California Supreme Court Lowers the Bar for Plaintiffs in Whistleblower Act Claims

Insights
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The California Supreme Court just made things a bit more difficult for employers by lowering the bar and making it easier for disgruntled employees and ex-employees to bring state whistleblower claims against businesses. The court's January 27 decision in *Lawson v. PPG Architectural Finishes, Inc.* may have significant ramifications on how employers defend against whistleblower claims in California. What do you need to know about this decision and what should you do in response?

Background

For decades, California courts have grappled over how a plaintiff employee must prove whistleblower retaliation under California's Whistleblower Act (found at Labor Code section 1102.5). Unfortunately, they have applied different frameworks on an inconsistent basis when reviewing these claims.

- Some have applied the so-called *McDonnell Douglas* three-prong test used in deciding whether a plaintiff has sufficiently proven discrimination to prevail in a whistleblower claim.
- Others have used a test contained in section 1102.6 of the Act itself, which is in some ways less onerous for employees. Courts applying this test say that plaintiffs must only show by a "preponderance of the evidence" that the alleged retaliation was a "contributing factor" in the employer's decision to terminate or otherwise discipline the employee.

Facts of the Case

This case stems from an employee who worked for PPG Architectural Finishes, Inc., a paint and coating manufacturer. According to Wallen Lawson, his supervisor allegedly ordered him to engage in fraudulent activity. After he says he refused and filed two anonymous complaints, he was terminated for poor performance.

Lawson later filed a lawsuit in the Central Federal District Court of California alleging that PPG fired him because he blew the whistle on his supervisor's fraudulent scheme. PPG asked the court to rule in its favor before trial and the lower court agreed. To get there, though, it applied the employer-friendly *McDonnell Douglas* test. Specifically, the lower court found that the employee was unable to prove that PPG's legitimate reason for terminating him – his poor performance – was pretextual, as required under the third prong of the legal test.

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The employee appealed to the Ninth Circuit Court of Appeals arguing that the lower court applied the wrong test. He contended that the court should have applied the employee-friendly test under section 1102.6 which did not require him to show pretext. Considering the history of inconsistent rulings on this issue, the Ninth Circuit asked the California Supreme Court for guidance on which test to apply when interpreting state law.

Court Ruling: Bar Should Be Lower for Plaintiffs to Proceed

In a decision authored by California Supreme Court Justice Leondra Kruger – who has been placed on a short list to potentially be the next Justice on the U.S. Supreme Court – the state's highest court announced that trial court judges throughout California should use the evidentiary standard that arises from the Whistleblower Act itself and not from the employer-friendly *McDonnell Douglas* case. "Unsurprisingly, we conclude courts should apply the framework prescribed by statute in Labor Code Section 1102.6," said Justice Kruger. "Under the statute, employees need not satisfy the *McDonnell Douglas* test to make out a case of unlawful retaliation." In reaching the decision, the Court noted the purpose behind Section 1102.6, namely "encouraging earlier and more frequent reporting of wrongdoing" and "expanding employee protection against retaliation."

What is the Significance of This Ruling?

From an employer's perspective, what is the difference between requiring a plaintiff to prove whistleblower retaliation under section 1102.6 of the Act versus using the *McDonnell Douglas* test? In short, section 1102.6 lessens the burden for employees while simultaneously increasing the burden for employers.

First, under section 1102.6, employees need only show by a "preponderance of the evidence" that retaliation was "a contributing factor" in the employer's decision to take an adverse employment action, such as a termination or some other form of discipline. Compare this to the requirements under the *McDonnell Douglas* test, where the burden of proof shifts to the employee to try to show that the employer's reason was pretextual after the employer shows a legitimate reason for the adverse action. In other words, under *McDonnell Douglas*, the employee has to show that the *real* reason was, in fact, retaliatory. By not having a similar "pretext" requirement, section 1102.6 effectively lowers the bar for employees by allowing them to argue that retaliation was *a contributing reason*, rather than the *only reason*.

Further, under section 1102.6, an employer must show by the higher standard of "clear and convincing evidence" that it would have taken the same action even if the employee had not blown the whistle. And while the Act codifies a common affirmative defense colloquially known as the "same-decision" defense, it raises the bar for employers to use this defense by requiring them to prove it by clear and convincing evidence.

Main Takeaways

The main takeaway from this Supreme Court ruling is this: if you haven't already, you should re-evaluate how you intend on defending against whistleblower claims if they arise. Courts will no longer evaluate such claims under the less burdensome *McDonnell Douglas* framework, and will instead apply the more employee-friendly standard under section 1102.6. As a result of this decision, we can now expect an increase in whistleblower cases bring filed by zealous plaintiffs' attorneys eager to take advantage of the lowered bar. Employers should prepare by reviewing their whistleblowing policies and internal complaint procedures to mitigate their risks of such claims.

We will monitor developments related to this lowered standard and provide updates as events warrant. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have any questions on whistleblower retaliations claims or how this California Supreme Court case may affect your business, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our California offices.

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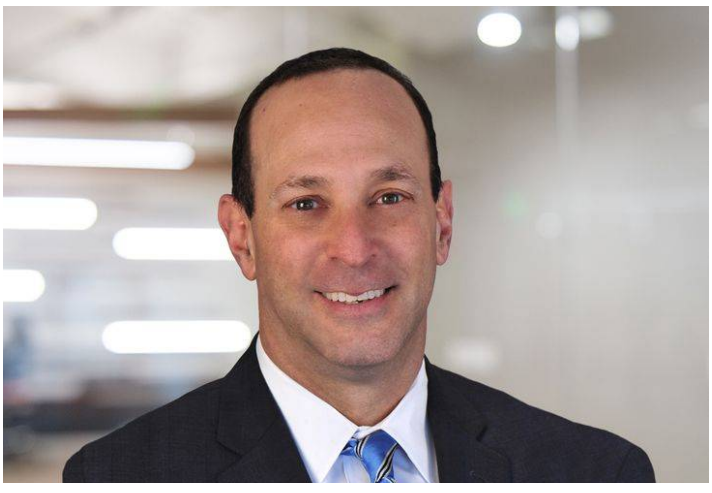

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