

Despite Employee-Friendly Test, California Court of Appeal Finds in Favor of Employer in Whistleblower Retaliation Claim

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As we reported [here](#), earlier this year, the California Supreme Court confirmed a relaxed standard by which employees can prove whistleblower retaliation under Labor Code section 1102.5 in *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022).

Despite the newly affirmed and extremely high burden for employers to prevail against Section 1102.5 claims on summary judgment, the Third District Court of Appeal recently ruled in favor of the County of Sacramento in a lawsuit brought by the County's former employee, Cynthia Vatalaro in *Vatalaro v. County of Sacramento*, No. C090896, 2022 WL 1775708 (Cal. Ct. App. May 5, 2022).

Vatalaro was an administrative analyst for Sacramento County. She received a job description listing the expected job duties for her promotion to an administrative services officer position from her would-be supervisor, Mindy Yamasaki. Vatalaro contacted a human resources analyst expressing concerns about the anticipated reporting structure, her assigned job duties differing from the duties she had developed with her former supervisor, and that the assigned duties seem "inappropriate" for her position. Shortly thereafter, Vatalaro started her new position, which was probationary for a six-month period under the County's civil service rules. Ultimately, the County determined Vatalaro did not succeed during the probationary period, terminated Vatalaro from the promoted position, and returned her to her previous job classification.

Vatalaro sued Sacramento County for unlawful retaliation under Labor Code section 1102.5^[1], claiming Yamasaki mistreated her on several occasions as follows:

- Assigning Vatalaro work "too lowly" for her position;
- Excluding her from a staff appreciation meeting with "treats" by holding it on a day Vatalaro had taken off;

- Giving Vatalaro certain assignments as “punishment” for complaining to Vatalaro’s former supervisor about Yamasaki’s conduct;
- Teaming up with a co-worker to “harass” Vatalaro on several occasions after further complaints about her assignments.

Vatalaro attributed Yamasaki’s purported mistreatment to Vatalaro’s complaints about her assigned job duties. Vatalaro also claimed she was released from probation in retaliation for her complaints. Yamasaki submitted a memorandum supporting the release on the grounds that Vatalaro had been subordinate, disrespectful, and dishonest in her actions, pointing to several instances that she believed Vatalaro exhibited those qualities, such as Vatalaro repeatedly calling several meetings and assignments “a waste of her time,” and being dishonest about why she was unable to complete an assignment.

The county filed a motion for summary judgment. The parties and the trial court framed their respective positions and ruling around the *McDonnell Douglas* burden-shifting test, and the trial court granted the motion in favor of the County. The trial court held that the County had met its burden to show that Vatalaro could not allege a prima facie case of retaliation because she had not alleged or presented evidence of protected conduct. The court reasoned that Vatalaro had neither “alleged that she had a reasonable belief that a specific federal, state, or local law or regulation was violated,” nor “presented evidence that she engaged in protected conduct,” but instead had only shown that she complained about “internal personnel matters.” The trial court added that the County presented evidence that it had a legitimate business reason for releasing her from probation and Vatalaro fail to establish pretext. Vatalaro appealed.

The Third District Court of Appeal affirmed the trial court’s ultimate ruling, but in light of *Lawson*, did so pursuant to the evidentiary standard of Section 1102.6, rather than the *McDonnell Douglas* test. Section 1102.6 states:

[O]nce it has been demonstrated by a **preponderance of the evidence** that an activity proscribed by Section 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 Section 1102.5

[Cal. Lab. Code § 1102.6](#) (emphasis added). The Court of Appeal reasoned that the County had met its burden and that Plaintiff needn't show pretext. The appellate court also questioned whether the test for a prima facie case for retaliation requires a plaintiff to actually hold a reasonable belief as distinct from the plain language of Section 1102.5, which states the employee must "have reasonable cause to believe" there was a violation of law. Ultimately, the appellate court did not resolve the issue, stating that the County's independent reasons for termination were sufficient to satisfy their burden on summary judgment.

[1] Vatalaro also asserted a cause of action for constructive discharge in violation of public policy. The cause of action was dismissed on summary judgment because, among other things, a public employee is barred from asserting such a claim against a public entity employer. The trial court's ruling on this cause of action as not analyzed in the Court of Appeal decision.

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