New life for whistleblower-retaliation claims

Lawson and not *McDonnell Douglas* now provides the framework for litigating section 1102.5 whistleblower claims

By Bryan Schwartz and Cassidy Clark

California continues to affirm its commitment to employees who blow the whistle on their employers' unlawful practices. Plaintiffs' lawyers should take note. Favorable recent developments in California whistleblower retaliation law mean we should all be looking for potential Labor Code section 1102.5 and other whistleblower retaliation claims.

The California Supreme Court, in *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, explained that the evidentiary standard to establish liability in whistleblower cases is different, and lower, than the *McDonnell Douglas* burden-shifting framework typically utilized in discrimination cases. Under *McDonnell Douglas*, the ultimate burden is on the employee – but not so, for whistleblowers.

Whistleblowing employees force a heavy burden onto their employers after demonstrating that protected activity was a contributing factor in an adverse action. Paired with the legislature's clarification that attorneys' fees are available in whistleblower cases, codified in Labor Code section 1102.5, subdivision (j), *Lawson* reaffirms the state's public policy interest in encouraging workplace whistleblowers to report unlawful acts without fearing retaliation.

Now, whistleblowers are stepping forward like never before, with a new awareness of health and safety in the wake of COVID, and social media increasingly available as a forum for raising concerns. Daily, whistleblowers impact global events, both with the war abroad, and at home, including at some of the biggest employers, from tech giants like Facebook to the federal government.

As plaintiffs' lawyers, we are in the auspicious position to support whistleblowers and protect the public from employers' harmful violations of the laws meant to protect us all.

California's evolving statutory whistleblower protections

Many statutes protect California whistleblowers. For example, employees are specifically protected from retaliation for asserting their rights under FEHA (Gov. Code, § 12940, et seq.), filing a wage claim with the Labor Commissioner (Lab. Code, § 98.6), discussing working conditions (Lab. Code, § 232.5), complaining about workplace health and safety issues (Lab. Code, § 6310), using sick leave (Lab. Code, § 246.5), taking time off work for jury duty (Lab. Code, § 230, subd. (a)), among many other additional protected activities.

However, the most sweeping California whistleblower protection is Labor Code section 1102.5, enacted in 1984, which prohibits an employer from retaliating against an employee for disclosing information the employee reasonably believes violates the law. The protected disclosure may be to a government agency, a person with authority over the employee, or another employee who has authority to investigate or correct the violation. Under section 1102.5, an employee is also protected for refusing to participate in an unlawful practice. (Section 1102.5, subds. (b-c).) In California, "our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77.)

In 2003, in response to "a series of high-profile corporate scandals and reports of illicit coverups," the legislature passed amendments to expand the Labor Code's whistleblower protections. (*Lawson*, 12 Cal.5th at 710 (citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003-2004 Reg. Sess.)).) These amendments included the addition of a procedural provision, section 1102.6. This section requires only that an employee show protected activity was a "contributing factor" under section 1102.5, by a preponderance of the evidence, before an employer must prove by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons, apart from protected activities. With the addition of section 1102.6, the *McDonnell Douglas* burden-shifting framework was abandoned in whistleblower retaliation cases, according to *Lawson*. (12 Cal.5th at 709-710.)

What changed with *Lawson*?

After section 1102.6 became law, some California courts adopted it as a new evidentiary standard for whistleblower retaliation claims. (*Lawson*, 12 Cal.5th at 711.) But some courts continued to use the *McDonnell Douglas* standard, giving short shrift to section 1102.6. (*Ibid.*) Courts applying *McDonnell Douglas* to section 1102.5 adapted it to the whistleblower retaliation framework as follows:

First, a plaintiff was required to establish a prima facie case of retaliation by showing that she engaged in a protected activity, that she was subjected to an adverse employment action, and that there was a causal link between the two. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69). Second, the burden shifted to the employer to put

forth evidence of a legitimate, nonretaliatory reason for the adverse employment action. (*Id*. at 68.) And third, the burden shifted back to the employee to prove the reason was pretext for impermissible retaliation. (*Id*. at 68-69; see also *Lawson*, 12 Cal.5th at 710.) The *Lawson* plaintiff's case was dismissed by the U.S. District Court on summary judgment, ostensibly because he failed to prove pretext, under this third element. He appealed.

On appeal, in 2020, the Ninth Circuit noted that California appellate courts conflicted on which evidentiary standard to apply, the *McDonnell Douglas* framework or that outlined in 1102.6, and certified a question to the California Supreme Court to clarify this issue. (*Lawson v. PPG Architectural Finishes* (9th Cir. 2020) 982 F.3d 752.)

Lawson clarifies that section 1102.6, and not *McDonnell Douglas*, "supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (12 Cal.5th at 712.) *Lawson* expressly disapproves state court cases relying on *McDonnell Douglas*-type burden shifting, including *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, and *Patten v. Grant Joint Union High School Dist*. (2005) 134 Cal.App.4th 1378.

How *Lawson*'s reading of section 1102.6 helps plaintiffs

Once an employee shows that the whistleblowing was a "contributing factor" to an adverse employment action, the burden shifts to the employer to demonstrate by clear and convincing evidence" that the alleged adverse employment action would have occurred "for legitimate, independent reasons" even if the employee had not engaged in protected whistleblowing activities. (*Lawson*, 12 Cal.5th at 712.) This means that the ultimate burden of proof under section 1102.6 lies with the employer to prove, convincingly, that the adverse action would have occurred without the whistleblowing activity.

