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LEGAL UPDATES

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California Whistleblower Statute's Lower Evidentiary Standard Governs Retaliation Claims

On January 27, 2022, in the unanimous decision *Wallen Lawson v. PPG Architectural Finishes, Inc.*, the California Supreme Court (Court) clarified the applicable evidentiary standard for the presentation and evaluation of whistleblower retaliation claims filed under California Labor Code Section 1102.5 et. seq., (Section 1102.5). Section 1102.5 provides a private right of action based on retaliation to whistleblowers who disclose unlawful corporate activities to authorities and subsequently are subjected to a material adverse employment action. In adjudicating Section 1102.5 retaliation cases, California courts have applied various evidentiary standards, including the burden-shifting evidentiary framework used in certain Title VII discrimination cases set forth in the U.S. Supreme Court decision *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (McDonnell Douglas). According to the Court, the appropriate evidentiary standard for retaliation claims brought under Section 1102.5 is the contributing factor framework set forth in Section 1102.6, which permits employees to establish unlawful retaliation even if other legitimate factors also contributed to the adverse employment action. The application of the contributing factor burden of proof framework will make it more difficult for employers to defend Section 1102.5 whistleblower retaliation claims in California.

Factual and procedural background

Plaintiff Wallen Lawson (Lawson) filed a claim for retaliation under Section 1102.5 after reporting his employer's fraudulent activity and subsequently being terminated. Applying the three-part, burden-shifting framework from *McDonnell Douglas*, the U.S. District Court for the Central District of California (District Court) granted the employer's motion for summary

judgment. The District Court ruled that Lawson had established a *prima facie* case of unlawful retaliation but failed to establish that the employer's proffered legitimate reason for termination was pretextual.

On appeal, Lawson argued that the District Court erred in applying the *McDonnell Douglas* evidentiary framework. The U.S. Court of Appeals for the Ninth Circuit acknowledged the existence of "widespread confusion" in California law on the issue of the appropriate evidentiary standard applied in Section 1102.5 retaliation actions. It certified the issue for consideration by the California Supreme Court.

The contributing factor evidentiary framework applies to Section 1102.5 retaliation cases

The Court held that the District Court erred and that the correct evidentiary framework is the contributing factor framework as articulated in Section 1102.6. The contributing factor standard allows a claimant to "satisfy their burden of proving unlawful retaliation even when other legitimate factors also contributed to the adverse action." Under the contributing factor framework, a whistleblower claimant who asserts a claim of retaliation based on the exercise of protected activity must establish by a preponderance of the evidence that retaliation was only a "contributing factor" in the adverse employment action.

The Court based its conclusion on the plain text of Section 1102.6, which "describes the applicable substantive standards and burdens of proof for both parties in a Section 1102.5 retaliation case." The 2003 procedural amendments to Section 1102.6 provide:

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.

The Court also recognized that the 2003 procedural amendments were enacted to achieve the public policy purpose of curtailing the incidence of fraudulent and unlawful corporate financial and accounting activity and were "designed to encourage earlier and more frequent reporting of wrongdoing by employees and corporate managers" who have knowledge of specific illegal acts.

***McDonnell Douglas* evidentiary framework inapplicable in Section 1102.5 retaliation cases**

In discussing its holding, the Court acknowledged that in 1984, when Section 1102.5 was originally enacted, the statute did not contain procedural provisions for establishing unlawful retaliation. Consequently, the three-part, burden-shifting framework borrowed from *McDonnell Douglas* was frequently used in adjudicating Section 1102.5 claims. Despite the later enactment of Section 1102.6, some California courts continued to apply the *McDonnell Douglas* framework to Section 1102.5 retaliation actions.

The *McDonnell Douglas* three-step evidentiary framework requires the employee to establish a *prima facie* case of retaliation; the employer to articulate a legitimate reason for taking the challenged adverse action; and then it shifts the burden back to the employee to demonstrate that the proffered legitimate reason is a pretext for unlawful retaliation. The Court rejected the use of the *McDonnell Douglas* evidentiary framework in litigation and adjudication of Section 2201.5 retaliation claims stating that the third prong of the *McDonnell Douglas* framework requires a finding of the one “true” reason for the adverse employment action. Such a framework is inapplicable to claims brought under 1102.5 because it is inconsistent with Section 1102.6 which contemplates recovery by the claimant if only one of several reasons for the adverse employment action is based on impermissible retaliation.

What this means to you

The Court’s decision clarifies the evidentiary standard applicable in Section 1102.5 retaliation cases as required under the plain text of the existing law. To successfully defend against Section 1102.5 retaliation claims for purposes of summary judgment and at trial, employers must meet the higher burden of showing that by “clear and convincing evidence” they would have made same adverse employment decision absent the protected whistleblowing conduct.

To aid in the defense of whistleblower retaliation claims, employers should be transparent in their strategy for preventing workplace retaliation arising from participation in protected activities, including whistleblowing activities. A successful prevention strategy includes:

1. Providing more than one method of reporting illegal activity and disseminating whistleblower protection policies;
2. Investigating claims of illegal activity with promptness and transparency and holding individuals who engage in illegal activity accountable;
3. Training supervisors and HR personnel on appropriate response methods to whistleblower complaints;
4. Appointing an individual liaison for whistleblowers;

5. Ensuring that employment actions taken with respect to whistleblowers are objective and rewarding good faith whistleblowers.

Contact us

If you have questions regarding whistleblower retaliation claims; training on prevention strategies to mitigate litigation risks related to responses to protected activities; employment policies; or other developments in employment law, call Tracey O'Brien, Jennifer Hinds or your Husch Blackwell attorney.