S266001

No. 19-55802

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALLEN LAWSON,

Plaintiff-Appellant,

v.

PPG ARCHITECTURAL FINISHES, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 8:18-cv-00705-AG-JPR
Hon. Andrew J. Guilford

APPELLANT'S REPLY BRIEF

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INTRODUCTION

By its arguments in its Answering Brief, Appellee improperly requests the court to nullify on *de novo* review one of California's most powerful whistleblower protections, California Labor Code §§ 1102.5 and 1102.6, by misapplication of the waiver doctrine to effectively create new law and misapplying case decisions which predate the statute. Both arguments contradict and violate the statute, and if accepted, would undermine and deeply contravene the California Legislature's stated policy favoring whistleblowers such as Appellant, Wally Lawson, and encouraging them to come forward. Furthermore, Appellee's purported factual recitation mischaracterizes and omits critical facts, which show that Lawson was targeted and fired by a supervisor in retaliation for having reported and refused to participate in a fraudulent scheme, which was clearly unlawful under California law.

There are, at the very least, material factual issues as to whether Lawson's protected activity was a contributing factor in his termination and whether Appellee would have fired him absent his protected activity. Appellee fails to meet its heavy burden under California Labor Code § 1102.6 to prove by clear and convincing evidence that Lawson would have been fired even if he had not reported and refused to participate in his supervisor's scheme. The District Court's grant of summary judgment should therefore be reversed.

ARGUMENT

I. Appellee Fails to Address Evidence Undercutting its Contention That it Would Have Made the Same Decision Even in the Absence of Lawson's Protected Activity, Precluding Summary Judgment

In its answering brief, Appellee fails to adequately address or mischaracterizes the following facts amassed from the record and suspicious sequence of relevant events. Its failure address these facts demonstrates that it woefully unable to meet is burden to prove by clear and convincing evidence that Lawson would have been fired even in the absence of his reporting and protests of illegal activity that Moore and Appellee wanted to conceal.

The Stark Temporal Proximity of Events in Lawson's Reporting of Moore, Internal Investigation Findings of Moore's Fraud and Attempted Cover-up, Followed by Moore's Placement of Lawson on a PIP

It is undisputed that Lawson's reported his supervisor Clarence Moore's mis-tinting scheme to PPG, on April 21, 2017 and again on June 15, 2017, triggering a nationwide internal investigation by PPG.[1] (ER 388: ⁋19 - ER 389: ⁋ 6.) Appellee neglects to address the core facts of the investigation that disfavor it.

[1] Moore had ordered his TMs to engage in an elaborate fraudulent scheme, as Lawson had reported, as addressed more extensively in Appellant's earlier brief. In its answering brief, Appellee does not dispute that Moore directed his TMs to: 1.) Surreptitiously take product off the shelf (while Lowe's paint department associates were at lunch or on break); 2.) Mis-tint it "on the down low;" 3) Affirmatively misrepresent to Lowe's paint department that customers had ordered the mis-tinted paint; and 4.) If caught on camera by Lowe's associates, to further dissemble. (ER 388, ⁋⁋ 21-24; ER 292, ⁋⁋ 8-20; ER 132-133; ER 140.)

The investigation established that not only that Moore misrepresented to its own investigators his central role in the scheme Lawson had exposed, but that the scheme was more widespread at PPG and went beyond just Lawson's immediate supervisor. The investigators found "[i]t was Clarence's initiative to direct them to mis-tint the paint without the knowledge of Lowe's – according to the TMs interviewed." (ER 151.) The investigators learned that "[a]ll 14 [TM'S] stated that Moore directed them to intentionally mis-tint Rescue-it during Tuesday conference calls, as well as reaffirming his instructions during market walks. … (Occurred in April, May, June time frame). " (ER 370, ¶¶ 2-15; ER 132.) Moore tried to conceal his role in orchestrating the fraud, falsely claiming in his written statement to investigators in July 2017 he "did not recall the conversation[s] where the mis-tint idea was brought up," suggesting that one of his TMs was responsible, and he had merely "failed to stop it." (ER 148-49.)

It is undisputed that on July 6, 2017, Moore was chastened and ordered by the investigators to cease the fraudulent practice, prompting Moore's text to his direct reports urgently demanding they immediately cease the practice. (ER 154; ER 215; ER 378, ¶¶ 1-13; ER 132-33.) Despite the fact that Lawson had exposed the fraudulent scheme that Moore was engaged in, however, Moore was permitted to continue in his position as Lawson's supervisor.

Moore was aware of Lawson's identity as the whistleblower as of late April 2017, because Lawson was vocal in his opposition to Moore's directive to mis-tint paint. Refusing to participate in it, Lawson told Moore that the mis-tinting scheme was akin to "stealing" from Lowe's and "not acceptable." (Appellant's opening brief, pp. 8-9). Remarkably, Appellee says absolutely nothing in its answering brief about this crucial conversation and presents no facts to refute it.

