AUTHOR*

Ramit Mizrahi

LAWSON USHERS IN A NEW ERA FOR EMPLOYEE WHISTLEBLOWERS . . . OR DOES IT?

INTRODUCTION AND BACKGROUND

Within the past two years, Cal. Lab. Code § 1102.5,[1] California's general whistleblower protection law, went from being a secondary cause of action to the most important one for most employees alleging retaliation. Two critical events spurred this change: (1) the 2020 amendment to section 1102.5 allowing successful plaintiffs to recover attorney's fees; and (2) the California Supreme Court's January 2022 decision in *Lawson v. PPG Architectural Finishes, Inc.*,[2] which clarified the framework for evaluating section 1102.5 claims. But while the benefits of attorney's fees are readily apparent, the extent of *Lawson's* impact remains to be seen.

By way of background, section 1102.5 protects employees who disclose information to a government or law enforcement agency, to those with authority over them or with the authority to investigate, discover, or correct the violations, or to a public body conducting an investigation, hearing, or inquiry, regarding what they reasonably believe to be violations of or noncompliance with a local, state, or federal rule or regulation.[3] It protects employees who refuse to violate the law.[4] It also protects employees suspected of being whistleblowers (or who have that potential)[5] as well as whistleblowers' family members.[6]

LEGISLATIVE DEVELOPMENT

Before 2020, section 1102.5 did not provide for attorney's fees. Successful plaintiffs could seek attorney's fees under Cal. Code Civ. Proc. § 1021.5 for enforcing "an important right affecting the public interest," but the bar was high and the odds were low. As a result, section 1102.5 claims often took a back seat to causes of action that provided for statutory attorney's fees—those offered plaintiffs a far greater upside and leverage for settlement. This also meant that plaintiffs who only had section 1102.5 retaliation claims, even very strong ones, often had difficulties finding counsel.

That changed with A.B. 1947,[7] which went into effect on January 1, 2021, and added subdivision (j) to section 1102.5. Subdivision (j) is a one-way, fee-shifting provision that authorizes courts to award reasonable attorney's fees to plaintiffs, who bring successful actions under the statute. With that, section 1102.5 was now on equal footing with important civil rights laws that contained attorney's fee provisions, such as the Fair Employment and Housing Act (FEHA).[8]

But section 1102.5 held the promise of being *even more* employee-friendly than other statutes because of the framework laid out in section 1102.6. On the books since 2003 (a response to the Enron and Worldcom scandals),[9] section 1102.6 provides:

> In a civil action or administrative proceeding brought pursuant to [s]ection 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by [s]ection 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 [s]ection 1102.5.

Despite this clear framework, some appellate courts still imposed the *McDonnell Douglas*

burden-shifting test[10] when evaluating section 1102.5 claims, essentially disregarding section 1102.6.[11]

THE *LAWSON* DECISION

Then came the California Supreme Court's decision in *Lawson*. The decision, authored by Justice Leondra Kruger, made clear that the *McDonnell Douglas* burden-shifting test does not apply to section 1102.5 claims. *Lawson* held that section 1102.6 alone provides the governing framework for the presentation and evaluation of these claims.[12]

This holding promised to be a game-changer for California employee whistleblowers. Surely, many more cases would get past a motion for summary judgment and succeed at trial with the burden now shifted to the defendant to meet a clear and convincing evidence standard once the plaintiff made their initial showing. Indeed, PPG had expressed these concerns, and the court acknowledged them: "To the extent PPG is concerned that the existing framework sets the plaintiff's bar too low by requiring only a showing that retaliation was a contributing factor in an adverse decision, PPG's remedy lies with the Legislature that selected this standard, not with this court."[13]

POST-*LAWSON* CASE LAW

Thus far, however, this has not been borne out by the cases applying *Lawson*. The author has reviewed all published and unpublished post-*Lawson* California and Ninth Circuit appellate and federal district court decisions involving section 1102.5 claims—there were 23 of them as of October 23, 2022. A review of these cases failed to find any case in which a section 1102.5 claim survived summary judgment or other challenge while a concurrently presented FEHA retaliation claim (or other statutory retaliation claim evaluated under the *McDonnell Douglas* test) based on the same facts did not. Indeed, it appears that defendant employers are still regularly succeeding in disposing of section 1102.5 claims with little impact yet seen from the *Lawson* decision.

