Case No. S266001

In the

Supreme Court

of the

State of California

WALLEN LAWSON,
Plaintiff-Appellant,

v.

PPG ARCHITECTURAL FINISHES, INC.,
Defendant-Appellee.

CERTIFICATION OF THE QUESTION OF LAW TO
THE CALIFORNIA SUPREME COURT SUBMITTED BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 19-55802

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

Lawson *agrees* with PPG that the Legislature intended Labor Code Section 1102.6 to apply to a mixed motive framework derived from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) to Labor Code Section 1102.5 retaliation claims. However, Lawson disagrees with PPG's unsupported assertions[1] that: (1) the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) burden-shifting framework is appropriate to resolve Section 1102.5 claims on summary judgment; (2) that the legislative history discloses that the Legislature favored applying divergent standards for resolving Section 1102.5 claims depending on the stage of the proceedings in which the litigants find themselves (summary judgment versus trial); and (3) that the employer's burden under Section 1102.6 only arises at trial as an affirmative defense, contrary to Section 1102.6's expressly stating that its two-prong standard applies to all Section 1102.5 cases. PPG's argument fails for several reasons.

[1] Neither *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317 (2000) nor *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, relied upon by PPG, address whether the *McDonnell Douglas* framework is appropriate to resolve summary judgment in a case that will ultimately be tried with a mixed motive jury instruction. Both cases are also devoid of any reference to Section 1102.6, which is not applicable to FEHA claims addressed therein.

First, the plain language of Section 1102.6 states that it is the exclusive standard of proof applicable to whistleblower retaliation claims under Section 1102.5. The legal authority relied on by PPG does not involve situations where a court has decided to supply its own set of evidentiary rules to resolve a given set of cases, even though a statute specifies the evidentiary standard to be applied to those cases.

Second, contrary to Respondent's assertions, the *McDonnell Douglas* framework is incongruous with the Section 1102.6 standard. Requiring a plaintiff to disprove the employer's articulation of allegedly legitimate, nondiscriminatory reasons, as the *McDonnell Douglas* standard does, improperly displaces the employer's burden under Section 1102.6 to establish by clear and convincing evidence that the proffered reasons would have justified the adverse action. Injecting the *McDonnell Douglas* standard into a Section 1102.5 case would also impermissibly shift the plaintiff's overall burden, as it would change from having to show by a preponderance of the evidence that a proscribed Section 1102.5 action was a contributing factor to the adverse action to having to disprove the employer's proffered non-discriminatory reason for the adverse action. The employer, however, has the burden under Section 1102.6 to establish by clear and

convincing evidence that legitimate business reasons merited the adverse action taken against the plaintiff.

Third, PPG's claims that previous "existing law" favored the universal deployment of the *McDonnell Douglas* standard for discrimination and retaliation cases at the summary judgment stage of an action and that the Legislature endorsed this alleged practice is betrayed by the fact that California courts were already utilizing a standard akin to the Section 1102.6 standard (subject to the employer being under the preponderance of the evidence standard) to resolve mixed motive cases before the enactment of Section 1102.6. PPG even cites to a case confirming this practice.[2] Mixed motive cases are more analytically akin to the Section 1102.6 standard than standard single-decision FEHA discrimination and retaliation cases, neither of which are subject to the statutorily specified two-prong standard of Section 1102.6 Moreover, the incompatibility between the *McDonnell Douglas* and mixed motive standards (as recognized by this Court) defeats any notion that the Legislature was in favor of imposing the *McDonnell Douglas* standard on Section 1102.5 cases even <u>when</u> it could invalidate entirely either of the two prongs of the Section 1102.6 standard.

[2] *Grant-Burton v. Covenant Care, Inc*. (2002) 99 Cal.App.4th 1361.

Fourth, PPG takes groundless comfort in the notion that the existence of an affirmative defense that mirrors the employer's burden under the Section 1102.6 standard somehow establishes that the employer need only confront having to establish it at the trial stage of an action. In reality, the existence of the same-decision affirmative defense merely confirms the employer's obligation to establish it in any dispositive phase of a Section 1102.5 action. The employer's obligation to do so is triggered upon the plaintiff's showing that a Section 1102.5 proscribed action was a contributing factor to the adverse employment action, regardless of the stage of the proceeding in which the litigants find themselves.

