Editor-in-Chief
Jeffrey I. Ehrlich
THE EHRLICH LAW FIRM

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

Appellate Reports

CAL SUPREME COURT ADDRESSES WHISTLEBLOWING AND CONSEQUENT ADVERSE EMPLOYMENT ACTIONS; ALSO, COURT LOOKS AT EXTORTION BY SETTLEMENT DEMAND UNDER *FLATLEY v. MAURO*

***Lawson v. PPG Architectural Finishes, Inc* (2022) __ Cal.5th __ (Cal. Supreme)**

Who needs to know about this case? Lawyers handling retaliation claims under Labor Code section 1102.5.

Why is it important? The California Supreme Court held that a plaintiff asserting a claim under section 1102.5 need merely show that the employee's protected whistleblowing was a "contributing factor" to the adverse employment action. The three-part *McDonnell Douglas* burden-shifting framework does not apply.

Synopsis: Lawson worked as a territory manager for defendant PPG Architectural Finishes, Inc. (PPG), a paint and coatings manufacturer. Lawson was responsible for stocking and merchandising PPG paint products in Lowe's home improvement stores in Southern California. Although Lawson received a positive evaluation after he was hired in 2015, his evaluations were unfavorable thereafter and in 2017 he was placed on a performance improvement plan.

About the same time, his supervisor, Moore, began to order Lawson to "mis-tint" slow-selling PPG paint, that is, to tint it a shade the customer had not ordered. Lowe's would then be forced to sell the paint at a deep discount, enabling PPG to avoid buying back what would otherwise be excess unsold product. Lawson did not agree with this scheme and filed two anonymous complaints with PPG's central ethics hotline. He also told Moore directly that he refused to participate. The complaints led to an investigation. PPG eventually told Moore to discontinue the practice, but Moore remained with the company, where he continued to directly supervise Lawson and oversee his evaluations.

Some months later, after determining that Lawson had failed to meet the goals outlined in his performance improvement plan, both Moore and Moore's supervisor recommended that Lawson be fired. He was.

Lawson filed suit in the United States District Court for the Central District of California. As relevant here, Lawson claimed that PPG had fired him because he blew the whistle on Moore's fraudulent mis-tinting practices, in violation of the protections codified in Labor Code section 1102.5. PPG moved for summary judgment. Relying on California appellate authority dating to 2005, the district court applied the *McDonnell Douglas* burden-shifting framework to decide the motion. Under that framework, the employee must establish a prima facie case of unlawful discrimination or retaliation. Next, the employer bears the burden of articulating a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's proffered legitimate reason is a pretext for discrimination or retaliation.

The district court granted the motion, finding that Lawson had failed to produce sufficient evidence that PPG's stated reason for firing Lawson was pretextual. On appeal to the Ninth Circuit, Lawson argued that the district court erred in applying *McDonnell Douglas*. He contended the court should instead have applied the framework set out in Labor Code section 1102.6 (section 1102.6). Under the statutory framework, Lawson contended, his burden was merely to show that his whistleblowing activity was "a contributing factor" in his dismissal, not to show that PPG's stated reason was pretextual. The Ninth Circuit asked the California Supreme Court to decide the issue.

By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be "demonstrated by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action. (§ 1102.6.) Then, once the employee has made that necessary threshold showing, the employer bears "the burden of proof to demonstrate by clear and convincing evidence" that the alleged adverse employment action would have occurred "for legitimate, independent reasons" even if the employee had not engaged in protected whistleblowing activities.

It would make little sense to require section 1102.5 retaliation plaintiffs to satisfy *McDonnell Douglas* for the sake of proving that retaliation was a contributing factor in an adverse action. The central problem lies at the third step of *McDonnell Douglas*, which requires the plaintiff to prove that an employer's proffered legitimate reason for taking an adverse action was a pretext for impermissible retaliation. Under section 1102.6, a plaintiff does not need to show that the employer's nonretaliatory reason was pretextual. Even if the employer had a genuine, nonretaliatory reason for its adverse action, the plaintiff still carries the burden assigned by statute if it is shown that the employer also had at least one retaliatory reason that was a contributing factor in the action.

There is, then, no reason why whistleblower plaintiffs should be required to satisfy the three-part *McDonnell Douglas* inquiry – and prove that the employer's proffered legitimate reasons were pretextual – in order to prove that retaliation was a contributing factor under section 1102.6. To the contrary, placing this unnecessary burden on plaintiffs would be inconsistent with the Legislature's evident purpose in enacting section 1102.6: namely, encourag[ing] earlier and more frequent reporting of wrongdoing by employees and corporate managers when they have knowledge of specified illegal acts by expanding employee protection against retaliation.

***Falcon Brands, Inc. v. Mousavi & Lee, LLP* (2022) __ Cal.App.5th __ (Fourth District, Div. 3.)**

Who needs to know about this case? Lawyers making settlement demands and lawyers litigating anti-SLAPP motions involving settlement demands.

Why is it important? Holds that the lawyer's escalating series of settlement demands, in which she linked failure to pay

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the demand to the reporting of criminal acts to the recipient's merger partner, constituted extortion and was not protected conduct under the anti-SLAPP statute.