There have been three published California appellate decisions to date applying *Lawson*.[14] In *Scheer v. Regents of the Univ. of California*,[15] the Court of Appeal reversed summary judgment in a case involving a university administrator who alleged retaliation in violation of section 1102.5, Cal. Gov't Code § 8547 *et seq*., and Cal. Health & Saf. Code § 1278.5. The Court of Appeal held that the trial court erred in applying the *McDonnell Douglas* test to the first two causes of action instead of the section 1102.6 framework, requiring reversal and further proceedings under the appropriate standard. The Court declined to review the evidence under the section 1102.6 framework in the first instance. The Court of Appeal also found that the trial court erred in finding no triable issues of material fact with respect to the Cal. Health and Saf. Code § 1278.5 cause of action, which relied on the same facts and was evaluated using the *McDonnell Douglas* burden-shifting test. This suggests that the Court of Appeal would have reversed as to the first two causes of action *even if it had used the McDonnell Douglas test*.

Vatalaro v. County of Sacramento,[16] which took a different approach, involved a county employee who alleged retaliation in violation of section 1102.5 after she reported that she was working below her service classification. The trial court applied the *McDonnell Douglas* test and granted the summary judgment for defendent. The trial court found that the plaintiff could not show that she had a reasonable belief that she disclosed a violation of law, and further that she failed to raise a triable issue of material fact to support that the employer's stated reasons for terminating her were pretextual. She appealed. The Court of Appeal acknowledged that the wrong standard had been used by the trial court. It nevertheless affirmed the judgment, as it concluded that, applying *Lawson*, the employer had presented sufficient undisputed "clear and convincing" evidence to satisfy its burden under section 1102.6 that the termination would have occurred for legitimate, independent reasons even if she had never complained.

Francis v. City of Los Angeles[17] involved allegations by a police officer that she suffered retaliation in violation of section 1102.5. After the trial court denied the employer's motion for nonsuit, the case went to trial and the jury found in the employer's favor. The employee appealed, arguing that the jury instructions and special verdict form contained prejudicial errors. The employer, in turn, argued that there was no substantial evidence to support the employee's claim and that the motion for nonsuit should have been granted. The Court of Appeal affirmed the judgment. It held that there was no substantial evidence of an adverse employment action under section 1102.5, such that nonsuit should have been granted.

The six post-*Lawson* unpublished/noncitable California appellate decisions involving section 1102.5 claims fail to evidence a sea change in favor whistleblower plaintiffs. In all six, the employer defendants prevailed on appeal.[18]

In the Ninth Circuit's only published section 1102.5 case, *Killgore v. SpecPro Professional Services, LLC*,[19] the court reversed summary judgment with respect to the plaintiff's section 1102.5(b) and wrongful termination claims, but affirmed with respect to his 1102.5(c) claim. The plaintiff, who worked for a federal contractor, alleged that he

was terminated soon after reporting to his supervisor that he was being directed to prepare an environmental assessment in a manner that violated federal law. The Ninth Circuit held that, in granting summary judgment, the district court misapplied California law in several ways, including: (1) by deeming the disclosures unprotected because they were made to a supervisor who did not necessarily have authority to investigate, discover, or correct the violation; (2) by deeming the disclosures unprotected because they were made as part of his normal duties; and (3) by finding that he did not have a reasonable belief that he was disclosing a violation of law. Applying *Lawson*, it held that genuine issues of material fact existed such that summary judgment was improper. It affirmed summary judgment as to the 1102.5(c) claim because the plaintiff did not demonstrate that he had refused to participate in illegal activity, as he did not get a chance to refuse to work on the project before he was fired. While this case was a win for the plaintiff, the authorities the Ninth Circuit relied upon in discussing the district court's errors pre-dated *Lawson* such that one cannot say that *Lawson* had any impact on the outcome of the case.