Finally, *McDonnell Douglas* requires that the plaintiff prove that the employer's purported reason is untrue—a pretext—while the mixed motive framework allows a plaintiff to prevail without having to disprove the employer's reason.

II. LABOR CODE SECTION 1102.6 IS THE EXCLUSIVE STANDARD OF PROOF FOR LABOR CODE SECTION 1102.5 CASES

A. The Plain Language of Labor Code Section 1102.6 Reveals That It is the Exclusive Standard of Proof for Labor Code Section 1102.5 Cases

According to PPG, a plain language reading of Section 1102.6 confirms that the employer's obligation to establish the same-decision defense arises only at the trial stage of an action. PPG's construction of the plain language of Section 1102.6, however, is woefully misguided since the statute unmistakably specifies that it provides the *exclusive* standard of proof for Labor Code Section 1102.5 cases.

Courts divine legislative intent principally from the plain language of a statute, consistent with the canons of statutory interpretation. (*Hunt v. Superior Court* (1999) 21 Cal.App.4th 984, 1000.) This Court has stated that when determining legislative intent, it looks first to the words of a statute, giving the language its usual, ordinary meaning. (*Ibid*.) "If there is no ambiguity in the language, [the Court] presume[s] the Legislature meant what it said, and the plain meaning of the statute governs." (*Ibid*.) In this instance, the plain language of Section 1102.6 expressly provides that it is the standard of proof for all claims brought under Section 1102.5:

> 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. Labor Code § 1102.6.

The first sentence of Section 1102.6 clearly states in unqualified fashion that it applies to civil actions brought pursuant to Section 1102.5. The statute does not state that the evidentiary standard prescribed therein applies to particular stages of an action; rather, it states that it applies "in a civil action or administrative proceeding brought pursuant to Section 1102.5." This clearly signifies that the Section 1102.6 standard applies at all stages of a Section 1102.5 action in which the merits of the action are being resolved.

Not surprisingly, PPG provides no persuasive authority to support its claim that only half the statute applies at the summary judgment stage of a Section 1102.5 action or that the Court should ignore the employer's burden to establish the same-decision defense by shifting it to the plaintiff to refute the employer's rationale under the

McDonnell Douglas standard.[3] PPG similarly offers no rational reason for deviating from the plain language of Section 1102.6 by applying a court-created standard that nullifies one half of the statute. Instead, PPG contends that the same-decision defense is an affirmative defense and, therefore, somehow, an employer is not obligated to address the defense at the summary judgment stage of a Section 1102.5 action. This argument, however, is wholly groundless because the statute clearly confirms that it applies to all stages of a Section 1102.5 proceeding. And PPG fails to explain why the evidentiary burden for a Section 1102.5 case should change depending on whether the case is at the summary judgment or trial stage, especially when the two evidentiary standards at play (according to PPG) differ as to whether and when the burden shifts to the employer to establish that legitimate

[3] *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239, relied upon by PPG, is inapposite. The language block quoted by PPG plainly says that the *McDonnell Douglas* framework applies in FEHA cases that do not involve mixed motives. (Resp't Br., p. 21). PPG advocates a tortured reading of the language, suggesting that no FEHA employment discrimination cases involve mixed motives and therefore *McDonnell Douglas* is always applicable. (*Ibid.*) This makes little sense, however, as *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal. App. 5th 1168, 1185, clearly holds that some FEHA cases involve mixed motives and that *McDonnell Douglas* is inapplicable in such cases. Moreover, FEHA does not have an explicit statutory framework similar to Section 1102.6 that treats all Section 1102.5 cases as mixed motive cases.

business reasons merit the adverse action the employer took, as explained in further detail in II(b) below.

Courts typically consider the consequences that will result from a particular interpretation of a statute and construe it with a view towards promoting rather than defeating the general purpose and the policy behind it. (*Anaheim Union Water Co. v. Franchise Tax Bd*. (1972) 26 Cal. App.3d 95, 105.) Additionally, where a statute is susceptible to two constructions, which is not the case here, but which is being assumed for the sake of argument only, the one that leads to the more reasonable result will be followed. (*Metropolitan Water Dist. v. Adams* (1948) 32 Cal. 2d 620, 630-31.)

