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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2022

The profound potency of Labor Code section 1102.5(b)

A LOOK AT THE GENERAL-WHISTLEBLOWER STATUTE APPLICABLE TO BOTH PRIVATE AND PUBLIC WORKPLACES

When I began my employment-law practice in 1997, I was reluctant to accept stand-alone Labor Code section 1102.5 claims because of the uncertainties regarding administrative exhaustion, relatively limited remedies, and a burden of proof that was in flux at the trial court and appellate levels. However, over the years, those practitioners who represent whistleblowers have watched Labor Code section 1102.5 evolve into perhaps the most potent and useful employee-rights statute in California.

What is Labor Code § 1102.5(b)?

Labor Code section 1102.5 is a general-whistleblower statute applicable to both private and public workplaces. The most utilized section of this law is section 1102.5, subdivision (b), which states: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." Put succinctly, section 1102.5, subdivision (b) protects an employee from retaliation by his employer for making a good faith disclosure of a violation of federal or state law.

Who is protected under Labor Code § 1102.5(b)?

The protections of section 1102.5(b) are only available to common-law-defined employees. (*Bennett v. Rancho California Water Dist*. (2019) 35 Cal.App.5th 908, 911.) Independent contractors are not protected by the statute. To avail oneself of Labor Code section 1102.5, subdivision (b), an employee must be able to articulate both a "protected activity" and a resulting "adverse employment action." It should also be noted that section 1102.5, subdivision (h) protects employees who are family members of a person who has, or is perceived to have, engaged in activity protected by section 1102.5(b).

What is considered "protected activity"?

To engage in activity protected under section 1102.5(b), the employee must disclose reasonably based suspicions of illegality to a government employee, law enforcement employee, or a fellow employee who has authority over the disclosing employee or authority to investigate, discover or correct the violation. Note that the employee need not be correct in their belief, but rather must only prove that they held the belief in good faith, even if mistaken. (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.4th 913, 922).

"Protected activity" not only includes reports of an employer's unlawful activity, but also includes reports of unlawful activity by third parties. (*McVeigh v. Recology San Francisco* (2013) 213 CA4th 443, 471). An employee engages in a "protected activity" even though the disclosure might fall within the employee's general job duties. (*Id.* at 469.) Further, the employee's motivation for reporting suspected illegality is irrelevant to the analysis of whether the disclosure is considered a "protected activity." (*Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 Cal.4th 832, 850-852).

In addition, a disclosure does not need to be the first or only report of suspected illegal activity to qualify as "protected activity." (*Hager v. County of Los Angeles* (2014) 228 Cal.4th 1538, 1551-1552 (disapproved on other grounds).) Finally, unlike a *Tameny* claim, a "protected activity" need not implicate or concern a violation of public policy. (See *Cardenas v. M. Fanaian, D.D.S., Inc*., 194 Cal.Rptr.3d 1, 9-10, review granted and opinion superseded sub nom. *Cardenas v. Fanaian*, 362 P.3d 431 (Cal. 2015), and review dismissed on Feb. 24, 2016.)

As a practical matter, you should always cite to the specific law(s), rule(s) or regulation(s) suspected to have been violated when pleading a section 1102.5(b) claim.

What is considered an "adverse employment action"?

California courts define an "adverse employment action" as an action or course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of employment. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052-1056).

The most obvious adverse employment actions are termination and demotion. However, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. (*Ibid.*) Rather, a determination of whether an adverse employment action occurred must "take into consideration the unique circumstances of the affected employee as well as the workplace context of the claims." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367.) Therefore, a series of subtle actions, such as workplace harassment (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212), a reduction of work hours (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 93), a reduction in support staff (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424), or an undesirable reassignment (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424) has been regarded as an "adverse employment action" taking as a whole the unique facts of each case.

Does Labor Code § 1102.5(b) require administrative exhaustion?

Before 2014, courts were sharply divided on whether employees were required to exhaust administrative remedies with the California Department

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of Industrial Relations before bringing claims as a civil action. That division was resolved in 2014 with California legislature's adoption of Labor Code section 244, subdivision (a) and amendment of Labor Code section 98.7. Under both of those statutes, a person is generally not required to exhaust administrative remedies before filing an individual civil action for violation of section 1102.5(b).

For those who represent public employees, however, the California Torts Claims Act (Gov. Code, § 900, et seq.) most likely still applies to Labor Code section 1102.5, subdivision (b) claims brought against public entities. (See *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932.) Therefore, practitioners must be careful to vet such claims taking into consideration the relatively short six-month exhaustion window the California Tort Claims Act proscribes.

What remedies are available under Labor Code § 1102.5(b)?

Tort remedies

All forms of tort damages, including compensatory, general, and punitive damages are available in a section 1102.5(b) case. (See *Mathews v. Happy Valley Conf. Ctr., Inc.* (2019) 43 Cal.App.5th 236, 267; *Cardenas, supra* at 9.)

