No. S266001

IN THE SUPREME COURT OF CALIFORNIA

WALLEN LAWSON,

Plaintiff and Appellant,

v.

PPG ARCHITECTURAL FINISHES, INC.,

Defendant and Respondent.

On a Certified Question from the
United States Court of Appeals for the Ninth Circuit
Case No. 19-55802

PPG'S ANSWER TO AMICUS BRIEF OF DIVISION OF LABOR STANDARDS ENFORCEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Other Authorities

INTRODUCTION

Defendant and Respondent PPG Architectural Finishes, Inc. ("PPG") submits this answer to the amicus brief of the Division of Labor Standards Enforcement ("DLSE") pursuant to California Rules of Court Rule 8.200(c)(7).

Though the DLSE pays lip-service to the plain language of Section 1102.6, it ultimately ignores it by omitting key statutory language. By its terms, Section 1102.6 applies only after "it has been demonstrated by a preponderance of the evidence" that that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee. In moving for summary judgment under Federal Rule of Civil Procedure 56, however, the employer is only required to show there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. Thus, the preponderance of the evidence standard, which applies at trial or in an administrative hearing, is not applicable to summary judgment. As such, by its plain language, Section 1102.6 does not apply on a motion for summary judgment. Instead, it is only at trial, and only *after* the plaintiff proves his case by a preponderance of the evidence, that the burden would shift to a defendant wishing to assert the same-decision defense in Section 1102.6. But, if the plaintiff is unable to prove his case, the burden never shifts.

Ultimately, while the DLSE incorrectly argues that the *McDonnell Douglas* test is inapplicable at summary judgment, it fails to provide the Court any assistance in determining whether, at the summary judgment stage, a plaintiff employee has met *his* burden of identifying sufficient disputed evidence from which a jury could ultimately conclude that his protected conduct was a "contributing factor" in his termination, sufficient to survive summary judgment. Everything in the DLSE's brief referencing PPG's burden for its affirmative defense misses the point.

I. THE DLSE IGNORES THE EMPLOYEE'S BURDEN.

The DLSE's error is displayed in its introduction where it says, "Once an employee makes an **initial showing** that protected activity was a 'contributing factor' in an adverse action, section 1102.6 imposes a burden on the employer to prove by clear and convincing evidence that it would have taken the same adverse action for legitimate, independent reasons even without the protected activity." (DLSE Amicus Curiae Brief p. 7 (emphasis added).)

The DLSE opts to paraphrase rather than quote Section 1102.6 because it actually says, "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" (emphases added). Section 1102.6 requires more than a mere "initial showing" by the employee.

Section 1102.6, by its terms, clearly applies only if (and only *after*) "it has been demonstrated by a preponderance of evidence" that protected activity was a contributing factor in an adverse employment action—a question decided by the fact finder.

Where an employee cannot produce a genuine dispute (or triable issue) of material fact in the face of a legitimate, non-retaliatory reason for the alleged adverse employment action, trial is inappropriate. The DLSE's analysis is inapt to that question.

II. SECTION 1102.6 APPLIES A "CLEAR AND CONVINCING EVIDENCE" BURDEN ONLY AFTER A PLAINTIFF DEMONSTRATES BY A PREPONDERANCE OF EVIDENCE THAT PROTECTED ACTIVITY WAS A "CONTRIBUTING FACTOR" IN THE ADVERSE EMPLOYMENT ACTION.

PPG does not disagree that at trial, or during an administrative hearing conducted by the DLSE, if a plaintiff proves by a preponderance of the evidence that activity protected by Section 1102.5 was a "contributing factor" in the alleged adverse employment action, an employer wishing to avoid liability bears a burden of proving the Section 1102.6 affirmative defense by clear and convincing evidence. PPG also does not disagree that the legislature's motivation for placing this heightened burden on employers was to prevent employers from escaping liability through pretextual adverse

employment actions. PPG does not agree, however, that the legislature intended for cases to proceed to trial in the absence of a triable issue of material fact on the issue of pretext. Where, as here, the employee lacks direct evidence of retaliatory animus, and lacks evidence that the employer's claimed reason for the alleged adverse action was a pretext for retaliation, the case should not proceed to trial because the employee would not be able to prove by a preponderance of the evidence that the adverse action was retaliatory.

III. THE PLAIN LANGUAGE OF SECTION 1102.6 DOES NOT EXCUSE A PLAINTIFF FROM DEMONSTRATING THAT A LEGITIMATE, NON-RETALIATORY REASON FOR ADVERSE ACTION IS PRETEXTUAL.

