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EMPLOYMENT LAW UPDATE

Relationship-Driven Results | February 2022

JUDICIAL

California

California Supreme Court Clarifies Standard for Labor Code Section 1102.5 Whistleblower Retaliation Claims in *Lawson v. PPG Architectural Finishes, Inc.*

In a decision that strikes a blow to California employers in favor of an alternate standard, in *Lawson v. PPG Architectural Finishes, Inc.*, the California Supreme Court clarified that the appropriate standard for whistleblower retaliation claims brought under Labor Code section 1102.5 is that which is codified in Labor Code section 1102.6 ("section 1102.6").

Wallen Lawson ("Lawson") was employed as a territory manager by PPG Architectural Finishes, Inc. ("PPG"), a paint manufacturer. Lawson was responsible for stocking PPG paint products in Lowe's home improvement stores in southern California. In his lawsuit, Lawson claimed he had uncovered and reported a supervisor's scheme of intentionally tinting paint to a different shade than had been ordered by the customer (called "mis-tinting") in order for PPG to avoid buyback requirements for excess paint. Lawson opposed this scheme and spoke out directly against his supervisor. Lawson also made two anonymous complaints with PPG's ethics hotline, prompting an investigation, after which the supervisor was ordered to discontinue the mis-tinting practice. The supervisor, however, remained employed by PPG and continued to supervise Lawson. After making the complaints, Lawson's previously positive job evaluations took a significant downturn, and Lawson was placed on a performance improvement plan. Lawson was later discharged as a result of purported poor performance.

Lawson sued PPG in federal court, claiming PPG violated section 1102.5 by firing him after he complained of the fraudulent mis-tinting scheme. Applying *McDonnell Douglas*, the trial court granted PPG's motion for summary judgment on the basis that Lawson failed to demonstrate that PPG's stated reasons for termination, most predominantly his poor performance, were pretextual. Following appeal to the federal Ninth Circuit Court of Appeal, the California Supreme Court was asked to clarify the standard for whistleblower retaliation claims.

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Before the *Lawson* ruling, there existed a split of authority among both state and federal courts as to whether whistleblower retaliation claims should be analyzed using the burden-shifting *McDonnell Douglas* test or the framework enacted by the legislature in section 1102.6. *McDonnell Douglas* was established by the U.S. Supreme Court as the appropriate test for use in discriminatory retaliation cases, and was adopted by California for such cases in state courts. Using *McDonnell Douglas* in a whistleblower case, an employee is required to establish a *prima facie* case of retaliation by showing: (1) the employee engaged in protected activity (e.g., whistleblowing); (2) the employee was subjected to an adverse employment action; and (3) there is a causal link between the adverse action and the protected activity. If the employee establishes a *prima facie* showing of retaliation, the burden shifts to the employer to articulate a "legitimate, nonretaliatory reason" for the adverse action. If the employer meets that burden, the burden shifts back to the employee, which is tasked with demonstrating that the employer's proffered reason for the adverse action was pretextual.

Section 1102.6 provides a more lenient framework for plaintiff employees. Under section 1102.6, it must first be "demonstrated by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action. Then, once the employee has made that threshold showing, the employer bears "the burden of proof 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. While the standards *sound* similar, the difference is crucial, particularly for employers. Under section 1102.6, an employee need only show that the whistleblowing was a "contributing factor" to the adverse action, and need not also show that the employer's proffered reason for the adverse action was pretextual.

This ruling by the California Supreme Court finally puts an end to the whistleblower standard debate by clarifying that the proper test for whistleblower retaliation claims is that outlined by section 1102.6, not *McDonnell Douglas*. Plaintiffs can now utilize a more relaxed burden for whistleblower claims, as the "contributing factor" standard allows litigants to meet their burden merely by showing that whistleblowing activity was *one* factor that contributed to the adverse action. As a result, employers may find it even more difficult to successfully defend against whistleblower retaliation claims.

California Court of Appeal Reverses Attorneys' Fees Reduction in *Vines v. O'Reilly Auto Enterprises, LLC*

California law allows for prevailing plaintiffs in most types of employment claims to recover attorneys' fees incurred in the prosecution of those claims. This legislative protection is often used as a negotiating chip for plaintiffs, whose counsel regularly note that employers are unable to "lose small" at trial on employment claims, as even modest damage awards can give rise to recovery of significant attorneys' fees. In *Vines v. O'Reilly Auto Enterprises, LLC*, however, California's Second Appellate District offered

additional clarification as to the scope of this potential recovery, instructing a trial court to re-evaluate its initial reduction to a post-judgment fee request.

Renee Vines ("Vines") sued his former employer, O'Reilly Auto Enterprises LLC ("O'Reilly"), pursuing a series of claims predominantly based on alleged race and age-based discrimination, harassment, and retaliation. A number of claims were dismissed prior to trial, at which point the jury ruled in O'Reilly's favor on Vines' discrimination and harassment claims, but in favor of Vines on retaliation and failure to prevent retaliation claims. In doing so, it awarded Vines $70,200 in damages.

Following the verdict, Vines sought an award of attorneys' fees totaling $809,681.25, and supported his application with billing records and declarations from counsel. The trial court ruled that, although no pre-trial procedural mechanism had been utilized in a manner that could otherwise limit/reduce recovery, it had discretion to determine (and therefore reduce) the value of reasonably incurred fees. It utilized that perceived discretion to drastically reduce the fees awarded to Vines' counsel to $129,540.44, as it estimated that more than 75 percent of Vines' counsel's time had been spent litigating discrimination and harassment claims that were ultimately unsuccessful.

The appellate court reversed this decision, holding that the trial court abused its discretion in reducing the fee award. In issuing its ruling, the court held that, while ostensibly unsuccessful, Vines' discrimination and harassment claims were still related to his (successful) retaliation claims. The same analysis applied to other claims that had been dismissed prior to trial via dispositive motion, as the appellate court reasoned that work performed in litigating all claims was linked to, and probative of, the claims on which Vines did succeed. Based on this analysis, the Court of Appeal remanded the matter to trial court to recalculate the subject fee award.

Vines serves as yet another cautionary tale of the risks associated with attorneys' fees provisions. Here, even where an employer successfully defeated the majority of claims levied against it, an adverse verdict on a mere fraction of claims was sufficient to give rise to a significant attorneys' fees award.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Christopher Reilly, Tina Robinson, Zachary Rankin, Christine Robles, Brian Jun, Christine Dixon, or Jessica O'Malley at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Rachel Albert, Sevada Hakopian, or Catherine Brackett at (310) 649-5772.

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