The Ninth Circuit also addressed a section 1102.5 claim in an unpublished memoradum disposition, in which the court affirmed summary judgment in favor of the defendant, holding that the plaintiff failed to provide evidence of protected activity based on a statute, rule, or regulation.[20]

The twelve federal district court decisions addressing section 1102.5 claims are mixed, with about half favoring the employee plaintiffs and half favoring the employer defendants. It is unclear whether the section 1102.6 framework had any impact on the outcomes of any of the cases. In one, the trial court denied the defendant's motion for a new trial after the plaintiff won over $200,000 in compensatory damages and $27.3 million in punitive damages on her section 1102.5 and wrongful termination claims (it did substantially reduce the punitive damages award).[21] In five, the plaintiffs' section 1102.5 claims survived motions for summary judgment.[22]

But, in six federal district court cases, the employer defendants prevailed on for summary judgment or summary adjudication with respect to the section 1102.5 claims.[23]

CONCLUSION

Defendants have prevailed on summary judgment in the majority of post-*Lawson* section 1102.5 appellate and federal district court cases decided to date, with the plaintiffs unable to get past the first step of demonstrating that an activity proscribed by section 1102.5 was a contributing factor in an alleged adverse employment action. The author's sense is that some courts may be treating this first step in the sections 1102.5/1102.6 analysis as creating a heavier burden than the first step in the *McDonnell Douglas* test (making out a prima facie case of retaliation).[23] If so, the benefits of section 1102.6 to plaintiffs may largely be neutralized, contrary to the intentions of the California Legislature in enacting it.

Nevertheless, with the attorney's fees provisions and broad protections that section 1102.5 provides, and with the (yet unrealized) promise of *Lawson*, we can all expect to see many more of these cases.

---

* Ramit Mizrahi, founder of Mizrahi Law, is an employment law mediator. She is Chair of the Pasadena Bar Association Labor & Employment Law Section, former Chair of the CLA Labor & Employment Law Section, and an Executive Editor of this publication. She is a graduate of Yale Law School, the London School of Economics, and UC-Berkeley's Haas School of Business. She has been recognized as one of the Top 100 Super Lawyers (2023) and Top 50 Women Super Lawyers in Southern California (2022, 2023). She can be reached at ramit@mizrahilaw.com.

1. Unless otherwise indicated, all sections refer to Cal. Lab. Code.
2. 12 Cal. 5th 703 (2022) (*Lawson*).
3. Cal. Lab. Code § 1102.5(b).
4. Cal. Lab. Code § 1102.5(c).
5. Cal. Lab. Code § 1102.5(b).
6. Cal. Lab. Code § 1102.5(h).
7. 2020 Cal. Stat. 344.
8. Cal. Gov. Code § 12965(b).
9. *See Lawson*, n.2, 710-711 (quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 777 (2003–2004 Reg. Sess.) as amended May 29, 2003, p. 1).
10. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
11. *See*, *e.g.*, *Hager v. County of Los Angeles*, 228 Cal. App. 4th 1538 (2014); *Mokler v. County of Orange*, 157 Cal. App. 4th 121 (2007); *Patten v. Grant Joint Union High School Dist.*, 134 Cal. App. 4th 1378 (2005). *Lawson* disapproved all these decisions. *Lawson*, 12 Cal. 5th at 718, n. 2.
12. *Lawson*, 12 Cal. 5th at 710.
13. *Id.*, 717-718.
14. (1) *Scheer v. Regents of the Univ. of California*, 76 Cal. App. 5th 904 (2022), reh'g denied (Apr. 13, 2022), *reh'g denied*

(Apr. 18, 2022), *review denied* (July 13, 2022); (2) *Vatalaro v. County of Sacramento*, 79 Cal. App. 5th 367 (2022); and (3) *Francis v. City of Los Angeles*, 81 Cal. App. 5th 532 (2022), *mod. reh'g den.* (July 22, 2022), *rev. filed* (Aug. 31, 2022).

15. *See Scheer*, n. 14, *supra*.

16. *See Vatalaro*, n. 14, *supra*.

17. *See Francis*, n. 14, *supra*.

18. *See Hussain v. Peralta Cmty. Coll. Dist.*, No. A164189, 2022 WL 5117841 (Cal. App. 1 Dist. Oct. 5, 2022) (affirming summary judgment, holding that plaintiff failed to meet his burden to show a connection between protected activity and adverse action); *Randhawa v. Hanford Cmty. Hosp.*, No. F081846, 2022 WL 4481504 (Cal. App. 5 Dist. Sept. 27, 2022) (affirming summary judgment, holding that defendant met its burden by clear and convincing evidence); *Joseph v. California Dep't of Corr.*, No. E074481, 2022 WL 1817753 (Cal. App. 4 Dist. June 3, 2022), *rev. den.* (Aug. 17, 2022) (affirming summary judgment, holding that plaintiff did not demonstrate that retaliation was a contributing factor with respect to adverse employment actions); *Abernathy v. Duncan Enterprises*, No. F081502, 2022 WL 1789908 (Cal. App. 5 Dist. June 2, 2022) (affirming summary judgment, holding that plaintiff failed to present evidence that protected activity was a contributing factor in her dismissal); *Ward v. California Dep't of Corr. & Rehab.*, No. E073567, 2022 WL 533828 (Cal. App. 4 Dist. Feb. 23, 2022) (affirming trial court's decision to grant a new trial motion based on insufficiency of the evidence after plaintiff prevailed at trial); *Robinson v. Compton Unified Sch. Dist.*, No. B310764, 2022 WL 1617247 (Cal. App. 2 Dist. May 23, 2022) (affirming summary judgment, holding that plaintiff could not establish elements of his claim, including that protected activity was a contributing factor in failure to promote).

