer, for Plaintiff and Appellant.

Latham & Watkins, Joel E. Krischer, Joseph B. Farrell and Jessica C. Kronstadt for Defendants and Respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ROTHSCHILD, J.

Dr. Rajesh **Gaur** appeals from the order of dismissal entered after the trial court sustained without leave to amend the demurrer filed by the **City of Hope** and the Beckman Research Institute of the **City of Hope** (collectively, **City of Hope**). Dr. **Gaur** contends that he can pursue his discrimination cause of action in the instant lawsuit, even though he did not obtain relief through administrative mandamus under Code of Civil Procedure section 1094.5^[1] from **City of Hope's** dismissal of his internal grievance in which he claimed that he was denied a full and fair promotion review and then terminated from employment. We agree with Dr. **Gaur** and reverse the order of dismissal as to the discrimination cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

1. Dr. Gaur's Employment at City of Hope

On November 13, 2000, Dr. **Gaur** signed a contract for a term of employment with **City of Hope**, and on January 8, 2001, he began work as an Assistant Professor in the Division of Molecular Biology.^[2] After Dr. **Gaur** had completed his sixth year at **City of Hope**, in January 2007, the process for his advancement to Associate Professor was initiated. Dr. John Rossi, the chair of Dr. **Gaur's** department, advised Dr. **Gaur** "to prepare his promotion package `at [his] earliest convenience." In October 2007, the Ad Hoc Promotions Committee recommended deferring consideration of Dr. **Gaur's** promotion to Associate Professor for one year because promotion at that time was inadequately supported and an extension would allow Dr. **Gaur** to further publish and obtain external funding. Based on that recommendation, the Appointments and Promotions Committee (APC) decided "to further defer consideration of Dr. **Gaur's** promotion for 1-2 years, and to consider re-submitted promotion materials at that time." Dr. **Gaur** was notified of the decision in December 2007 and told to "explore alternative employment that does not depend on obtaining grants"; Dr. Rossi and Dr. Richard Jove, the then new director of the Beckman Research Institute of the **City of Hope**, received notification of the decision as well.

On January 16, 2008, Dr. Jove sent a letter to Dr. **Gaur** stating that ". . . your appointment for this final period is extended to September 30, 2008." After a meeting with Dr. Jove, Dr. **Gaur** secured an extension of his appointment through September 30, 2009, and Dr. Jove indicated that at that time "we will reevaluate the options based on grants and publications" and told Dr. **Gaur**, "[i]n the meantime, I would strongly recommend that you continue to explore other positions, in case extending beyond Sept 2009 is not an option. I suggest you discuss this further with your chair, [Dr.] Rossi."

In June 2009, Dr. **Gaur** met with Dr. Jove, presenting progress on his research and asking for a reevaluation of his promotion to Associate Professor. Dr. Jove informed Dr. **Gaur** that the reevaluation process had to be completed by September 30, 2009, the ending date for Dr. **Gaur's** appointment. Dr. **Gaur** informed Dr. Rossi, the chair of his department, "I will work with you (following APC policy) to move this process forward. You will have my full cooperation." Dr. Rossi informed the previous Ad Hoc

Committee members who had assessed Dr. **Gaur** for promotion that a new review would take place and asked them to serve on the evaluation committee. Toward the end of June, Dr. **Gaur** suffered a neck injury and missed several days of work as a result.

The next month, on July 29, 2009, Dr. Jove declined Dr. **Gaur's** request to apply for a "Susan G. Komen for the Cure" grant, given the upcoming termination of his contract. Dr. Rossi told Dr. **Gaur** that Dr. Jove "is not backing off the Oct 1 date as your last date. That is why he refused to sign the proposal. I do not think there are any options left on this."

On August 11, 2009, after Dr. **Gaur** had hired an attorney to represent him in connection with his **City of Hope** employment, the attorney sent a letter requesting an extension of Dr. **Gaur's** appointment for one year through September 30, 2010 and referencing his physical disability based on the neck injury he had suffered in June.