In this instance, creating two divergent standards for assessing the merits of a Section 1102.5 claim creates a substantial risk of the absurd result that the same set of facts in a given case could yield two completely different outcomes, depending on whether or not the case is subjected to the *McDonnell Douglas* test or the Section 1102.6 standard. PPG's interpretation of the Section 1102.6 standard would both lead to an unreasonable result and defeat the general purpose and policy behind Section 1102.6 to subject employers to a high burden and standard of proof in a Section 1102.5 proceeding.

If the Court were to read into Section 1102.6 that "civil action or administrative proceeding" means "at the summary judgment stage of a civil action or administrative proceeding," this would not only contravene the written language of the statute, but also amount to a judicial usurpation of the Legislature's role to enact law. (*People v. Bunn* (Cal. 2002) 27 Cal.4th 1 (affirming the separation of powers principle under the California Constitution).)

B. The Labor Code Section 1102.6 Standard is a Complete Standard of Proof That Operates Separate and Independent from the McDonnell Douglas Framework

Section 1102.6 explicitly adopts a two-part burden-shifting analysis that is distinct from the three-part *McDonnell-Douglas* analysis applicable to FEHA and Title VII discrimination claims. Section 1102.6 states, in relevant part:

> [O]nce it has been demonstrated by a preponderance of the evidence that an activity proscribed by [the statute] was a contributing factor in the alleged prohibited personnel action against an employee, the burden of proof shall be on the defendant to 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 this section. Labor Code § 1102.6

Section 1102.6, therefore, prescribes a two-step analysis with different burdens of proof for each. On the other hand, under the three-part *McDonnell-Douglas* analysis, first an employee must establish a

prima facie case. (*McDonnell Douglas v. Green* (1973) 411 U.S. 792, 802.) Second, the employer must offer a legitimate reason for its actions, but it need only produce the reason; the employer never bears the burden of persuasion. (*Id*. at pp. 802-803; *see also Texas Dep't of Cmty. Affairs v. Burdine* (1981) 450 U.S. 248, 255.) At that point, the analysis focuses on the ultimate question -- whether the employee has proven by a preponderance of the evidence that the adverse action was discriminatory. (*See, e.g*., *United States Postal Serv. Bd. of Governors v. Aikens* (1983) 460 U.S. 711, 714-16.) In making this final showing, the employee can demonstrate that the employer's offered legitimate reason is pretext for discrimination, which constitutes the third phase of the *McDonnell-Douglas* burden-shifting analysis. (*Burdin*e, *supra*, 450 U.S. at p. 255.)

Applying the *McDonnell-Douglas* analysis alongside the Section 1102.6 standard invites confusion, contradiction, and, ultimately, a corrosion of the Section 1102.6 standard. The first phase of the Section 1102.6 standard requires the employee to establish by a preponderance of the evidence that a section 1102.5 illegal action was a <u>contributing factor</u> to the adverse action at issue. Logically, this allows for both retaliatory and legitimate reasons to come into play under a Section

1102.6 analysis before the burden shifts to the employer to provide a business justification for its adverse action. The *McDonnell Douglas* standard, on the other hand, if imported into the Section 1102.6 framework, would require the plaintiff to disprove the employer's alleged business justifications for the adverse action. This would impermissibly shift to the plaintiff the employer's burden to prove the same-decision defense under a clear and convincing standard.

This Court has commented on the incompatibility between the *McDonnell Douglas* standard and the mixed motive standard, which mirrors the Section 1102.6 standard, in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 2013.[4] In *Harris*, the Court declared that the