19. *Killgore v. SpecPro Professional Services, LLC*, --- F.4th ----, 2022 WL 11530092 (9th Cir. Oct. 20, 2022).

20. *Tandon v. GN Audio USA, Inc.*, No. 21-15312, 2022 WL 1210945 (9th Cir. (Cal.) Apr. 25, 2022) (it also held that the plaintiff's FEHA retaliation claim failed for the same reason).

21. *See Nikmanesh v. Wal-Mart Stores, Inc.*, No. SACV15202JGBJCGX, 2022 WL 1837515 (C.D.Cal. Feb. 25, 2022).

22. *See Jaekel v. Aytu Bioscience, Inc.*, No. 20-CV-00340-TSH, 2022 WL 3229339 (N.D.Cal. Aug. 10, 2022); *Cunning v. Skye Bioscience, Inc.*, No. SACV2100710DOCKES, 2022 WL 3643756 (C.D.Cal. July 28, 2022); *United States v. Porifera Inc.*, No. 19-CV-00765-HSG, 2022 WL 2158967, at *1 (N.D.Cal. June 15, 2022); *Kirkpatrick v. City of Oakland, California*, No. 20-CV-05843-JSC, 2022 WL 1032446 (N.D.Cal. Apr. 6, 2022); *Webb v. Kohler Co.*, No. 2:20-CV-11734-AB-MRW, 2022 WL 2284581 (C.D.Cal. Mar. 23, 2022).

23. *See Khan v. SAP Labs, LLC*, No. 18-CV-07490-BLF, 2022 WL 3924252 (N.D.Cal. Aug. 30, 2022) (granting summary judgment, in 1102.5 case involving *pro se* plaintiff convicted of arson against his manager, plaintiff's protected activity was not a factor in his being placed on leave); *Dina Rodriguez v. Lab Corp. of Am.*, No. CV2100399MWFJCX, 2022 WL 4597420 (C.D.Cal. Aug. 25, 2022) (granting summary judgment in part, including as to Section 1102.5 claim because plaintiff failed to make a protected disclosure); *Winns v. Exela Enter. Sols., Inc.*, No. 4:20-CV-06762-YGR, 2022 WL 4094137 (N.D.Cal. Aug. 17, 2022) (granting summary judgment, *pro se* plaintiff with Section 1102.5 and FEHA claims failed to show any causal link between protected activity and any adverse employment action); *United States v. TruConnect*, No. CV 16-3767 PSG (SKX), 2022 WL 3009130 (C.D.Cal. June 21, 2022) (granting summary judgment, plaintiff provided no evidence that decision makers knew of protected activity and therefore failed to show causal link between protected activity and adverse action); *Wiele v. Delaware N. Companies, Inc.*, No. 2:21-CV-07271-SB-AS, 2022 WL 714392 (C.D.Cal. Mar. 4, 2022) (granting summary judgment, plaintiff failed to establish that retaliation was a contributing factor for any of the adverse actions); *Foshee v. MasTec Network Sols., Inc.*, No. 120CV00890AWISAB, 2022 WL 446675 (E.D.Cal. Feb. 14, 2022) (granting summary judgment, plaintiff did not show that he engaged in protected activity, let alone that it was a contributing factor in his termination).

24. *See, e.g., Abernathy*, n. 18, *supra*, *9 ("While one can proceed through the *McDonnell Douglas* framework by merely showing the bare facts of a report, an adverse action, and some circumstance suggesting discrimination, the analysis under section 1102.6 requires, at a minimum, some valid inference that the protected action was a contributing–i.e., substantial or motivating – factor in the resulting harm.").