A few weeks later, on September 4, 2009, Dr. **Gaur** sent an email informing Dr. Rossi that he was preparing his promotion package. The following week, he provided Dr. Rossi with the names of two people who had agreed to serve as reviewers for his promotion package. He then submitted his curriculum vitae and the names of nine additional potential reviewers. On September 21, 2009, Dr. **Gaur** emailed Dr. Rossi, "Here is my complete promotion package. Please let me know the seminar date ASAP."

On September 29, 2009, Dr. Rossi forwarded to Dr. **Gaur** an email from Dr. Jove indicating that the following day, September 30, 2009, was the end of Dr. **Gaur's** appointment. Three days later, on October 2, 2009, **City of Hope's** counsel sent a letter to Dr. **Gaur's** attorney stating, "As you know, Dr. **Gaur's** promotion[] package was provided to Dr. Rossi on September 21, 2009, which obviously did not leave sufficient time for the Academics Promotions Committee to review prior to Dr. **Gaur's** last day of employment. Consequently, Dr. **Gaur's** promotion[] package will not be considered by the APC."

2. Dr. Gaur's Grievance and the City of Hope's Decision

City of Hope's Policy and Procedures for Academic Appointments and Promotions (Policy and Procedures), in effect on September 30, 2009, Dr. **Gaur's** final day of employment, provided that "[a]ny faculty member may initiate a grievance action in writing according to the procedures outlined" It further stated, "An academic staff member (grievant) may submit a formal grievance by written application . . . to Executive Committee of the Faculty Senate who will forward the grievance . . . as appropriate." As relevant in this case, "[a] grievance is defined as a complaint that (a) involves a decision regarding an individual's rank, promotion, or termination of academic appointment arising from academic performance, that was arbitrary and capricious and adversely affected his/her existing terms and conditions of employment"

On October 28, 2009, Dr. **Gaur** filed a grievance with the Faculty Senate Executive Committee against Dr. Jove, contending that **City of Hope** violated its Policy and Procedures in his promotion process. According to Dr. **Gaur**, Dr. Jove "prematurely aborted the proceedings of [Dr. **Gaur's**] promotion to Associate Professor[,] which resulted in his termination. Dr. **Gaur** maintained that **City of Hope** had "failed and refused to follow its own rules, promptly initiate and conduct . . . a reevaluation [of his credentials] and afford [him] the customary rights and procedures to which [he is] entitled under [**City of Hope's** rules] and California law"

The Faculty Senate Executive Committee formed a grievance committee to consider Dr. **Gaur's** claim. After questioning Dr. Jove, Dr. Rossi and Dr. **Gaur**, and considering their testimony and documentary evidence, the grievance committee issued a report on January 29, 2010, concluding that "[t]he grievance against Dr. Jove is not founded based on the evidence . . . and should be dismissed."

The committee summarized its findings: "Dr. **Gaur** states that the original review [in 2007] was not undertaken in a timely manner, but the intention of both the Ad Hoc and APC in their recommendations was to enable Dr. **Gaur** to publish work and to obtain grant support for his program. There was no prejudice in this case and other faculty members have been accorded similar time to establish their programs. [¶] Although Dr. **Gaur** stated that he made repeated requests to pursue a reevaluation, no evidence of such communication or suggestions for a reevaluation is noted prior to the 16Jun2009 meeting between Drs. **Gaur** and Jove. Statements by Dr. Rossi support the finding that Dr. Jove did not impede the promotion process initiated in June 2009. [¶] Dr. Jove clearly indicated to Dr. Rossi on 18June2009 that the promotion process needed to be completed before . . . 30Sept2009. Dr. **Gaur** acknowledged the need and pledged his cooperation on 19Jun2009. Dr. Rossi acted in a manner reflecting his concern about timing and contacted members of the Ad Hoc Committee within 1 day of receiving an email from Dr. **Gaur** asserting his 'full cooperation.' [¶] Although Dr. **Gaur** suffered and received treatment for a medical problem in