A. The DLSE Fails to Identify the "Prima Facie Case."

The DLSE assumes, without any justification, that a "prima facie case" is all that an employee must show to avoid summary judgment. However, if the DLSE is correct and Section 1102.6 replaces the *McDonnell Douglas* standard in its entirety, the predicate to the defense in Section 1102.6 cannot therefore be the mere "prima facie case" identified in *McDonnell Douglas.*[1]

The predicate to Section 1102.6 is not a "prima facie case" of hypothetical retaliation under *McDonnell Douglas*, but rather, the *entirety of*

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[1] *See, e.g., Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-355 [100 Cal.Rptr.2d 352, 8 P.3d 1089] [the "prima facie case" under *McDonnell Douglas* is "designed to eliminate . . . the most patently meritless claims"].

plaintiff's burden of proving liability under Section 1102.5. And, where there is a stated non-retaliatory motive for the adverse employment action, an employee must prove that the stated motive was *not* the sole motive for the adverse employment action to prevail under Section 1102.5. In other words, the employee must prove that the legitimate motive was at least partially pretextual because another, improper factor "contributed to" the decision. But where an employee cannot raise a triable issue that the decision was pretext for retaliation (*i.e.*, that the unlawful motive "contributed to" the decision), he cannot possibly prove his case by a preponderance of the evidence, and there is no need for a trial or any analysis under Section 1102.6.[2]

B. D.C. Court of Appeals Authority Contradicts the DLSE's Analysis.

The D.C. Court of Appeals held with respect to its own whistleblower statute—upon which Section 1102.6 was modeled—that at the summary judgment stage, the plaintiff must show a prima facie case *and* proffer evidence sufficient to rebut a showing of a legitimate, non-retaliatory reason for adverse employment action prior to getting to trial. *Johnson v. District of Columbia* (D.C. 2007) 935 A.2d 1113, 1118 (a summary judgment motion is meritorious where the employee cannot counter the employer's explanation

[2] The DLSE acknowledges in its brief that Section 1102.6 provides the employer with a "defense." (DLSE Amicus Curiae Br. at 12.)

of the adverse employment action "for an unrelated, legitimate reason"); *see also McCormick v. District of Columbia* (D.D.C. 2012) 899 F.Supp. 2d 59, 70 (granting summary judgment on whistleblower claim because "Plaintiff points to no factual material contesting the 'unrelated, legitimate reason' for his termination.").[3] In short, the District of Columbia's whistleblower statute has substantively identical language as Section 1102.6, and the D.C. Court of Appeals continues to employ the *McDonnell Douglas* burden shifting analysis because "the use of the *McDonnell Douglas* burden shifting approach makes sense." *Johnson*, 935 A.2d at 1120.

C. The DLSE's Use of Federal Authority is Unpersuasive.

The DLSE points to a number of federal court decisions dealing with different federal statutes to argue that *McDonnell Douglas* does not apply to a retaliation claim *at summary judgment*. The DLSE's argument misses the mark and is unpersuasive because Section 1102.6 does not mirror the underlying federal statutes addressed in those cases. The DLSE first points to the Sarbanes-Oxley Act. That "statute incorporates by reference the rules and procedures applicable to the Wendell H. Ford Aviation Investment and

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[3] The *McCormick* court made this point clear, stating, "[a]t summary judgement, a plaintiff must 'challenge the motion for summary judgment with a proffer of admissible evidence that their "protected activity" . . . was a "contributing factor" in her adverse employment actions.' Yet even if a plaintiff makes such a proffer, summary judgment for the defendant is nonetheless appropriate where plaintiff '[can]not counter the [defendants'] explanation that appellants would have been [disciplined] anyway, for an unrelated, legitimate reason.'" *McCormick*, 899 F. Supp. 2d at 70.

Reform Act for the 21st Century ('AIR-21')." *Wiest v. Tyco Elecs. Corp.* (3d Cir. 2016) 812 F.3d 319, 329. Accordingly, the Department of Labor promulgated a regulation that applied AIR-21's two-part burden-shifting framework to Sarbanes-Oxley complaints. *See* 29 C.F.R. § 1980.104(e). However, that burden-shifting process requires only a "prima facie showing," which (in contrast to the law in this case) includes only a requirement that an employee "raise an inference" that protected activity was a contributing factor in the adverse employment action. *Id.*; *see also Johnson v. Stein Mart, Inc.* (11th Cir. 2011) 440 Fed.Appx. 795, 800. This is not the same standard as set forth in Section 1102.6. The California legislature did not lower the plaintiff's burden under Section 1102.5 to a mere "prima facie showing" that "the circumstances were sufficient to raise the inference that the protected activity was a contributing factor." Rather, the statutory scheme in 1102.6 plainly requires a plaintiff to "demonstrate" by a "preponderance of evidence" that their protected activity was in a fact a contributing factor to adverse employment action before any burden shifts to the employer.