Synopsis:

Falcon is in the cannabis business. Beginning in 2017, Mousavi's client, Nick Honard, worked for Falcon both as a contractor who earned commissions, and as an employee. Honard was fired by Falcon in August 2019. Falcon claims it terminated Honard after it learned he had submitted fraudulent expense reimbursement requests and hired an employee without Falcon's knowledge or authorization.

On September 6, 2019, attorney Mousavi emailed a letter to Falcon's counsel, announcing she had been retained to represent Honard with respect to his potential claims for wrongful termination, misclassification of employment, failure to pay compensation, failure to provide employment records and retaliation for actions protected by whistleblower laws. In the email Mousavi requested that Falcon immediately provide her with certain relevant employment records.

On October 8, 2019, Mousavi emailed another letter to Falcon's counsel in which she complained she had not received a response to her earlier records request. She then added that if she did not receive a response by the next day, she "will be notifying Harvest Health & Recreation Inc. and Jason Vedadi since they will be acquiring the [Falcon] and will be named as defendants in the action that I will be filing against all of the above referenced individuals and entities, if we cannot resolve this matter."

In that same email she summarized Honard's claims: "[a]side from failure to provide earning statements, Falcon and/or Coastal Harvest have consistently cheated Mr. Honard out of his commissions by forcing him to give his account information (which he was earning commissions from) to other employees, reducing his commissions, not paying Mr. Honard his commissions, and taking over the accounts.... Falcon has refused to reimburse Mr. Honard for his expenses." "In this correspondence, I am not addressing the wrongful termination and defamation by Mark Malatesta, who on the phone told employees that Mr. Honard was let go because he embezzled from the company. Should we not resolve our dispute, I will seek compensation for the damages in the complaint."

Mousavi's letter then segued into what it characterized as various violations of law by Falcon. The October 8 email correspondence did not directly link any of the alleged misconduct to Mousavi's settlement demand. Instead, after listing the purported misconduct, Mousavi summarized her analysis of the damages Honard was entitled to recover from Falcon, which totaled just over $491,000. Mousavi then offered to settle Honard's claims for $490,000. She required a response to her demand by the next day, stating, "If I don't have a response from you by tomorrow, I have no choice but to contact Harvest Health & Recreation Inc. and file a complaint."

On Friday, October 11, Mousavi sent another email to Falcon's counsel: "I have put the attorneys for Harvest on notice about Mr. Honard's claim for wages, without disclosing other issues mentioned in my letter of October 8, 2019. However, Harvest has requested that I forward the demand letters I have sent you. I am planning to email those letters on Tuesday. Please call me if you have any questions. Thanks."

Mousavi emailed Falcon's counsel again on Tuesday, October 15, stating "[s]ince I have not received a response to my letters, I will move forward accordingly. Does [*sic*] any of you accept service or should I serve your client directly? Please respond. Thanks."

In response to Mousavi's email, Falcon's counsel accused her of trying to "extort an undue settlement for Mr. Honard." On October 16, Mousavi replied with another email: "I have been providing you with [an] opportunity to resolve this matter, but all I get from you are threats and evasiveness. I waited patiently to no avail. As stated I will proceed accordingly. If you want to resolve this matter, now is the time."

The parties failed to reach a settlement; Mousavi thereafter sent Harvest copies of the various settlement demands she had made to Falcon. Harvest subsequently sued to rescind its merger agreement with Falcon, apparently based on the claims of illegal conduct it received from Mousavi.

On January 31, 2020, Mousavi filed Honard's complaint against Falcon, alleging causes of action for failure to pay wages and overtime, failure to reimburse expenses, wrongful termination and retaliation, among others. Falcon cross-complained against Mousavi alleging causes of action for extortion and intentional interference with a contract.

Mousavi moved to strike the cross-complaint pursuant to the anti- SLAPP law. In support of the motion, Mousavi declared that, after she learned Falcon was involved in a merger with Harvest, she had a good faith reason to inform Harvest about Honard's claims against Falcon because the Corporations Code states the surviving corporation in a merger remains liable for any judgment entered against the disappearing corporation. She denied threatening to report Falcon to the Bureau of Cannabis Control, to other law enforcement agencies, or to the media.

Mousavi argued the statements underlying Falcon's causes of action for extortion and intentional interference with a contract were all made in the context of settlement negotiations, and thus they are protected by the anti-SLAPP law. The trial court granted the motion to strike. *Reversed.*

Under *Flatley v. Mauro* (2006) 39 Cal.4th 299, 305, a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint. This rule applies here.

While Mousavi's October 8 email, standing alone, may not have crossed the line into misconduct, the October 11 email did because it made clear that she was taking the position: "settle the case now or Harvest will become aware of Falcon's

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alleged criminal conduct next week."

Mousavi's $490,000 settlement demand, as explained in her October 8 email correspondence, was for unpaid wages, commissions, and related expenses. The demand was unrelated to any alleged criminal conduct. Thus, Mousavi's threat to disclose criminal activity entirely unrelated to her client's damage claim "exceeded the limits of respondent's representation of his client" under *Flatley*.

Although statements made in connection with litigation are generally protected under the terms of the anti-SLAPP law, the Supreme Court made it clear in *Flatley* that settlement demands that contain threats may not be afforded protection: "not all speech or petition activity is protected by Code of Civil Procedure section 425.16. The law does not contemplate the use of criminal process as a means of collecting a debt."

The ruling on the anti-SLAPP motion was reversed as to the cause of action for extortion.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*