the summer of 2009, he had ample time to complete the dossier for submission and completion of the promotion process. Most of the documentation needed was included in the yearly review process. A list of potential referees was furnished to Dr. Rossi on 11Sept2009 and 21Sept2009. The complete package was stated as being sent by Dr. **Gaur** on 29Sept2009. [¶] Although Dr. **Gaur** cited his medical problem as a principal reason for his inability to complete the review process, in mid-August 2009, Dr. **Gaur** traveled to a meeting in Germany and then went on vacation until the beginning of September. [¶] The 3-month time period to complete the promotion process and reevaluation was sufficient. Indeed, the completion of the promotion process would have been possible in a shorter time frame. However, the Committee finds that the inability to complete the process before 30Sept2009 rests with the failure of Dr. **Gaur** to complete and submit his dossier in a timely manner and not from any impediments by Dr. Jove. [¶] Although submission of the Susan G. Komen for the Cure grant application was prevented by Administration, the Committee does not find this decision a violation of Dr. **Gaur's** rights. Grants from that foundation are not transferable. Reviews of the proposal would have been received after the 30Sept2009 termination date. [¶] In summary, the Grievance Committee does not agree that Dr. **Gaur** was guaranteed a second promotion review. Dr. Jove, with proper authority, placed a time limit on the promotion proceedings, and Dr. **Gaur** failed to meet the time limit. Dr. Jove did not impede the reevaluation process of Dr. **Gaur** that was started in June 2009. Therefore, the Grievance Committee does not find merit in his grievance."^[3]

On February 4, 2010, Dr. **Gaur** sent a letter to Dr. Michael Friedman, president and chief executive officer of **City of Hope**, alleging that the grievance committee failed to consider certain facts in its report. Dr. Friedman responded on February 12, 2010, that he had considered the report, and the committee's response to Dr. **Gaur's** February 4, 2010 letter, and that he accepted the committee's recommendation to dismiss the grievance.

On February 18, 2010, Dr. **Gaur** appealed Dr. Friedman's February 12, 2010 decision, contending that the grievance committee made false and misleading findings and ignored key evidence in recommending the dismissal of his grievance. Dr. Friedman considered Dr. **Gaur's** appeal and, on March 3, 2010, after reviewing the materials examined by the committee, stated his approval of the committee's recommendation to dismiss the grievance.

3. Dr. Gaur's Complaint

On May 27, 2010, Dr. **Gaur** filed the complaint in this action, alleging three causes of action: (1) breach of contract; (2) fraudulent misrepresentation and concealment; and (3) discrimination based on race and national origin.

The breach of contract and fraudulent misrepresentation and concealment causes of action focused on **City of Hope's** alleged failure to follow its Policy and Procedures in reviewing him for promotion and misrepresentations to him that "his promotion review would be conducted in a full and fair manner."

In his cause of action for discrimination based on race and national origin, Dr. **Gaur** alleged that he "is a member of a 'protected class' because of his race (Asian) and national origin (Indian)" and suffered an adverse employment action when **City of Hope** terminated his employment. "On April 13, 2010, [Dr. **Gaur**] filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission On April 22, 2010, the California Department of Fair Employment and Housing . . . issued a Right-To-Sue-Letter on the grounds that processing has been waived to another agency." According to Dr. **Gaur**, although he met or exceeded all four of the requirements for promotion to the rank of Associate Professor—publications in high-quality, peer-reviewed journals; attainment of national recognition; receipt of extramural peer-review funding; and contributions to the graduate school—**City of Hope** terminated him, while his white coworkers with similar or less qualifications were promoted or retained. Dr. **Gaur** alleged that his request for research support from **City of Hope** was denied, while his white coworkers received disproportionate institutional funding for research, and that Dr. Jove asked a white coworker to become a lead investigator on a research proposal that was designed and written by Dr. **Gaur**. In addition, Dr. **Gaur** said, **City of Hope** granted white coworkers extensions for submitting their promotion packages, while denying him an extension. In recent years, according to Dr. **Gaur**, only three Assistant Professors were denied promotion to Associate Professor, and all three are not white.^[4]

Dr. **Gaur** sought reinstatement; restoration of back pay, benefits, seniority and interest; removal of documentation from his personnel file relating to his termination; enforcement of **City of Hope's** Policy and Procedures; general, special and punitive damages; and costs and attorney fees.