The Federal Rail Safety Act analogy fairs no better. The FRSA also adopts the AIR-21 framework. *Rookaird v. Bnsf Ry. Co.* (9th Cir. 2018) 908 F.3d 451, 459. Further, under the FRSA, a claim proceeds in two stages: the prima facie stage, and the substantive stage, and each stage has its own burden-shifting framework. (*Id.*) There, the "prima facie" stage includes the

prima facie case and the employer's opportunity to show by clear and convincing evidence that it would have taken the same action notwithstanding the protected activity. *Id.* The existence of the prima facie case and failure of the defense results in an investigation. 49 U.S.C. § 42121(b)(2)(B)(ii). At the substantive stage, however, "a violation will be found 'only if the complainant demonstrates that any [protected activity] *was* a contributing factor in the unfavorable personnel action alleged in the complaint.'" *Rookaird*, 908 F.3d at 460 [emphasis in original]. Accordingly, "a complainant's burden is lower at the prima facie stage than at the substantive stage." *Id.* at 461. This is not the scheme the California legislature adopted, where the employee must prove liability by a preponderance of the evidence before any substantive burden shifts to the employer. At no point did the California legislature lower the plaintiff's burden *for liability* to a mere "prima facie" showing.

The federal Whistleblower Protection Act (WPA) does not apply in courts at all, and therefore has no place in a summary judgment analysis. *See* 5 U.S.C.S. § 1221(a) [relief lies with Merit Systems Protection Board]; *Gomez v. United States Postal Serv.* (9th Cir. 2002) 32 F.App'x 889, 893 [WPA does not provide a cause of action in federal court, but lies with Merit Systems Protection Board]. Indeed, over 20 of the authorities cited by the DLSE also have nothing to do with summary judgment, and the question

before this Court.[4] And, for those authorities addressing an appeal following a summary judgment motion, even if the standard were the same as Section 1102.6 (which as addressed above, it is not), many of the authorities rest on separate and unrelated issues. *See, e.g.*, *Allen v. Admin. Review Bd.* (5th Cir. 2008) 514 F.3d 468 (affirming judgment for the employer after finding plaintiff did not engage in protected activity); *Conrad v. CSX Transp., Inc.* (4th Cir. 2016) 824 F.3d 103 (affirming judgment for the employer after finding decision makers lacked knowledge of the alleged protected activity); *Lockhart v. MTA Long Island R.R.* (2nd Cir. 2020) 949 F.3d 75 (affirming

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[4] *See Rhinehimer v. U.S. Bancorp Investments., Inc.* (6th Cir. 2015) 787 F.3d 797; *Lockheed Martin Corp. v. Admin. Review Bd.* (10th Cir. 2013) 717 F.3d 1121; *Betchel v. Admin. Review Bd.* (2nd Cir. 2013) 710 F.3d 443; *Baca v. Dep't of the Army* (10th Cir. 2020) 983 F.3d 1131; *Mount v. U.S. Dep't of Homeland Sec.* (Fed. Cir. 2019) 937 F.3d 37; *Duggan v. Dep't of Defense* (9th Cir. 2018) 883 F.3d 842; *Whitmore v. Dep't of Labor* (Fed. Cir. 2012) 680 F.3d 1353; *King v. Dep't of the Army* (11th Cir. 2014) 570 Fed.Appx. 863; *Epple v. BNSF Ry. Co.* (5th Cir. 2019) 785 Fed.Appx. 219; *Rookaird v. BNSF Ry. Co.* (9th Cir. 2018) 908 F.3d 451; *Armstrong v. BNSF Ry. Co.* (7th Cir. 2018) 880 F.3d 377; *BNSF Ry. Co. v. U.S. Dep't of Labor* (8th Cir. 2017) 867 F.3d 942; *Pan Am Rys., Inc. v. U.S. Dep't of Labor* (1st Cir. 2017) 855 F.3d 29; *Consol. Rail Corp. v. U.S. Dep't of Labor* (6th Cir. 2014) 567 Fed.Appx. 334; *Maverick Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd.* (8th Cir. 2014) 739 F.3d 1149; *Smith v. Dep't of Labor* (4th Cir. 2016) 674 Fed.Appx. 309; *Addis v. Dep't of Labor* (7th Cir. 2009) 575 F.3d 688; *Indiana Michigan Power Co. v. U.S. Dept. of Labor* (6th Cir. 2008) 278 Fed.Appx. 597; *Williams v. Admin. Review Bd.* (5th Cir. 2004) 376 F.3d 471; *Trimmer v. U.S. Dep't of Labor* (10th Cir. 1999) 174 F.3d 1098; *Stone & Webster Eng'g Corp. v. Herman* (11th Cir. 1997) 115 F.3d 1568.

judgment for the employer after finding plaintiff did not engage in protected activity).[5]

D. The California Jury Instructions Contradict the DLSE's Position.

The Judicial Council of California's restatement of the law in Civil Jury Instruction Nos. 4603 and 4604 are correct. Instruction No. 4603 employs the "contributing factor" language for liability under Section 1102.5. Instruction No. 4604 applies *after Instruction No. 4603* and requires an employer using the "same decision" affirmative defense to prove, by clear and convincing evidence, that it would have taken the same adverse action for legitimate, independent reasons, as required by Section 1102.6. The latter instruction only applies after the employee proves his case. Thus, Instruction No. 4604 states in its directions for use, "[e]ven if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason."