Appellee also neglects to address Moore's revelatory response in which he told Lawson, "Don't worry about it. Stop. Don't concern yourself with it," or its aftermath. (ER 129, ¶ 11 – ER 130, ¶13.) Moore's curt response was aggressively delivered and signaled to Lawson he was offended. *Id.* Appellee presents no opposition to Lawson's testimony that from that point forward, his relationship with Moore deteriorated. (ER 249, ¶¶ 14-25.)

In close proximity to Lawson's protest, it is undisputed that on May 12, 2017, Moore placed him on a 60-day PIP, allegedly because of a "company policy" that required Lawson to meet a "sales quota." (ER 255, ¶2 – ER 257, ¶3.) Upon inquiry to HR, however, Lawson later learned there was *no* such policy. (ER 192-93.) Moreover, Appellee did not have a strict sales quota for territory managers (hereinafter "TMs"), as they were essentially retail merchandising clerks whose activities had no real influence on the amount of paint purchased at the Lowe's stores. (ER 245-46.) It is further undisputed that Moore failed to meet on a regular

basis with Lawson to chart his progress under the PIP (required under *actual* company policy). (ER 422; ER 437-38.) Only after Lawson complained to HR was he granted a one-month reprieve. (ER 451.)

On August 16, 2017, Moore conducted his final market walk with Lawson and scored him fifty percent lower than in his previous review. Moore then personally procured Lawson's firing on September 6, 2017 claiming he had failed to meet the requirements of the PIP, and blind-sided him with a newly contrived accusation that Lawson had "falsified" his Lowe's employee training roster. (ER 429, ¶¶ 2-15; ER 279, ¶¶17-25; ER 139, ¶¶ 16-21.) Appellee neglects to address key issues surrounding Moore's knowledge that the training roster software on Lawson's company-issued tablet had been malfunctioning. The charge of "falsification" is further disputed because its main proponent, Clarence Moore, has a documented history of misleading or false testimony (as addressed herein at pp. 8-10). (ER173, 189, 279-80). Appellee also fails to address that fact that Lawson's failure to enter correct dates on his training roster stands in sharp contrast to Moore's directive to steal.

The unusually suggestive proximity in time of these events, starting with the initial protected activity (April 21 initial ethics portal reporting and late April protests to Moore, June 15 hotline reporting), followed by the company's investigation of Moore (early July), and the adverse employment action (May 12

PIP leading to September 6 termination) is sufficient *on its own* to establish that Lawson's protected activity was a contributing factor in Appellee's decision to fire him. It is of particular significance that Lawson was placed on a PIP within just a few weeks of his protests to Moore.

As stated by the Ninth Circuit in *Davis v. Team Electric, 520 F.3d 1080* (9th Cir. 2008), "[w]e have held that causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity [citations]." In *Samson v. Wells Fargo Bank, N.A.*, 777 Fed. Appx. 881, 883 (9th Cir. 2019) further reaffirmed that "[i]n some cases, temporal proximity can by itself constitute sufficient circumstantial evidence of retaliation for purposes of both the prima facie case and the showing of pretext." (*quoting Dawson v. Entek Int'l*, 630 F.3d 928, 937 (9th Cir. 2011); *see also, e.g., Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003) (same) (*quoting Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003)); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (holding that "evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant.").

In so finding, the Court in *Samson* explained that "on summary judgment, it is not our place to decide between such competing inferences, and that while a reasonable jury could infer either that the decision was made before or after the

plaintiff's [protected activity], it must be assumed on summary judgment that the jury would make the inference favorable to the plaintiff." *Samson*, 777 Fed. Appx. 881, 883. This case is no different, and this line of controlling authority in this Court creates an insurmountable barrier to summary judgment.

Moore's Formal Warning to Comply with the Law and Stop Inappropriate Scoring of Market Walks Based Upon Whether TMs Were Mis-Tinting

Well after his interview with investigators in July 2017 and the September 2017 firing of Lawson (but before this lawsuit was filed), Appellee issued a formal warning to Moore concerning the "Lowe's Mis-tint Issue in a letter from HR and senior management dated February 22, 2018, which Moore was required to sign. (ER 165-166.) The letter began as follows: "You are aware of the investigation … based upon an Ethics complaint and TMs being instructed to mis-tint Rescue-it product and thereby forcing members of the Lowe's team to write-off product and sell it as mis-mixed paint." (ER 165.) Most importantly, Appellee also specifically ordered Moore—albeit belatedly—to discontinue his practice of unfairly scoring market walks based upon whether TMs were or were" not mis-tinting," and cautioned him that "all market walks need to be conducted and points allocated as appropriate." *Id.* He was further cautioned to comply with "all applicable laws," to "follow proper business practices at all times," and to "address issues or questionable activity," and was notified that "[a]s part of this formal warning you are required to review and acknowledge PPG's Global Code of Ethics." *Id.*

Moore was also instructed to remove from his email signature format his surprisingly revealing tagline--"Being Committed is so much more rewarding than being Compliant." (ER 165; ER 189.) Lawson believes that a jury would reasonably attach significance to Moore's tagline in assessing how Moore reacted to Lawson's insistence that he comply with the law.