4. The Trial Court's Order Sustaining City of Hope's Demurrer Without Leave to Amend and the Order of Dismissal

On August 23, 2010, **City of Hope** filed a demurrer to Dr. **Gaur's** complaint on the sole ground that all three of his causes of action failed because he had not first obtained relief from **City of Hope's** decision dismissing his internal grievance through an administrative mandamus proceeding under section 1094.5. According to **City of Hope**, Dr. **Gaur's** "sole remedy for protesting th[e] decision is a writ of mandamus as required by [s]ection 1094.5; he is, therefore, precluded from bringing a civil lawsuit." **City of Hope** maintained that, "[b]ecause the defects in Dr. **Gaur's** [c]omplaint are incurable, his entire [c]omplaint should be dismissed without leave to amend."

At a hearing on November 22, 2010, over Dr. **Gaur's** opposition, the trial court sustained the demurrer without leave to amend, concluding that he could not pursue a civil lawsuit against **City of Hope** based on its alleged failure to afford him a full and fair promotion hearing, which led to his termination, without first proceeding by administrative mandamus under section 1094.5 to overturn the dismissal of his internal grievance. As to the discrimination cause of action, the court concluded, "You title it separately, but you didn't plead anything other than what happened in the tenure process[,] which you [pleaded] in the first two causes of action" for breach of contract and fraudulent misrepresentation and concealment.

On January 18, 2010, the trial court entered an order of dismissal as to Dr. **Gaur's** complaint. Dr. **Gaur** filed a notice of appeal.

DISCUSSION

1. Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] . . . [W]e give the complaint a reasonable interpretation, and read it in context. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*)). We liberally construe the pleading with a view to substantial justice between the parties. (§ 452; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1120.)

2. The Trial Court Improperly Sustained the Demurrer As to the Discrimination Cause of Action on the Ground That Dr. Gaur Failed to Obtain Administrative Mandamus Relief from City of Hope's Dismissal of His Grievance

In *Schifando, supra*, 31 Cal.4th 1074, a **city** employee brought a disability discrimination lawsuit under the Fair Employment and Housing Act (FEHA) against the **city**. (*Id.* at p. 1080.) The **city** argued that the employee could not pursue his lawsuit because he had not exhausted its internal grievance procedures before filing the FEHA action. (*Ibid.*) In holding the employee was not required to exhaust internal grievance procedures before filing a FEHA lawsuit, the Supreme Court "conclude[d] the employee need not exhaust both administrative remedies [of the **city** and FEHA], and that receiving a Department of Fair Employment and Housing [DFEH] . . . 'right to sue' letter is a sufficient prerequisite to filing an FEHA claim in superior court." (*Id.* at p. 1080.) In reaching its conclusion, the Court relied on the Legislature's intent in enacting FEHA to "supplement, not supplant or be supplanted by existing antidiscrimination remedies" [Citation.]" (*Id.* at pp. 1085-1086, fn. omitted; see also *id.* at p. 1089 ["FEHA was enacted to expand, not to limit employees' rights to remedy discrimination"].) FEHA's legislative purpose to "give employees the maximum opportunity to vindicate their civil rights against discrimination" would be frustrated if employees were required to pursue internal remedies in addition to FEHA's administrative remedies as a prerequisite to filing a FEHA action. (*Id.* at pp. 1085-1086, italics omitted.) Although reaffirming its prior cases requiring a plaintiff to exhaust internal remedies before bringing common law claims in a judicial forum (see, e.g., *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*); *Moreno v. Cairns* (1942) 20 Cal.2d 531), the Court explained that, in those cases, "the Legislature ha[d] not specifically mandated its own administrative review process, as in the FEHA." (*Schifando*, at p. 1092, fn. omitted.) "Th[e] court, however, has never held that exhaustion of an internal employer procedure was required where an employee made a claim under FEHA or another statutory scheme containing its own exhaustion prerequisite. The distinction is

compelling." (*Ibid.*)

