Updates
February 14, 2022

CA Supreme Court Clarifies Standard for Whistleblower Retaliation Claims Under Labor Code Section 1102.5

The Supreme Court of California provided California employers with important clarification on the standard courts will apply when analyzing an employee's whistleblower retaliation claim arising under Labor Code Section 1102.5.

Faced with a split of California authority on the correct analytical framework applicable to a Section 1102.5 claim, the U.S. Court of Appeals for the Ninth Circuit in *Lawson v. PPG Architectural Finishes, Inc.* sought clarification from the California Supreme Court. [1] On December 7, 2020, the Ninth Circuit certified the following question: what is the appropriate evidentiary standard for retaliation claims arising under Cal. Lab. Code § 1102.5?

The California Supreme Court resolved all doubt on January 27, 2022, holding "Section 1102.6 provides the governing framework" for whistleblower retaliation claims brought under Section 1102.5, and a "plaintiff need not satisfy" the *McDonnell Douglas* burden-shifting framework to establish a claim for whistleblower retaliation.[2]

The court's decision clarifies that the less onerous standard for establishing a claim of retaliation set forth in Section 1102.6 applies to retaliation claims brought under Section 1102.5. Employers should be mindful of the impact the court's decision will have on future whistleblowing retaliation claims.

California Labor Code §§ 1102.5, 1102.6

Section 1102.5, the California whistleblower statute originally enacted in 1984, provides certain whistleblower protections to employees who disclose alleged wrongdoing. Section 1102.5, in part, prohibits an employer from retaliating against an employee for sharing information the employee "has reasonable cause to believe … discloses a violation of state or federal statute" or of "a local, state, or federal rule or regulation" with (1) a government agency; (2) a person with authority over the employee; (3) another employee who has authority to investigate, discover, or correct the violation; or (4) any public body conducting an investigation, hearing, or inquiry.[3] An employee who alleges retaliation in violation of Section 1102.5 may file a private lawsuit seeking damages.

In 2003, the California State Legislature amended the Labor Code's whistleblower protections and added a procedural provision, Section 1102.6, which states:

In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.[4]

Under Section 1102.6, once an employee demonstrates the alleged whistleblowing activity was a contributing factor in the employer's decision, the employer must demonstrate by clear and convincing evidence that it would

have taken the adverse employment action "for legitimate, independent reasons" to avoid liability for retaliation in violation of Section 1102.5.

McDonnell Douglas Framework

Prior to the enactment of Section 1102.6, courts analyzed Section 1102.5 retaliation claims using the *McDonnell Douglas* burden-shifting framework.[5] The *McDonnell Douglas* framework is frequently applied when plaintiffs lack direct evidence of discrimination or retaliation.

Under the three-step *McDonnell Douglas* approach, the employee must establish a *prima facie* case of unlawful discrimination or retaliation. Next, the employer bears the burden of articulating a legitimate reason for taking the challenged adverse employment action. If the employer articulates a legitimate, nondiscriminatory or retaliatory basis for the adverse employment action, the burden shifts back to the employee to demonstrate that the employer's proffered legitimate reason is merely a pretextual basis for a decision actually motivated by discrimination or retaliation. Under the *McDonnell Douglas* framework, the burden ultimately falls on the employee under circumstances where the employer identifies a legitimate basis for the adverse employment action. If an employee cannot identify evidence of pretext, the employer is entitled to summary judgment on the employee's claim.

This means that under the *McDonnell Douglas* framework, a plaintiff is unable to establish a claim for discrimination or retaliation absent evidence that the employer's stated reason for the adverse employment action is *false* and that the employer's *true motivation* for the employment action was unlawful discrimination or retaliation. Courts apply this analysis to various other employment claims, including under Title VII, the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), and other state and federal claims.

The Conflict

As demonstrated above, the *McDonnell Douglas* and Section 1102.6 frameworks impose significantly different burdens upon the parties, prompting the Ninth Circuit to certify this issue to the California Supreme Court while opining that "the continued application of *McDonnell Douglas* to section 1102.5 retaliation claims seems to ignore [the] critical intervening statutory amendment" implementing Section 1102.6. The Ninth Circuit noted that while the separate evidentiary standard under Section 1102.6 has existed since 2003, the California Court of Appeals' decisions have continued to apply the *McDonnell Douglas* framework to Section 1102.5 claims.

The Decision

The California Supreme Court agreed with the Ninth Circuit, concluding "unsurprisingly" that courts "should apply the framework prescribed by statute in Labor Code section 1102.6" and "employees need not satisfy the *McDonnell Douglas* test to make out a case of unlawful retaliation." The court recognized that the 2003 Labor Code amendments implementing the framework within Section 1102.6 were, in part, "in response to a series of high-profile corporate scandals and reports of illicit coverups" and "designed to 'encourage earlier and more frequent reporting of wrongdoing by employees and corporate managers when they have knowledge of specified illegal acts' by 'expanding employee protection against retaliation.'"

The court examined the differences between the Section 1102.6 and *McDonnell Douglas* frameworks, emphasizing that because Section 1102.6 requires whistleblower plaintiffs to establish that retaliation was only a

"contributing factor" in their termination, demotion, or other adverse action, "plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action." This is a significantly less onerous standard facing plaintiffs than under the *McDonnell Douglas* framework, which requires plaintiffs to establish that the employer's proffered reason for taking the action is merely a pretextual basis for an action motivated by unlawful discrimination or retaliation.

Characterizing the *McDonnell Douglas* test as "well-worn, but meaningfully different," the court addressed the Ninth Circuit's question directly:

We answer the Ninth Circuit's question as follows: Section 1102.6 provides the governing framework for the presentation and evaluation of whistleblower retaliation claims brought under section 1102.5. First, it places the burden on the plaintiff to establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action. The plaintiff need not satisfy *McDonnell Douglas* in order to discharge this burden. Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity.

The court's holding provides a clear analytical framework for parties and lower courts to follow moving forward, disapproving of prior published opinions analyzing Section 1102.5 claims under the *McDonnell Douglas* framework.

Key Takeaway

Under the *McDonnell Douglas* standard applicable to most discrimination and retaliation claims, if an employer identifies a legitimate nondiscriminatory basis for an adverse employment action, the burden falls on the employee to identify evidence of pretext to establish a claim and avoid an employer's motion for summary judgment. However, for claims arising under Section 1102.5, the employee need only demonstrate that the whistleblowing activity was a "contributing factor" in the employer's decision to establish a basis for liability, thereby placing the burden on the employer to establish by clear and convincing evidence that it would have made the decision for legitimate, independent reasons.

In light of the stark contrast between the applications of the Section 1102.6 and *McDonnell Douglas* frameworks, Section 1102.5 claims filed with other discrimination or retaliation claims may often reach a different result based on a similar set of facts.

The application of Section 1102.6 significantly increases an employee's opportunity for establishing a whistleblowing claim and avoiding summary judgment. The Ninth Circuit acknowledged as much when certifying the issue and opining that, under the facts of the case, "while the district court held that Lawson's claims failed under the *McDonnell Douglas* test, it seems reasonably clear that Lawson would survive summary judgment under section 1102.6." Employers should carefully consider the holding in *Lawson*.

Endnotes

[1] *Lawson v. PPG Architectural Finishes, Inc.*, 982 F.3d 752 (9th Cir. 2020).

[2] *Lawson v. PPG Architectural Finishes, Inc.*, No. S266001, 2022 WL 244731, at *1 (Cal. Jan. 27, 2022)

[3] *See* Cal. Lab. Code § 1102.5(b).

[4] *See* Cal. Lab. Code § 1102.6.

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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