[4] The Ninth Circuit observed that some federal and state courts confusingly apply the *McDonnell Douglas* test to section 1102.5 claims even after the addition of section 1102.6 (Certification Order at 12, 14 n.13). The cases cited by the Ninth Circuit that show a few instances in which courts have continued to apply the *McDonnell Douglas* standard in Section 1102.5 cases, however, do not address the question of the inherent incompatibility between the *McDonnell Douglas* standard and the Section 1102.6 standard, and, therefore, are distinguishable from this case. (*Cf. Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1540 ; *Patten v. Grant Joint Union High Sch. Dist.* (2005) 134 Cal.App.4th 1378, 1384; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138; *Nikmanesh v. Walmart Inc.* (9th Cir. 2019) 789 F. App'x 30, 31-32 (unpublished); *Sorensen v. Nat'l R.R. Passenger Corp.* (9th Cir. 2019) 786 F. App'x 652, 653 (unpublished); *Carter v. Nat'l R.R. Passenger Corp.* (C.D. Cal. Jan. 24, 2020) No. CV 18-9652 PSG (JCx), 2020 WL 2475085, at *8 (unpublished); *Ruiz v. Paradigmworks Grp., Inc.* (S.D. Cal. Jan. 13, 2020) No. 16-CV-2993-CAB-BGS, 2020 WL 133905, at *3 (unpublished).)

McDonnell Douglas standard is suited only for cases in which a single motive behind the employer's action is at issue, not in mixed motive cases. (*Id*. at pp. 214-215.)[5] This is instructive because the mixed motive standard, like the Section 1102.6 standard (which mentions the plaintiff's obligation to establish merely that a Section 1102.5-proscribed conduct contributed to the adverse action), recognizes that dueling legitimate and discriminatory reasons may inform an employer's action. Hence, the *McDonnell Douglas* standard simply does not apply in such situations.[6]

In *Quigg v. Thomas Cty. Sch. Dist.* (11th Cir. 2016) 814 F.3d 1227 (citing *Price Waterhouse*, 490 U.S., at 276), the Eleventh Circuit similarly confirmed that *McDonnell Douglas* is "fatally inconsistent

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[5] PPG argues that D.C. Circuit Court of Appeals confirmed that the *McDonnell Douglas* test would apply in mixed-motive cases. (Resp't Br. p.33, and p.34 n.10; *Chen v. General Accounting Office* (D.C. Cir. June 26, 1987) 821 F.2d 732, 738-39; *Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 117; *Childers v. Slater* (D.D.C. March 22, 1999) 44 F. Supp. 2d 8, 15-16.) These dated cases are not, however, instructive on how California courts resolve mixed motive cases based on the pronouncements of California courts, including this Court. Moreover, the Section 1102.6 standard, based on its codification, is the exclusive standard.

[6] The instant case, however, differs from the *Harris* standard in that the statute specifies the plaintiff is obligated only to prove that a Section 1102.5 proscribed action was a contributing factor towards an adverse action, whereas *Harris* announced a higher substantial factor standard for FEHA mixed motive cases.

with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason'" for the adverse action (*Quigg*, at p. 1237.) *McDonnell Douglas* does not allow plaintiffs to prevail if they cannot rebut the employer's proffered reasons for an adverse action even if they can offer evidence demonstrating that the employer also relied on a forbidden consideration; "[y]et, this is the exact type of employee that the mixed-motive theory of discrimination is designed to protect." (*Id.* at p. 1238.)

Following, and relying specifically on, *Harris* and *Quigg*, the California Court of Appeal for the Second District ruled that the *McDonnell Douglas* standard plays no role in a mixed motive case. *Husman* v. *Toyota Motor Credit Corp.* (2017) 12 Cal. App. 5th 1168, 1186. *Husman* held that a plaintiff may survive summary judgment under a mixed motive framework simply by showing a material issue of fact exists as to whether the protected activity was a motivating factor in the adverse action taken against the plaintiff, without having to also satisfy the *McDonnell Douglas* framework. (*Id.*, at p. 1186.)[7]

[7] Although the court subsequently proceeded to analyze the plaintiff's FEHA retaliation case and invoked the *McDonnell Douglas* standard when doing so, it nevertheless declared that the *McDonnell Douglas* standard plays no role in FEHA discrimination claims. PPG may claim that the court's reliance on the *McDonnell Douglas* standard for the retaliation claim is edifying.