The Supreme Court recognized that its decision that an employee need not pursue internal grievance procedures before bringing a FEHA discrimination cause of action in a judicial forum created "the existence of potential procedural issues that might arise in the situation where an employee chooses to pursue both avenues of redress, but [explained] those issues [we]re not before [it]." (*Schifando, supra*, 31 Cal.4th at p. 1092.) This case presents one of those procedural issues because Dr. **Gaur** pursued **City of Hope's** internal grievance procedures, without raising a discrimination claim, and, after **City of Hope** resolved his grievance against him, filed a discrimination lawsuit in a judicial forum. Dr. **Gaur** contends that, under *Schifando*, he could choose to pursue his discrimination claim in a judicial forum and thus no need existed for him to overturn **City of Hope's** decision dismissing his grievance through administrative mandamus under section 1094.5 before filing this lawsuit for discrimination. We agree with Dr. **Gaur** that, under *Schifando*, his discrimination cause of action is viable in a judicial forum. To hold otherwise would contravene *Schifando's* directive that, to enforce the Legislature's intent that FEHA "expand, not . . . limit[,] employees' rights to remedy discrimination[.]" a plaintiff is free to elect the forum in which to assert a discrimination cause of action and can do so judicially as long as he or she has exhausted FEHA's administrative remedies. (*Id.* at p. 1089.) As a result, *Schifando* preserves Dr. **Gaur's** election to pursue his discrimination cause of action in a judicial forum.^[5]

3. City of Hope's Arguments That Dr. Gaur May Not Pursue His Discrimination Cause of Action in a Judicial Forum Lack Merit

Despite the principles articulated in *Schifando*, **City of Hope** argues that Dr. **Gaur's** use of its internal grievance procedures, even though he did not include a discrimination claim in his grievance, prohibits him from later suing for *any* relief in a judicial forum unless he first obtains a writ of administrative mandamus overturning its decision to dismiss his grievance, which he has not done. None of **City of Hope's** arguments is persuasive.

City of Hope relies on *Page v. Los Angeles County Probation Dept. (2004) 123 Cal.App.4th 1135 (Page)*, in which a county detention services officer filed a grievance before the county civil service commission alleging disability discrimination and failure to reasonably accommodate. (*Id.* at pp. 1138-1139.) The hearing officer found in favor of the county, determining that the employee could not perform the essential functions of her former position, even with reasonable accommodations, and that the county had offered to reasonably accommodate her disability by transferring her to another position. (*Id.* at p. 1139.) Before the county adopted the hearing officer's decision, the employee received a right-to-sue letter from the DFEH and filed a lawsuit against the county alleging disability discrimination under FEHA. (*Id.* at p. 1140.) Thereafter, the commission approved the hearing officer's decision. (*Id.* at pp. 1139-1140.) The employee did not bring an administrative mandamus proceeding to challenge the commission's decision. (*Id.* at p. 1140.) Division Four of the Second Appellate District affirmed the order of dismissal based on the trial court's sustaining of the county's demurrer without leave to amend, concluding that, although the employee was not required to pursue the county's internal grievance procedures, once she elected to do so, she was obligated to exhaust those procedures and to overturn any adverse findings through an administrative mandamus proceeding before pursuing a FEHA cause of action in a judicial forum. (*Id.* at pp. 1142-1144.)

Page is distinguishable. Unlike in *Page*, Dr. **Gaur** did not use **City of Hope's** internal grievance procedures to address his discrimination claim. As recognized in *Page*, "[t]he *Schifando* court concluded that, to avoid . . . a `procedural minefield,' and to achieve the `benefits of judicial economy, agency expertise, and potential for swift resolution of grievances,' public employees may choose what forum is most appropriate to their situation." (*Page, supra*, 123 Cal.App.4th at p. 1142, quoting *Schifando, supra*, 31 Cal.4th at pp. 1088-1089.) "The *Schifando* court reasoned that some plaintiffs prefer the summary procedures of the civil service commission while others would prefer to bypass the administrative process and file a lawsuit to vindicate civil rights, and that giving the choice of forum to plaintiffs best serves the legislative purposes of FEHA." (*Page*, at p. 1142, citing *Schifando*, at p. 1087.) Dr. **Gaur** chose to litigate his discrimination claim in a judicial forum; he raised no such claim through **City of Hope's** internal grievance procedures. As a result, *Page* does not preclude Dr. **Gaur** from pursuing his discrimination cause of action.