Statutory remedies

Under section 1102.5(f), an employer who is a corporation or a limited liability company is liable for a civil penalty not to exceed $10,000 for *each* violation of section 1102.5(b). Practitioners should note that while section 1102.5(b) generally has a three-year statute of limitations (Code Civ. Proc., § 338, subd. (a)), the penalty component of the statute is likely governed by a one-year statute of limitations. (Code Civ. Proc., § 340, subd. (a).)

Attorneys' fees

In 2021, section 1102.5 was amended to include a one-way attorney's fees provision which authorizes the court to award reasonable attorney's fees to a plaintiff who successfully brings an action for violation of section 1102.5(b). (Lab. Code, § 1102.5, subd. (j).) Since this provision only provides for the award of attorney's fees to a successful plaintiff, there is no opportunity under this statute for a successful defendant to seek recovery of its attorney's fees. Further, it is likely that this amendment is retroactive to cover those pre-2021 cases which are currently pending but have yet to be resolved. (See *California Housing Finance Agency v. E.R. Fairway Associates I* (1995) 37 Cal.App.4th 1508, 1513; also see *Bradley v. School Bd. of City of Richmond* (1974) 416 U.S. 696.)

Costs of suit

If a plaintiff prevails at trial on her section 1102.5(b) case, she is entitled to costs of suit pursuant to Code of Civil Procedure section 1032. However, what happens if an employer is the prevailing party on such a case? In an FEHA case, an employer is required to prove that plaintiff's case was objectively groundless to recover its costs as the prevailing party. (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97.)

Courts have yet to squarely address the issue of costs for a prevailing defendant in a section 1102.5(b) claim. However, since the recovery of costs are not specifically addressed by section 1102.5, it is quite possible that courts will allow defendants to recover costs as a matter of right upon successfully defending a section 1102.5 claim. An exception might be found in those cases in which the protected activity involves disclosure of FEHA violations and includes a separate cause of action for violation of the anti-retaliation provision of FEHA. Otherwise, you would be wise and prudent to counsel your clients about the possibility of owing statutory costs of suit if their section 1102.5 claims prove unsuccessful.

What is the applicable burden of proof for Labor Code § 1102.5(b) claims?

In 2003, the California Legislature enacted Labor Code section 1102.6, which states:

> In a civil action or administrative proceeding brought pursuant to Section 1102.5, once 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.

(Emphasis added).

Nevertheless, before this year there was a great deal of confusion and disagreement about the applicable burden of proof to establish causation in a section 1102.5(b) case, at least at the summary judgment stage. Some courts held that the *McDonell Douglas* (1973) 411 U.S. 792, burden-shifting standard used to evaluate Fair Employment and Housing Act (FEHA) and *Tameny* (1980) 27 Cal.3d 167, cases at the summary judgment stage applied in Labor Code section 1102.5(b) cases.

Other courts were more faithful to the text adopted by the California legislature in 2003 and held that the applicable burden of proof for section 1102.5(b) claims at summary judgment was set forth in section 1102.6.

Fortunately, in 2022 the California Supreme Court issued *Lawson v. PPG Architectural Finishes*, a comprehensive opinion (in response to a certified question from the 9th Circuit Court of Appeals) which held that the burden of proof applicable to section 1102.5 claims at *both summary judgment and trial* is clearly set forth in section 1102.6. (*Lawson v. PPG Architectural Finishes*, No. S266001, Cal. Lexis 312 (Jan. 27, 2022) (citation pending).)

In holding that the statutory scheme means what it says, the Court observed that Labor Code section 1102.6 provides a "complete set of instructions for the presentation and evaluation of evidence in section 1102.5 cases; it is not merely the codification of an affirmative defense." (*Id.* at 12.) Thus, to establish a claim for violation of section 1102.5(b), a plaintiff must prove by a preponderance of

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the evidence that her protected activity was a "contributing factor" in defendant taking an adverse employment action. The Court further observed that "[e]ven 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." (*Id.* at 11.) The Court in *Lawson* further adopted the Ninth Circuit's definition of "contributing factor" used in the case of *Rookaird v. BNSF Ry. Co.* (2018) 908 F.3d 451, which is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." (*Id.* at 12.)

Once plaintiff satisfies her burden, to avoid liability the Defendant must 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. "'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) Moreover, "[u]nder the 'clear and convincing' standard, the evidence must be so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind." (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158.) In a righteous section 1102.5(b) case, this should prove to be a nearly impossible task for defendant to establish at the summary judgment phase, and a steep challenge to establish at trial.

The *Lawson* decision is entirely consistent with the plain text and legislative intent of sections 1102.5 and 1102.6. The decision further makes overcoming summary judgment and prevailing at trial much less onerous for employees, eliminating the need for plaintiffs to establish pretext and providing a framework that places the ultimately burden *on the employer* to proffer "clear and convincing" evidence of legitimacy untainted by illegality to justify its adverse employment actions.

Conclusion

Over the past four decades, section 1102.5 has evolved from a relatively limited and misunderstood mechanism into one of the most robust statutory schemes that employee rights attorneys have at their disposal. Section 1102.5, subdivision (b) is now and a "must have" cause of action in any case of unlawful retaliation in the workplace.

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