If *Husman*, following the pronouncements of this Court in *Harris* and the Eleventh Circuit in *Quigg,* held that this is an appropriate summary judgment analysis, where the FEHA provides no explicit framework, then there is no legitimate reason for courts to refuse to apply Section 1102.6's codification of the same standard. [8]

Aside from the incompatibility arising from the plaintiff only having to prove that a prohibited action was a contributing factor to an adverse action under the Section 1102.6 standard -- versus having to disprove an employer's stated reasons for the adverse action under the *McDonnell Douglas* standard -- Section 1102.6 places a clear and convincing standard of burden on the employer to establish business justifications, whereas the *McDonnell Douglas* standard requires the plaintiff to disprove such justifications. Injecting the *McDonnell Douglas* standard into the Section 1102.6 framework creates the

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However, PPG would be wrong. Since a plaintiff is only required to show that a Section 1102.5 action contributed to the adverse action at issue, it is more analogous to the mixed motive standard than it is to single-decision retaliation or discrimination claims.

[8] PPG argues that applying the Section 1102.6 standard would provide no workable method to determine whether a plaintiff has met its burden on summary judgment and implies that applying Section 1102.6 in this manner would all but eliminate summary judgment on Section 1102.5 claims. (Resp't Br. at 11). However, PPG fails to explain how this is so. Indeed, the *Husman* case illustrates how to analyze a mixed motive claim for the purposes of summary judgment.

possibility that the employer will escape its burden to establish that legitimate business reasons merit the adverse action if the employee fails to disprove to the satisfaction of the court the employer's alleged non-discriminatory reason. Accordingly, the *McDonnell Douglas* standard cannot be deployed in a Section 1102.5 claim; doing so would invalidate, or make inoperable, either or both of the two prongs of a Section 1102.6 analysis.

C. None of the Cases Relied on by PPG Establish that the McDonnell Douglas Standard Applies Either in California State Mixed Motive Cases or to Section 1102.5 Cases

None of the cases PPG relies on to support its claim that that the *McDonnell Douglas* standard must be invoked in an assessment of the merits of a Section 1102.5 case at the summary judgment stage support PPG's assertion. *Ruggles v. Cal. Polytechnic State Univ*. (9th Cir. 1986) 797 F.2d 782, *Chen v. General Accounting Office* (D.C. Cir. 1987) 821 F.2d 732, *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, and *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, discrimination and retaliation cases in which the court applied the *McDonnell Douglas* standard, are irrelevant for two principal reasons.

First, Section 1102.6 explicitly states that it is the exclusive standard for Section 1102.5 cases, whereas the discrimination and

retaliation statutes the courts construed in each of these cases did not specify the particular standard to be relied on by courts to evaluate the merits of a discrimination or retaliation claim. The *McDonnell Douglas* standard, which these cases applied, is also incompatible with the Section 1102.6 standard for reasons advanced above. None of these cases suggest that courts can substitute another legal standard for a codified standard.

Second, *Harris* and *Husman* clarified that the *McDonell Douglas* standard is inapplicable to FEHA mixed motive discrimination cases, which, again, are closer analytically in standard to Section 1102.6 than to garden-variety single-decision discrimination and retaliation claims. Mixed motive and Section 1102.6 actions share the common feature of requiring the plaintiff to show only that the prohibited action (be it discrimination under FEHA or retaliatory activity under Section 1102.6) contributed to/played in the adverse action at issue. Operating under a different analytical approach, the discrimination and retaliation cases at issue in *Chen*, *Ruggles*, *Yanowitz*, and *Guz* [9] are therefore unhelpful here.

[9] The plaintiff in *Guz* even conceded that the employer's stated reason for the alleged adverse action was correct, which entirely gutted his age discrimination claim. Therefore, *Guz* could not be factually farther from a

III. NOTHING IN LABOR CODE SECTION 1102.6'S LEGISLATIVE HISTORY OR JURY INSTRUCTIONS SUGGESTS THAT THE LEGISLATURE WAS IN FAVOR OF COURTS APPLYING THE MCDONNELL DOUGLAS STANDARD TO LABOR CODE SECTION 1102.5 RETALIATION CLAIMS

A. The Jury Instructions Fail to Support PPG's Claim that the Same-Decision Defense is Merely an Affirmative Defense to be Invoked at Trial or that the McDonnell Douglas Standard Applies at the Summary Judgment Stage of a Labor Code Section 1102.5 Action.