City of Hope also relies on *Westlake, supra*, 17 Cal.3d 465, arguing that any claim that Dr. **Gaur** would pursue in court, including his discrimination cause of action, necessarily is premised on its decision to terminate his employment and thus cannot go forward unless he obtains administrative mandamus relief overturning its decision to dismiss his grievance. *Westlake*, however, does not apply in this context because it did not involve a discrimination cause of action. In *Westlake*, the Supreme

Court held that a doctor's tort causes of action against a hospital based on its revocation of her staff privileges failed as a matter of law because she did not first overturn the hospital's internal decision upholding the revocation and her claims were "necessarily premised on an assertion that the hospital's decision to revoke [her] privileges was itself erroneous and unjustified." (*Westlake*, at p. 484.) The *Schifando* Court, in emphasizing the right of an employee to choose the forum to resolve a discrimination claim, distinguished *Westlake* because the causes of action in that case were common law claims, as opposed to a statutory FEHA cause of action with specified legislative goals and exhaustion requirements. (*Schifando, supra*, 31 Cal.4th at p. 1092.) *Westlake*, therefore, does not impede Dr. **Gaur's** choice to pursue his discrimination claim in a judicial forum.

City of Hope notes the application of *Westlake* to the denial of tenure to a university professor in *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716 (*Pomona College*), maintaining that, because **City of Hope** employed Dr. **Gaur** as a professor, his failure to obtain administrative mandamus relief is fatal to his discrimination cause of action. As discussed, however, *Westlake* did not involve a discrimination cause of action. In any case, the appellate court in *Pomona College* recognized that discrimination claims fall outside the public policy rationale for requiring a professor to overturn an adverse decision based on an internal grievance through administrative mandamus before pursuing a civil lawsuit. The court stated, "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." [Citation.]" (*Id.* at p. 1725, italics added.) Although in this case Dr. **Gaur's** grievance with **City of Hope** certainly involved academic matters within the expertise of **City of Hope's** professionals, his discrimination cause of action is not within that academic purview. Contrary to **City of Hope's** argument, *Pomona College* thus does not dispose of Dr. **Gaur's** discrimination cause of action.

City of Hope's reliance on *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967 (*Gutkin*) similarly is unpersuasive. In that case, the same appellate court as in *Pomona College* applied its decision to a university professor complaining about the decision to revoke his tenure. Although the professor in *Gutkin* had sued for age discrimination, that cause of action was not at issue on appeal, and the appellate court did not discuss the professor's discrimination claim. (*Id.* at pp. 976-981.) Indeed, in concluding that the professor's failure to obtain administrative mandamus relief from the university's rejection of his internal grievance barred his contract and tort causes of action, the court stated that its "analysis is governed by [its] decision in *Pomona College*, which is dispositive of all but [the professor's] discrimination claims in this case." (*Id.* at p. 976.) As a result, *Gutkin* likewise does not preclude Dr. **Gaur** from pursuing his discrimination cause of action in court.

Finally, **City of Hope** contends that its decision to dismiss Dr. **Gaur's** internal grievance, asserting that it violated its Policy and Procedures in the promotion process and thereby caused his termination, bars Dr. **Gaur's** claim that it discriminated against him unless he overturns its decision through administrative mandamus. We disagree. Even if Dr. **Gaur's** discrimination cause of action were seeking to vindicate the same primary right as his grievance asserting that **City of Hope** did not follow its Policy and Procedures and ultimately caused his termination^[6], **City of Hope** did not demonstrate that Dr. **Gaur** could have pursued a discrimination claim through its internal grievance procedure. As relevant, **City of Hope's** Policy and Procedures limits a "grievance" to a complaint involving a decision regarding promotion or termination that is "arbitrary and capricious . . ." An "arbitrary and capricious" decision does not necessarily encompass a discriminatory decision. Accordingly, on demurrer, **City of Hope's** decision to dismiss Dr. **Gaur's** internal grievance does not bar Dr. **Gaur's** discrimination cause of action. (See *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1170 ["[a]n important exception to the general rule of indivisibility of a primary right permits a second action on a different legal theory if the plaintiff was precluded from asserting that theory in the first action because of limitations on the subject matter jurisdiction of the first forum"].)^[7]

DISPOSITION

The order of dismissal is affirmed as to Dr. **Gaur's** causes of action for breach of contract and fraudulent misrepresentation and concealment, but reversed as to his discrimination cause of action. The matter is remanded to the trial court with directions to overrule the demurrer as to the discrimination cause of action and for further proceedings not inconsistent with this opinion. Dr. **Gaur** is entitled to recover his costs on appeal.

