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THE RECORDER

California Expands Protections for Whistleblowers

By JJ Johnston
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California cares about its workplace whistleblowers. Exactly four decades ago, state legislators enacted a law designed to protect employees who blew the whistle on their employers. Labor Code Section 1102.5 says that employers cannot prevent their employees from disclosing information to authorities when they believe that a rule or regulation is being or has been violated.

The law explicitly bars companies from retaliating against any employee whom they believe has made or is planning to make such a disclosure. But when it was drafted, the law failed to lay out a process that would enable whistleblowers to prove that they had been subject to retaliation by employers as a direct result of their actual or suspected whistleblowing activity. This was a big omission.

'McDonnell Douglas' Test

Courts, left to figure out the process, generally opted to apply the *McDonnell Douglas* burden-shifting test. The three-part test was first established by the U.S. Supreme Court in 1973 for proving certain types of workplace discrimination. (See *McDonnell Douglas v. Green* (411 U.S. 792 (1973).) It essentially shifted to the employee the burden of proving retaliation. First, the worker had to make a prima facie showing of discrimination; then the employer was required to offer a legitimate reason for its adverse action against the worker; finally, the burden shifted back to the employee to prove that the employer's stated reason was merely a pretext for intentional discrimination.

Although *McDonnell Douglas* did not actually address whistleblower retaliation, the burden-shifting test seemed to most courts the best option for establishing proof of such retaliation. For almost two decades, it served as the default standard for establishing retaliatory intent.

Courtesy photo

JJ Johnston of Johnston Mediation.

Section 1102.6

California legislators finally got their act together in 2003. They attempted to address the confusion surrounding proof of whistleblower retaliation by adopting Labor Code Section 1102.6. The new law was intended to provide an actual framework for proving retaliation under Section 1102.5:

"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."

This was a wholly different standard than had been established under *McDonnell Douglas*. Instead of putting the burden on the employee to prove nefarious intent, the onus now would remain on the employer to demonstrate that its actions were independent of the whistleblowing activity. Surprisingly, despite the new test spelled out in the law, courts continued to apply the three-part *McDonnell Douglas* burden-shifting test to whistleblower retaliation claims. They continued to do this until 2022, when the California Supreme Court finally laid down the law of the land.

'Lawson' Decision

The U.S. Court of Appeals for the Ninth Circuit certified the issue to the California Supreme Court in 2020 with a note that "17 years after the passage of Section 1102.6, neither federal nor state courts can agree on the correct evidentiary standard for Section 1102.5 retaliation claims." See *Lawson v. PPG Architectural Finishes,* 982 F.3d 752 (9th Cir. 2020).

And in what was viewed as a major victory for employees, the California Supreme Court stated in January 2022 that the *McDonnell-Douglas* test did not apply to Section 1102.5 cases. In *Lawson v. PPG Architectural Finishes,* the state's highest court ruled that the proper—and only— framework for courts to analyze whistleblower retaliation claims was Section 1102.6. *(Lawson v. PPG Architectural Finishes,* No. S266001, 2022 WL 244731, at *1 (Cal. Jan. 27, 2022).)

Courts, the justices wrote, "should apply the framework prescribed by statute in Labor Code Section 1102.6." The *McDonnell Douglas* test, they said, was "well-worn, but meaningfully different" than the statute. Under the law, "employees need not satisfy the *McDonnell Douglas* test to make out a case of unlawful retaliation."

SB 497

But this was not the end of the good news for employee whistleblowers. In January, SB 497 took effect. The new law makes it even easier for employees to prove whistleblower retaliation. Far from requiring workers to prove that a company's reasons for terminating them were merely pretextual, the law puts the ball solidly in the employees' court. It creates a rebuttable presumption of retaliation if any employee is disciplined or discharged within 90 days of engaging in any alleged protected activity, including whistleblowing.

Employees can meet their initial burden by merely alleging that they engaged in conduct proscribed by Section 1102.5 and were then terminated within 90 days of that conduct. The onus is now squarely on the employer to rebut the legal presumption by presenting clear and convincing evidence, as required by Section 1102.6.

In addition, SB 497 amended the civil penalty provision in 1102.5 to make it more favorable to affected employees. Prior to SB 497, the penalty of up to $10,000 could only be assessed against an employer that was "a corporation or limited liability company." And because it was a civil penalty, it went to the labor commissioner rather than to the employee. Under SB 497, that provision has been revised to apply the penalty to any employer. The award now goes directly to the employee against whom the retaliatory action was taken. When assessing the amount of the penalty, the labor commissioner is now obligated to consider the nature and seriousness of the violation, using evidence obtained during the course of the investigation.

Conclusion

The tide has clearly turned for whistleblowers in California. Where once they faced an uphill battle trying to prove that their employers had no legitimate reason for taking adverse action against them, workers are now presumptively in the driver's seat when alleging retaliation. The burden of proof has shifted to employers, putting pressure on them to carefully consider any negative employment actions and to be mindful of the timing of all such actions.

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