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California Supreme Court Relaxes Standard Needed to Prove Whistleblower Retaliation

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The California Supreme Court has resolved an inconsistency that has divided the courts as to the proper evidentiary standard necessary to prove a whistleblower retaliation claim. *Lawson v. PPG Architectural Finishes, Inc.*, No. S266001, 2022 WL 244731 (Cal. Jan. 27, 2022).

Background

Plaintiff Wallen Lawson, who was discharged by his employer PPG Architectural Finishes for alleged poor performance, brought a whistleblower claim against PPG. Lawson claimed he had uncovered and reported a supervisor's scheme to "mis-tint" unpopular paint colors in order to avoid buyback requirements. A federal district court, applying the three-step framework of *McDonnell Douglas v. Green*, concluded Lawson did not meet his burden of demonstrating that PPG's legitimate, non-retaliatory reason for discharging him was pretextual. Lawson appealed to the Ninth Circuit, which certified to the California Supreme Court the question of what evidentiary standard applies to whistleblower claims under California law.

Ruling

The California appellate courts have not uniformly applied the same evidentiary standard to whistleblower retaliation claims. Some courts applied the three-part burden shifting framework established by the U.S. Supreme Court in *McDonnell Douglas v. Green*, under which (1) the employee first must establish a *prima facie* case of retaliation; (2) the employer then has the burden to show a legitimate reason for the adverse employment action; and (3) the burden then shifts back to the employee to show the reason given by the employer is pretextual.

Other courts have applied the “contributing-factor standard” under which: (1) an employee must demonstrate by a preponderance of the evidence that the whistleblowing activity was a contributing factor to the adverse action taken by the employer against them; and then (2) the employer has the burden to show by the higher *clear and convincing evidence* that it would have taken that action in any event for legitimate, independent reasons, regardless of the employee’s alleged protected activity.

After considering the legislature’s intent behind and the legislative history of Cal. Labor Code section 1102.6, the plain text of the statute, as well as how other courts have addressed and interpreted similar statutes at the federal level, the California Supreme Court rejected the *McDonnell Douglas* burden-shifting standard in favor of the far-more employee-friendly “contributing-factor” standard.

Implications

Plaintiffs’ attorneys are apt to try to capitalize on this ruling, as the “contributing-factor” standard enables whistleblowers to meet their burden by showing their whistleblowing activity was just one factor that contributed to the adverse action, even when there are other, legitimate factors for the employer’s decision. Moreover, the heightened burden of proof on the employer will likely make it even more difficult for employers to prevail in whistleblower cases both at the summary judgment and trial phases of a case.

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