MALLANO P. J. and CHANEY, J., concurs.

[1] Statutory references are to the Code of Civil Procedure.

[2] We state the factual background based on the allegations in Dr. **Gaur's** complaint, which we must accept as true to determine the propriety of the demurrer. (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373 [reviewing court accepts as true all properly pleaded facts to determine whether the complaint states a cause of action].) In connection with its demurrer, **City of Hope** attached certain documents from its review of Dr. **Gaur's** internal grievance as exhibits. On appeal, Dr. **Gaur** moved for judicial notice of the documents, and **City of Hope** filed no opposition. We granted the motion and thus consider those documents, along with the complaint's allegations, in our recitation of the factual background. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [courts consider judicially noticed material in reviewing demurrer].)

[3] The date of submission of Dr. **Gaur's** promotion package appears to be September 21, 2009, not September 29, 2009, as referenced by the grievance committee.

[4] In his opening brief, Dr. **Gaur** refers to his discrimination cause of action as based on disability, as well as race and national origin. Dr. **Gaur**, however, in his complaint pleaded a cause of action for discrimination based on only race and national origin. Any allegations in the complaint regarding his medical condition relate to discriminatory animus against him based on his race and national origin, or to his other causes of action for breach of contract and fraudulent misrepresentation and concealment. We recognize that Dr. **Gaur** has filed an action in federal court alleging race, national origin and disability discrimination under Title VII (42 U.S.C. §§ 12101, 2000e-2(a)) (*Gaur v. City of Hope* (C.D. Cal., 2011, No. CV-00651)) and have taken judicial notice of the first amended complaint in that action. But Dr. **Gaur's** complaint in this case does not include a cause of action for discrimination based on disability. On October 3, 2011, Dr. **Gaur** filed a motion asking us to take judicial notice of the district court's order in his federal action denying **City of Hope's** motion to dismiss the first amended complaint for failure to state a claim or, in the alternative, to stay the first amended complaint. We deny that motion because the district court's order is not relevant to our resolution of this appeal.

[5] On appeal, Dr. **Gaur** challenges only the trial court's sustaining of the demurrer as to his discrimination cause of action. He does not argue that the trial court erred by sustaining the demurrer as to his causes of action for breach of contract and fraudulent misrepresentation and concealment. We affirm the order of dismissal as to those causes of action. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [appellant forfeits issue that it pursued in the trial court by failing to raise it on appeal]; see *Los Angeles Equestrian Center, Inc. v. City of Los Angeles* (1993) 17 Cal.App.4th 432, 450 [summary resolution of causes of action not addressed in appellants' brief upheld because the "failure to discuss the theories on appeal constitutes an abandonment"].)

[6] Compare *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1483 ["[C]ase law recognizes two distinct rights or interests at stake when a civil service employee challenges discipline or termination on discriminatory or retaliatory grounds. The primary right protected by the state civil service system is the right to continued employment, while the primary right protected by FEHA is the right to be free from invidious discrimination and from retaliation for opposing discrimination"] with *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 992 ["determinative factor in applying the primary right theory was the harm [plaintiff] suffered"; plaintiff's federal discrimination claim and his state breach of contract cause of action both "involved the primary right to be employed by District"].)

[7] We recognize that, under collateral estoppel principles, **City of Hope's** factual findings in connection with its resolution of Dr. **Gaur's** grievance may affect issues litigated in his discrimination cause of action (see *Schifando, supra*, 31 Cal.4th at p. 1090 ["[w]e serve judicial economy by giving collateral estoppel effect to appropriate administrative findings"], citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 72-73, 76), but need not decide any such effect in this case.