The jury instructions relied upon by PPG fail to support its claim that the second prong of the Section 1102.6 evidentiary standard (the same-decision defense) is an affirmative defense reserved only for trials.

Although the Section 1102.6-based jury instructions support PPG's proposition that the same-decision defense in a mixed motive case is an affirmative defense, they do not support PPG's wholesale rejection of the same-decision defense in summary judgment situations. The same-decision defense under Section 1102.6 is reflected in California Civil Jury Instruction 4604, which PPG cites. It communicates nothing more than the employer's obligation to establish the same-decision defense by clear and convincing evidence under the Section 1102.6 evidentiary standard to the extent that the employer

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contributing factor case, as Section 1102.6 requires the plaintiff to show, than it already is.

claims that legitimate business reasons would have merited the adverse action.

If, on the other hand, the employer makes no such claim, then a Section 1102.5 action is resolved solely on the issue of whether the plaintiff can establish by a preponderance of the evidence that a Section 1102.5 proscribed action was a contributing factor to the adverse employment action. The employer's burden is correctly construed as an affirmative defense at the trial stage because it is the employer's obligation to prove it. However, that the same-decision defense is an affirmative defense at trial fails to establish that an employer is not required to prove it at the summary judgment stage of a Section 1102.5 action, or that a plaintiff should have to disprove the employer's alleged non-discriminatory rationale under the *McDonnell Douglas* standard to survive summary judgment.

California Jury Instruction 4603 similarly reflects the first prong of the Section 1102.6 standard for evaluating the merits of a Section 1102.5 claim, as it must, since the plaintiff is initially obliged to show, by a preponderance of the evidence, that a Section 1102.5 proscribed action was a contributing factor to the adverse action. Overall, the splitting of the two prongs of the Section 1102.6 standard across two

jury instructions merely reflects the parties' relative burdens of proof, both of which are equally at play at all stages of a Section 1102.5 action to the extent the parties believe the facts support their relative claims. Thus, nothing about Jury Instruction 4604 being an affirmative defense supports PPG's claim that the second prong/same-decision defense may only be invoked at trial. Notably, the Directions for Use for Instruction 4603 further confirm that Section 1102.6 sets forth the standard of proof in all Section 1102.5 claims:

> The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (**See Lab. Code, § 1102.6**; CACI No. 4604, Affirmative Defense—Same Decision.)

Instruction 4503 (emphasis added).

B. The Legislative History Fails to Support PPG's Claim that the McDonnell Douglas Standard Must be Deployed at the Summary Judgment Stage.

PGG claims that courts regularly applied the *McDonnell Douglas* standard to resolve Title VII and FEHA employment discrimination cases at the time Section 1102.6 was enacted, that the enactment of Section 1102.6 only evidences the Legislature's desire to heighten the evidentiary standard for employers in situations where the

same-decision defense is at issue, and that the Legislature otherwise did not intend to displace existing law, which PPG construes as endorsing the use of the *McDonnell Douglas* standard by courts in Section 1102.5 cases. None of these contentions, however, establishes that the *McDonnell Douglas* standard should play any role in an assessment of the merits of a Section 1102.5 action or that the Legislature understood, or wanted, the *McDonnell Douglas* standard to apply to Section 1102.5 cases.

The single-decision FEHA disparate impact discrimination cases in which courts have applied the *McDonnell Dougl*as standard, and to which PPG cites, are of no import here. Lawson makes no claim that the *McDonnell Douglas* standard is inapplicable to any set of facts or to any type of case; it just does not apply here where Section 1102.6 expressly states that its two-prong standard is the controlling legal standard for resolving the merits. Lawson further contends that the rationale for why the *McDonnell Douglas* standard does not apply to Section 1102.5 cases may be gleaned from the treatment of mixed motive cases by California courts, including this Court.

Mixed motive and 1102.5 share the common feature that a plaintiff need only prove that illegal conduct was a contributing or

motivating factor to an adverse employment action. California courts have declared that the *McDonnell Douglas* standard is inapplicable in mixed motive cases. Since Lawson is alleging that a Section 1102.5 proscribed action contributed to the decision to terminate his employment, the standard used by courts to resolve FEHA single-decision disparate impact discrimination or retaliation cases is irrelevant. The mixed motive standard is more analogous. But most important, however, is the fact that Section 1102.6 is a codified standard and, therefore, must apply to all Section 1102.5 cases. The *McDonnell Douglas* standard is incompatible with Section 1102.6.