Once the employee proves his case under Section 1102.5, the employer must then prove that it *would have taken* (not "*did take*") the action

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[5] Further, much of the case law relied upon by the DLSE evolved after 2003. There is no reason to assume that the 2003 California legislature intended to adopt later interpretations of these statutory schemes.

for legitimate, independent reasons.[6] This might occur, for example, where the plaintiff proved by a preponderance of the evidence that the employer had a retaliatory motive for termination, but the employer closed the employee's entire division the next day, which would have resulted in the employee's termination for reasons entirely unrelated to the alleged retaliatory motive. This language, and this affirmative defense, is not necessary where the employee cannot prove that the legitimate termination reason was pretextual to begin with. Where an employer terminated an employee for a purely legitimate reason that the employee cannot rebut, the employee fails to prove his case under Section 1102.5. Section 1102.6 and Jury Instruction No. 4604 assume that there was already proof of an illegitimate reason for the adverse employment action, and so the employer is necessarily presenting a *mixed-motive* defense as a fall-back position.

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[6] Accordingly, an employer that initially argues it had no improper motive may still argue that it would have terminated an employee *despite* the improper motive, even after the employee proves the improper motive. *See Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240, 152 Cal.Rptr. 3d 392, 419 ["But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge."]. Where the employer argues it had a purely non-pretextual, non-retaliatory motive, it argues that the employee cannot meet his burden under Section 1102.5. On the other hand, where the employer argues it would have taken the same action despite the retaliatory motive, that is an argument for which the employer has the burden of proof under Section 1102.6.

Accordingly, the DLSE's argument that PPG's interpretation would lead to "absurd results" is itself absurd. If the employee can prove that the termination was purely motivated for a retaliatory (and no other) motive, the employee satisfies Section 1102.5 under Jury Instruction 4603 and the analysis ends there. The DLSE states that the Section 1102.6 framework is "easier for a plaintiff to satisfy," but the plaintiff does not have to satisfy Section 1102.6 at all—*the employer does*, after the plaintiff proves liability under Section 1102.5. It is unremarkable that Section 1102.6 is "easier" for the employee, because it is an affirmative defense on which the employer bears the burden of proof—after the plaintiff has already proven his case.

E. It Is Not PPG's Burden to Disprove Retaliation.

The legislative history of Section 1102.6 does not suggest that the legislature intended to relax the employee's burden, but rather, that it intended to raise the employer's affirmative defense burden. (California Bill Analysis, Senate Judiciary Committee, 2003-2004 Regular Session, Senate Bill 777, April 8, 2003, p. 5.) Certainly nothing in the legislative history suggests that the employer bears the burden to disprove all claims of retaliation. Nor does the legislative history suggest that Section 1102.5 cases should be treated with an assumption that the employer had an improper motive, which would be the result of treating every Section 1102.5 claim as a "mixed motive" case from the outset.

That is why the DLSE and Lawson urge that *Harris* governs this case by "analogy." But not all claims under 1102.5 trigger a mixed-motive defense, and employers are not *per se* required to assert a mixed-motive defense at summary judgment to prevail on a Section 1102.5 claim. PPG set forth that it had no retaliatory motive, and that Lawson was terminated for poor performance. Lawson was unable to present a genuine dispute of material fact sufficient for the court to determine that he might be able to establish at trial, by a preponderance of the evidence, that his alleged protected activity contributed to PPG's decision to terminate him. Lawson's and the DLSE's attempt to shift the burden of proof onto PPG without any showing that PPG's legitimate reason for terminating Lawson was pretextual is erroneous and improperly places the cart before the horse.

CONCLUSION

The DLSE fails to acknowledge that a plaintiff employee bears a burden of proof, by a preponderance of the evidence, to show that protected activity was a contributing factor in adverse employment action. Application of the *McDonnell Douglas* burden-shifting process at summary judgment is the best way for the court to measure a plaintiff's ability to ultimately meet their burden at trial of establishing by a preponderance of the evidence that

the alleged protected activity was a contributing factor in the alleged adverse action.

Dated: July 14, 2021 Respectfully submitted,

By: */s/ Karin M. Cogbill*
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Dated: July 14, 2021

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PPG'S ANSWER TO AMICUS BRIEF OF DIVISION OF LABOR STANDARDS ENFORCEMENT

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