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California Supreme Court Clarifies Whistleblower Retaliation Standard

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California employers can expect to see an uptick in whistleblower claims as a result of a recent California Supreme Court ruling that increases the burden on employers to prove that adverse employment actions are based on legitimate reasons and not on protected reporting of unlawful activities. Seeking to settle "widespread confusion" among lower courts, the California Supreme Court recently confirmed that California's whistleblower protection statute—Labor Code section 1102.5—should *not* be analyzed under the familiar three-part burden shifting analysis used in cases brought under the California Fair Employment and Housing Act and federal anti-discrimination law, Title VII.

Section 1102.5 prohibits employers from retaliating against employees for disclosing information the employee has reasonable cause to believe is unlawful. This includes disclosures and suspected disclosures to law enforcement and government agencies. Claims rarely involve reporting to governmental authorities; more commonly, plaintiffs allege retaliation after making internal complaints to their supervisors or others with authority to investigate, discover, or correct the alleged wrongdoing.

The Supreme Court in *Lawson v. PPG Architectural Finishes* clarified that the applicable standard in

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presenting and evaluating a claim of retaliation under the whistleblower statute is set forth in Labor Code section 1102.6. The *Lawson* plaintiff was an employee of a paint manufacturer. Lawson claimed his supervisor ordered him to engage in a fraudulent scheme to avoid buying back unsold product. Lawson complained both anonymously and directly to his supervisor. The company investigated, but did not terminate the supervisor's employment. Several months later, the company terminated Lawson's employment at the supervisor's recommendation. Lawson sued under Labor Code section 1102.5, claiming his termination was retaliation for his having complained about the fraudulent buyback scheme.

Labor Code section 1102.6, enacted in 2003 in response to the Enron scandal, establishes an employee-friendly evidentiary framework for 1102.5 cases. Section 1102.6 requires the plaintiff to set forth, by a preponderance of the evidence, that retaliation for an employee's protected activities was *a contributing factor* in a contested employment action. If the plaintiff can make this 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.

Despite the enactment of section 1102.6, however, many courts instead applied the familiar burden-shifting framework established by a 1973 U.S. Supreme Court case, *McDonnell Douglas v. Green*, to claims under section 1102.5. Under that framework, the employee first must state a prima facie case showing that the adverse employment action was related to the employee's protected conduct. The employer then is required to *articulate* a legitimate, non-retaliatory, reason for the adverse employment action. The burden then shifts again to the employee to prove that the stated reason is a pretext and the real reason is retaliation. In sharp contrast to section 1102.6, *McDonnell Douglas* does not state that the

employer prove the action was based on the legitimate non-retaliatory reason; instead, the employee always bears the ultimate burden of proving that the employer acted with retaliatory intent.

The *Lawson* Court essentially confirmed that section 1102.6 means what it says, clarifying that section 1102.6 is a "complete set of instructions" for presenting and evaluating evidence in whistleblower cases. In response to the defendant's complaints that the section 1102.6 framework set the plaintiff's bar too low, the Supreme Court said: take it up to with the Legislature, not us.

Section 1102.6 recognizes that employers may have more than one reason for an adverse employment action; under section 1102.6, plaintiffs may satisfy their burden even when other legitimate factors contributed to the adverse action. By contrast, the Court noted, *McDonnell Douglas* was not written for the evaluation of claims involving more than one reason, and thus created complications in cases where the motivation for the adverse action was based on more than one factor. Ultimately, requiring the plaintiff to prove pretext (as under *McDonnell Douglas*) would put a burden on plaintiffs inconsistent with the language of section 1102.6.

Takeaways

While the *Lawson* decision simply confirms that courts must apply section 1102.6 as the proof standard for whistleblower claims, it will feel like a course correction to many litigants because of the widespread application of *McDonnell Douglas* to these claims. Section 1102.6 imposes only a slight burden on employees; the employee need only show that the protected activity *contributed* to the employer's decision to shift to the employer the burden of justifying this decision by clear and convincing evidence. The import of this decision is that employers must be diligent in maintaining internal protective measures to avoid retaliatory

decisions. Employers should, whenever possible, implement anonymous reporting procedures to enable employees to report issues without needing to report to supervisors overseeing the employee. It is also important to stress through training and frequent communication, that supervisors must not retaliate against employees for reporting alleged wrongdoing in the workplace. Employers should consider recusing supervisors from employment decisions relating to employees who have made complaints against the same supervisor.

Employers must also continue to be proactive in anticipating and preparing for litigation by performance managing, disciplining, and terminating employees with careful preparation, appropriate messaging, thorough documentation, and consultation with qualified employment counsel. Employees should be appropriately notified of performance shortcomings and policy violations at the time they occur—and those communications should be well-documented—rather than after the employee has engaged in arguably protected activity. Such documentation can make or break a costly retaliation claim.

For assistance in establishing protective measures or defending whistleblower claims, contact your Akerman attorney.