PPG's position that Section 1102.6 was enacted simply to heighten the evidentiary standard for same-decision defense and, therefore, that the *McDonnell Douglas* standard somehow continues to apply in Section 1102.5 cases also fails. (Opposition, at 25.) One of the cases PPG cites to support its position in this regard, *Grant-Burton v. Covenant Care, Inc*. (2002) 99 Cal.App.4th 1361, actually undercuts its position and supports Lawson's position.

In *Grant-Burton*, the Court of Appeal reversed a summary judgment ruling against the employee in a retaliation case in which the employee alleged that she was fired for engaging in protected activity,

disclosing her wages to other employees. In doing so, the court found that although the employer had alleged several legitimate reasons for terminating the plaintiff's employment, the plaintiff successfully established that she was terminated in part for unlawful reasons, i.e., her participation in discussions about pay. (*Grant-Burton*, at p. 1379.) The court further found that the employer had failed to establish its same-decision defense. (*Ibid*.) It did not apply the *McDonnell Douglas* standard in its analysis. Instead, it treated the case as a mixed motive case in which illegitimate and legitimate motives contributed to an employment decision. The court relied on an evidentiary standard that mirrors the Section 1102.6 standard, the exception being that, rather than operating under a clear and convincing standard, the employer was subjected to a lower preponderance of the evidence standard for his same-decision defense. And it reversed the summary judgment ruling against the employee after finding that the employer could not establish its same-decision defense.

Insofar as PPG is claiming that the Legislature did not want to change existing law (which PPG understands as revealing a sole and unwavering application of the *McDonnell Douglas* test) but for toughening the evidentiary standard for the same-decision defense, its

citation to *Grant-Burton* refutes its position. *Grant-Burton* confirms that California courts were already assessing the merits of whistleblower claims under a mixed motive standard that resembled the Section 1102.6 standard without invoking the *McDonnell Douglas* standard.

Furthermore, the bill analysis for Section 1102.6 reveals the Legislature understood existing law as comprising of a two-prong standard similar to Section 1102.6 for assessing the merits of Section 1102.5 cases, i.e. the same standard employed in *Grant-Burton*. (Lawson Br. at 14-15; S. Rules Comm. 2003-2004 Reg. Sess., Cal Bill Analysis at Analysis, sec. 4 (amended on Aug. 18, 2003, published on Aug. 22, 2003 as Senate Floor Analyses). After codifying that standard, albeit with a more rigid same-decision defense, the Legislature ensured that the Section 1102.6 standard would be the exclusive standard for analyzing Section 1102.5 cases.

Lastly, *Grant-Burton* refutes PPG's claim that Section 1102.6 is an unworkable standard at the summary judgment stage when the *McDonnell Douglas* standard is not invoked because the court analyzed the retaliation claim at the summary judgment stage by using a two-

prong mixed-motive standard similar to Section 1102.6 without invoking the *McDonnell Douglas* test.

Even if the legislative history suggests that the sole focus of Section 1102.6, as PPG claims, was to raise employers' burden of proof on the same-decision defense, the plain language of the statute codifies the exclusive use of the mixed motive framework in Section 1102.5 cases.[10]

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[10] PPG misquotes the Senate Report to suggest that "then-existing law", implying Section 1102.5 itself, previously incorporated *McDonnell Douglas.* (Resp't Br. at 23-24.) Instead, the cited language in the report shows that the Legislature was merely attempting to explain the state of existing case law implementing Section 1102.5, including *McDonnell Douglas*:

> 4. Existing case law provides that, after a plaintiff shows by a preponderance of evidence that the action taken by the employer is proscribed by the whistleblower statute, the burden shifts to the employer to show by a preponderance of the evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by the whistleblower statute. [*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.]
>
> This bill would instead require the employer to make that showing by clear and convincing evidence.

