ERMA
Employment Risk Management Authority

Legal Alert

The California Supreme Court Makes it Easier for Employees to Blow the Whistle

In January 2022, the California Supreme Court finally dispelled widespread confusion regarding the evidentiary standard for whistleblower retaliation claims bought under **Labor Code section 1102.5**. In *Lawson v. PPG Architectural Finishes, Inc. (Lawson),* the Court clarified that an employee-friendly evidentiary framework should be used to decide 1102.5 claims. Not only will this ruling make it more difficult to defend against these types of claims, but employers can also expect to see an increase in whistleblower lawsuits. The *Lawson* decision combined with the enactment of **AB 1947**, which authorizes attorney's fees for successful 1102.5 claims, provides additional incentive for employees to blow the whistle.

What was the Confusion About?

Before *Lawson*, courts throughout the State were split in applying the framework for litigating 1102.5 claims. Some applied the *McDonnell-Douglas burden-shifting framework*, in which an employee must establish a *prima facie* case of unlawful retaliation by proving (1) they engaged in protected activity, (2) they were subjected to an adverse employment action, and (3) there was a causal link between the two. Once established, the burden shifted to the employer to provide evidence of a legitimate, nondiscriminatory reason for taking the adverse employment action. The burden then shifted back to the employee to prove that the employer's stated reason was a pretext for retaliation.

In contrast, other courts applied the more employee-friendly evidentiary standard under **California Labor Code section 1102.6**, which requires employers to prove by *clear and convincing* evidence that they did not retaliate based on the employee's whistleblowing activities.

The *Lawson* Case

Wallen Lawson worked as a territory manager for PPG Architectural Finishes, Inc. (PPG), a paint and coatings manufacturer.

Lawson alleged his direct supervisor instructed him to intentionally mis-tint slow-selling PPG paint products so that PPG could avoid buying back what would otherwise be excess unsold products. Lawson did not agree with this instruction and filed two anonymous complaints, in addition to confronting his supervisor directly. PPG investigated the issue and told the supervisor to discontinue the practice but did not terminate the supervisor's employment. The supervisor also continued to directly supervise Lawson. Ultimately, PPG terminated Lawson's employment upon the supervisor recommendation that he be fired due to performance issues.

Lawson sued PPG and alleged he was fired because he "blew the whistle" on his supervisor's mistinting order, in violation of Labor Code section 1102.5. In considering PPG's motion for summary judgment, the lower court applied the burden-shifting framework in *McDonnell-Douglas*. The district court concluded that while Lawson had established a *prima facie* case of unlawful retaliation "based on his efforts to stop the paint mistinting scheme", PPG sustained its burden of articulating a legitimate, non-retaliatory reason for firing him, specifically for his poor performance on "market walks" and failure to demonstrate progress under a performance improvement plan. The court concluded that because Lawson was unable to provide sufficient evidence that PPG's stated reason for terminating him was pretextual, summary judgment must be granted as to Lawson's 1102.5 claim.

On appeal, Lawson argued that the court was wrong to use the *McDonnell-Douglas* framework. Instead, he argued the issue should have been analyzed under the framework laid out in Labor Code section 1102.6. Under Section 1102.6, Lawson only needed to show that his whistleblowing was a

"contributing factor" in his dismissal; he is not required to show that the employer's reason for termination was pretextual.

In its decision, the California Supreme Court held Labor Code section 1102.6, n o t *McDonnell-Douglas*, is the proper framework for litigating 1102.5 whistleblower claims, reasoning that 1102.6 describes the standards and burdens of proof for both parties in a 1102.5 retaliation case. First, the employee must demonstrate "by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action. Second, once established, the employer must prove by *"*clear and convincing evidence" that the alleged adverse employment action would have occurred for legitimate, independent reasons, even if the employee were not involved in protected whistleblowing activities.

The Court observed the *McDonnell-Douglas* test is inapplicable or not "well-suited" as a framework to litigate whistleblower claims because while *McDonnell-Douglas* presumes an employer's reason for adverse action "is either discriminatory or legitimate", an employee alleging 1102.5 whistleblower retaliation can prove unlawful retaliation "even when other, legitimate factors also contributed to the adverse action".

What Practical Effect Does *Lawson* Have on Employers?

It is now more important than ever for employers to have objective, well-founded reasons supported by documented evidence (e.g., performance evaluations, witness statements, counseling memos) before taking any adverse employment action against an employee. In other words, employers should "cross their t's and dot their i's" before terminating, suspending, demoting, or taking any other action or engaging in a course of conduct that (taken as whole) materially and adversely affects the terms, conditions, or privileges of an employee's employment.

Taking these steps is necessary for employers to show by *clear and convincing evidence* that they would have taken the same adverse employment action even if a plaintiff had not blown the whistle or engaged in the protected activity. "Clear and convincing" means the employer must persuade the jury that is it *highly probable* that the factual contentions of the defense are true. This is a higher standard of proof than required for employees, which requires the facts to be *more likely true than not* by a preponderance of the evidence.

Additionally, before taking an adverse employment action, employers should consider whether the employee in question engaged in any conduct that could be construed as whistleblowing. While employers often take care to ensure the reason for terminating an employee was not made for discriminatory reasons (e.g., race, gender, age, and disability), employers frequently overlook possible whistleblowing.

Further, when investigating vague employee complaints, employers should not only determine whether discrimination, harassment, or retaliation occurred based on **Fair Employment and Housing Act (FEHA)** protected classifications, but they should also investigate whether whistleblowing specifically is a factor.

Finally, employers should review their anti-retaliation policies and ensure managers and supervisors are adequately trained and informed of the legal ramifications if retaliation claims are not addressed appropriately.

The information in this legal alert was provided by Liebert Cassidy Whitmore.

Visit ERMA Website