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PERSPECTIVE

High court to tackle evidentiary standard for retaliation claims.

By Aaron L. Osten

California Labor Code Section 1102.5(b) prohibits an employer from retaliating against an employee who engages in certain whistleblowing activity by making reports of reasonably suspected unlawful conduct. To establish a prima facie case of retaliation under Section 1102.5, a plaintiff must show that "'(1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.' [Citation.]." *McVeigh v. Recology San Francisco*, 213 Cal. App. 4th 443, 468 (2013).

Generally, when an employee brings an action for retaliation or discrimination, courts apply "the threestep burden-shifting analysis" which was developed in Title VII actions and is set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Loggins v. Kaiser Permanente Internat.*, 151 Cal. App. 4th 1102, 1108-09 (2007). Under that standard, if the employee establishes a prima facie case, the employer is required to offer "a legitimate, nondiscriminatory reason for the adverse employment action." *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 798, 806 (1999). The employer's burden at this stage is to go forward with additional evidence; it does not take on a burden of persuasion. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Clark v. Claremont University Center*, 6 Cal. App. 4th 639, 663 (1992). If the employer produces substantial evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination created by the prima facie case "simply drops out of the picture" (*Horn*, 72 Cal. App. 4th at 807, quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)) and the burden shifts back to the employee to prove intentional discrimination. *Horn*, 72 Cal. App. 4th at 806; *Hersant v. Department of Social Services*, 57 Cal. App. 4th at 997, 1003 (1997); *Clark*, 6 Cal. App. 4th at 664. "[T]he plaintiff may establish pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (1998), quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

Although the 9th U.S. Circuit Court of Appeals panel in Lawson was simply posing a question, the analysis employed by the court in describing why certification to the Supreme Court was appropriate, strongly supports the conclusion that application of McDonnell Douglas to an 1102.5 claim would subvert the intention of the Legislature under Section 1102.6.

However, there has been confusion as to whether, by placing the burden back on the plaintiff-employee to prove pretext, the *McDonnell Douglas* standard clashes with Labor Code Section 1102.6 for purposes of a retaliation claim under Section 1102.5. In an action under Section 1102.5, Section 1102.6, squarely places the burden on the defendant-employer to prove 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." Thus, under Section 1102.6, the burden of persuasion to prove that the employment decision was based on non-retaliatory conduct remains with the employer and is not shifted to the employee, as it does under *McDonnell Douglas*. Indeed, when Senate Bill 777 passed in 2003, and ultimately enacted Labor Code Section 1102.6, the legislative history distinguished Section 1102.6 as the prevailing standard over the *McDonnell Douglas* test, stating: "This bill instead requires the employer to make that showing by clear and convincing evidence." S. Rules Comm. 2003- 2004 Reg. Sess., Cal. Bill Analysis at Analysis, sec. 4 (Aug. 18, 2003).

As recently explained in Lawson v. PPG Architectural Finishes, Inc., 982 F.3d 752, 757-59 (9th Cir. 2020), "despite the fact that section 1102.6 provides a separate evidentiary standard that would seem to replace the *McDonnell Douglas* test for section 1102.5 claims, three published California appellate court decisions expressly applied the *McDonnell Douglas* test to section 1102.5 claims after the addition of section 1102.6. [See Hager v. County of Los Angeles, 228 Cal. App. 4th 1538 (2014); Patten v. Grant Joint Union High School Dist., 37 Cal. Rptr. 3d 113 (2005); Mokler v. County of Orange, 157 Cal.App. 4th 121 (2007).] ... Although neither Hager, Patten, nor Mokler even cites, much less meaningfully deals with, section 1102.6, these cases have sown widespread confusion as to which evidentiary standard actually applies to section 1102.5 retaliation claims."

"Indeed … some California courts have applied the section 1102.6 evidentiary standard to section 1102.5 claims — including in a recent published California appellate court decision … other courts — both state and federal—insistthatthe*McDonnell Douglas* test continues to apply to section 1102.5 claims. Others confusingly cite the two different standards simultaneously. And some argue that *McDonnell Douglas* provides the relevant standard at the summary judgment stage, while others insist that section 1102.6 should be applied at that stage." Ibid. The following question arises from this differing treatment: How could the burden shift back to the employee to prove that the employer's stated reason for its adverse employment decision was a pretext, under *McDonnell Douglas*, and the burden remains on the employer to prove by clear and convincing evidence that it took that adverse action for nonretaliatory reasons, under Section 1102.6?

Our Supreme Court will soon answer that question. Last December, the court accepted Lawson's request to answer the following question: "Does the evidentiary standard set forth in section 1102.6 of the California Labor Code replace the *McDonnell Douglas* test as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of California's Labor Code?"

As Lawson explains, the *McDonnell Douglas* standard

and the 1102.6 standard are material in at least three respects: First,unlike *McDonnell Douglas*, where the burden of persuasion is never truly on the employer, 1102.6 squarely places the burden on the employer to prove no pretext.

Second, 1102.6 uses the heightened clear and convincing standard. Recently, the court concluded that this heightened burden had significance beyond trial, explaining: "We conclude that appellate review of the sufficiency of the evidence in support of a finding requiring clear and convincing proof must account for the level of confidence this standard demands." Conservatorship of O.B., 9 Cal. 5th 989, 995 (2020).

Third, Lawson explained that "subjecting section 1102.5 retaliation claim defendants to *McDonnell Douglas*'s lesser evidentiary standard would subvert the California legislature's decision to afford plaintiffs bringing these claims heightened protection."

Although the 9th U.S. Circuit Court of Appeals panel in Lawson was simply posing a question, the analysis employed by the court in describing why certification to the Supreme Court was appropriate, strongly supports the conclusion that application of *McDonnell Douglas* to an 1102.5 claim would subvert the intention of the Legislature under Section 1102.6.

If our Supreme Court reaches that conclusion, it will have significant impact on the manner 1102.5 claims are litigated at summary judgment and at trial. Seventeen years after the enactment of Section 1102.6, an employer will no longer be able to simply posit a nonretaliatory basis for its decision and then, by doing so, shift the burden to the employee to find evidence (which often is within the exclusive control of the employer) demonstrating that the employer's stated reason is mere pretext. Instead, the defendant-employer will have to muster evidence "that it is highly probable" (Conservatorship of O.B., 9 Cal. 5th at 998) that it would have taken the same adverse employment action even if the plaintiff-employee had not blown the whistle. Not an easy task. Stay tuned! ■

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