California Bill Analysis, Senate Committee, 2003-2004 Regular Session, Senate Bill 777 (Apr. 8, 2003). While it is possible that the legislature may have misunderstood *McDonnell Douglas* somewhat as suggested by PPG, this paragraph clearly conveys the legislature's primary intention to replace existing case law, including *McDonnell Douglas.*

IV. THE FACTS OF THIS CASE DEMONSTRATE THE IMPORTANCE OF THIS ISSUE

As detailed in Lawson's original brief, his supervisor Clarence Moore directed Lawson and his other subordinates to systematically engage in a fraudulent practice against PPG's customer Lowe's Companies, Inc. for the purposes of inflating his sales metrics. (Lawson Br. at 7.) Shortly before PPG fired him, Lawson confronted Moore and vociferously objected to this instruction. (*Id.* at 8.) The interaction ended with Moore becoming visibly agitated with Lawson.[11] (*Ibid.)*

PPG asserts that it fired Lawson due to the alleged performance issues detailed in its brief. (Resp't Br. at 12-13.) Nonetheless, it is undisputed that Moore played a critical role in both the performance assessments of Lawson and PPG's decision to fire him. (Lawson Br. at 8-9.)

Lawson developed critical evidence in discovery showing that a reasonable jury could believe that his protected activity was at least a contributing factor in PPG's decision to fire him. The evidence

[11] PPG's brief attempts to downplay this poignant confrontation by relegating it to a footnote, while focusing on the fact that Lawson elected not to tell Moore that he had already reported his fraudulent scheme to the company's ethics hotline. (Resp't Br. at 14-15 n.3.) Lawson's understandable reluctance to reveal to Moore his anonymous report in no way undermines the credibility of Lawson's testimony regarding his confrontation with Moore.

includes: Moore's hostility in the face Lawson's confrontation; the fact that Moore's conduct and Lawson's whistleblowing resulted in a company-wide investigation into the fraudulent practice; the close temporal proximity between the protected activity and the firing; and the fact that PPG's own internal investigator believed that Moore should have been the one that PPG fired, instead of Lawson. (*Id.* at 6-9.) This evidence should have been more than sufficient to prove that a reasonable jury could believe that his protected activity was a contributing factor in the decision to fire him and survive summary judgment under Section 1102.6.

In applying *McDonnell Douglas*, the district court analyzed the extent to which Lawson could rebut PPG's alleged reasons and granted summary judgment because it found that while Lawson was able to raise a prima facie case of retaliation, he could not fully rebut PPG's reasons for his termination. (1 ER 6). Lawson would not have been required to rebut PPG's reasons to survive summary judgment had the trial court applied Section 1102.6's analysis. His showing of circumstantial evidence that his protected activity was a contributing factor would have sufficed. The district court's erroneous application of *McDonnell Douglas* was therefore outcome determinative.

PPG offers its own rendition of the trial court's summary judgment ruling, falsely claiming that the trial court found that Lawson failed to meet his burden under Section 1102.6 to establish that an illegal Section 1102.5 action was a contributing factor to his termination. (Resp't Br. at 35.) However, nothing about the trial court's ruling suggests that Lawson could not prove that a Section 1102.5-barred action contributed to the decision to terminate his employment or that the trial court properly engaged in a proper Section 1102.6 analysis. Additionally, PPG's spin of the facts is refuted by the Ninth Circuit's summation that Lawson would likely have survived summary judgment had the trial court employed the Section 1102.6 standard and not applied the *McDonnell Douglas* standard. (*Lawson v. PPG Architectural Finishes Inc*. (9th Cir. 2020) 982 F.3d 752, 760.) Certainly, the trial court's finding that Lawson had established a prima facie case favors an assumption that his whistleblowing played a contributing factor in the decision to terminate his employment.

V. CONCLUSION

In enacting Labor Code Section 1102.6, the Legislature recognized that whistleblower retaliation claims by nature frequently involve situations where the employer may have multiple reasons, both

lawful and retaliatory. The Legislature therefore made the mixed motive framework the exclusive standard of proof for Labor Code Section 1102.5 claims in order to better protect whistleblowers such as Lawson.

Date: June 1, 2021

Respectfully submitted

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Dated: June 1, 2021 By: */s/Bruce C. Fox*
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