The ultimate burden of proof in discrimination cases under *McDonnell Douglas,* to show pretext, is a heavy lift for many plaintiffs – as it was for the plaintiff in *Lawson* at the trial court. The Supreme Court in *Lawson* explains that even if the employer has a "genuine, nonretaliatory reason for its adverse action," all a plaintiff has to do is show that the employer "also had at least one retaliatory reason that was a contributing factor in the action." (*Lawson*, 12 Cal.5th at 715-16.) This recognizes the reality that unlawful whistleblower retaliation is often one of multiple reasons that employers can identify for their adverse actions.

The 1102.6 evidentiary standard is not focused on finding the one, "true" reason for the adverse action, as is the *McDonnell Douglas* framework. (*Id*. at 714.) Section 1102.6 recognizes the complexity of "mixed motive" cases, wherein employers may make decisions on the basis of both lawful and unlawful considerations. (*Ibid*.) *Lawson* says that section 1102.6 does not merely codify the "same-decision defense" under *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 in a whistleblower case – section 1102.6 provides the entire applicable framework for litigating and adjudicating section 1102.5 claims. (*Lawson*, 12 Cal.5th at 712.)

Some courts that referenced the section 1102.6 framework prior to *Lawson* applied a prima facie test akin to that from *McDonnell Douglas* as just the first step of their analysis. (See, e.g., *Greer v. Lockheed Martin Corp.* (N.D. Cal. 2012) 855 F.Supp.2d 979, 988.) *Greer* equates the first step of the section 1102.6 framework (a plaintiff must demonstrate, by a preponderance of the evidence, that the employee's whistleblowing was a contributing factor to an adverse employment action) with the *McDonnell Douglas* framework: (1) the plaintiff engaged in a protected activity; (2) the plaintiff was subjected to an adverse employment action; and (3) there is a causal link between the two. (*Greer*, 855 F.Supp.2d at 988.) The Supreme Court in *Lawson* described *Greer* as one of the decisions in federal courts that showed "widespread confusion" about the evidentiary standards. *Lawson* brings clarity, holding that section 1102.6 allows plaintiffs to establish liability under section 1102.5 without reliance on *McDonnell Douglas*. (*Lawson*, 12 Cal.5th at 717.)

Assessing potential section 1102.5 claims

When assessing a potential 1102.5 claim, we should be prepared to address some of the considerations unaltered by *Lawson*. We should always investigate: whether the employee's belief that an activity was unlawful was reasonable; whether the employee disclosed the unlawful activity externally to a government entity, or internally to someone with authority over the employee or the power to investigate or rectify the violation; and, whether an adverse action occurred after the disclosure, setting up an allegation that the disclosure was a contributing factor in what occurred.

Recall that section 1102.5 protects not just those who report violations of law, but also employees who are perceived by employers to have engaged in whistleblowing activity even if they did not do so (subsection 1102.5(b)), employees who testify before a public body about a practice they reasonably believe is unlawful (subsection 1102.5(a)), employees who refuse to participate in activities they reasonably believe are unlawful (subsection 1102.5(c)), and family members of individuals who engage in activities protected by the statute (subsection 1102.5(h)).

The one-two punch of sections 1102.5 and 1102.6 is intended to encourage employees to come forward about the legal violations of their employers without fear of retaliation. We can deploy these statutes not only to protect employees, but to help rectify the many underlying concerns that whistleblowers are raising.

Section 1102.5 fees

Beyond *Lawson*, the relatively recent addition of subsection 1102.5(j) makes clear that courts should award reasonable attorneys' fees to a plaintiff who brings a successful action for whistleblower retaliation under section 1102.5, but not to a defendant who defeats whistleblower

claims. Previously, if plaintiffs' attorneys wanted to seek fees for whistleblowers, they had to do so under the California Labor Code Private Attorneys' General Act (PAGA), or another statute.

Conclusion

Given the explosion of whistleblowing activity, coupled with new pro-whistleblower developments in California, plaintiffs and their lawyers are in a better position than ever to pursue whistleblower retaliation claims.


Schwartz

Bryan Schwartz is an Oakland-based practitioner representing workers in class, collective, and individual actions, including discrimination, wage/hour, whistleblower, and unique federal and public employee claims. He practices in state and federal trial and appeals courts, in arbitration, and before a variety of administrative agencies. The Washington Post and other publications have featured his victories on behalf of whistleblowers for decades. He is past Chair of the 8,000+-member State Bar Labor and Employment Law Section (now called California Lawyers Association), and on the Board of Directors of Legal Aid at Work, the Foundation for Advocacy, Inclusion and Resources (FAIR), and is a former Board member of the California Employment Lawyers Association. He is a regular speaker, moderator, and conference co-chair on employment law issues, and a frequent contributor to Plaintiff magazine and other publications. www.BryanSchwartzLaw.com. bryan@bryanschwartzlaw.com.

Cassidy Clark is an associate at Bryan Schwartz Law. *She represents workers in discrimination, retaliation, whistleblower, and wage/hour claims. Ms. Clark earned her undergraduate degree at Cornell University and her Juris Doctor from UC Berkeley School of Law. cassidy@bryanschwartzlaw.com.*


Clark