Appellee's formal warning of Moore for engaging in the very misconduct to which Lawson objected, and for manipulating market walk scores based upon whether TMs would participate in the misconduct, greatly undercuts Appellee's assertion that Moore's market walk scoring of Lawson was "fair and accurate," as well as its core argument that Lawson "would have been terminated anyway." At the very least, Moore's formal warning gives rise to further issues of material fact. This evidence, all by itself, is sufficient to defeat Appellee's motion for summary judgment.

Moore's Continuing Implausible Denials of Wrongdoing and Falsehoods

Appellee's lead internal investigator, Daniel Duffy, when asked if he agreed with Lawson's complaint that Moore's mis-tinting directive to his TMs was "stealing," said, "I concluded it was unethical, yes." (ER 165; ER 189.) Appellee admits that Moore's practice violated the company's global code of ethics. (ER142-143, at Request for Admission No. 12; ER 212; ER 165-166.) Internal investigator Ian Dalton, when asked if Moore was telling the truth when he

questioned him on July 7, 2017, said, "obviously not." (ER 373, ¶¶13-14.) Moore not only misrepresented his central role in the fraud to Appellee's investigators,[2] he continues to dissemble about it *to this day*:

> Q. And it's still your position as you sit here today and testifying to the jury that you didn't know at the time about the practice of mis-tinting?
> A. Yes, sir.

(ER 410, ¶¶13-14.)

Duffy acknowledged, "it's ironic that the whistle-blower who reported the misconduct of Clarence Moore was terminated by Clarence Moore and that Clarence Moore is still working at the company."[3] (ER 393, ¶¶12-24.) In its answering brief, Appellee, however, simply ignores the above-recited evidence in the record of Moore's unreliability and presumes Moore's veracity in seeking summary judgment on *de novo* review by this Court. Appellee essentially asks this Court to disregard the facts in this case in favor of Moore's version of events, despite the fact that Appellee's own investigators and findings contradict that version. The Court must therefore allow *a jury* to decide whether Appellee would have fired Lawson even in the absence of his reporting of Moore's fraud and refusal to break the law.

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[2] Dalton confirmed that "it was Clarence's initiative to direct them to mis-tint the paint." (ER 151.)

[3] Duffy is unequivocal that if he were in charge of Moore, he would have fired him for his fraud. (ER 187, ¶¶10-16.)

Appellee has not even come close to meeting its burden of proof to prove, by clear and convincing evidence, that it would have fired Lawson "anyway." Lawson, on the other hand, has produced record evidence that supports each fact in the above-described chronology. Accordingly, this is not a case for summary judgment, no matter which evidentiary standard is applied. The summary judgment granted by the District Court should be reversed.

II. The Heightened Evidentiary Standard for Retaliation Claims Mandated by the California Legislature in Labor Code § 1102.6 is Controlling

The California Legislature's clear intent in enacting Labor Code § 1102.6 was to enact a heightened evidentiary standard favoring whistleblowers, to protect them from retaliation and encourage them to come forward. The Legislature enacted §1102.6 in 2003— in the wake of Enron, Worldcom and other corporate accounting scandals of that era—to strengthen §1102.5 by shifting the burden of proof strongly in favor of the employee:

> § 1. The Legislature finds and declares that unlawful activities of private corporations may result in damages not only to the corporation and its shareholders and investors, but also to employees of the corporation and the public at large. * * *
>
> *It is the intent of the Legislature to protect employees who refuse to act at the direction of their employer or refuse to participate in activities of an employer that would result in a violation of law.*

(Legislative History to §1102.6, Cal. Stats. 2003 ch 484) (emphasis supplied). The legislative history of §1102.6 confirms the California Legislature deemed it

necessary to hold employers to an elevated evidentiary standard in order to protect whistleblowers from retaliation. The Legislators' express intent was to protect whistleblowers from retaliation for refusing to participate in activities that violate of the law. For that very reason, it enacted §1102.6, and expressly imposed upon the employer "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. Labor Code §1102.6.[4]

The *McDonnell Douglas* burden-shifting framework, which Appellee wrongly advocates and which the District Court erroneously utilized in granting summary judgment on Lawson's § 1102.5 claim, sets a much higher bar for employees as compared to §1102.6, as described thoroughly in Appellant's Brief at pp. 18-19, in four separate respects. Hence, the evidentiary standard for retaliation claims brought under California Labor Code § 1102.5 is higher evidentiary

[4] Appellee erroneously contends Lawson must prove his protected activity was "the cause" of the adverse employment action. Answering Brief, p. 2. However, Lawson's retaliation claims brought under § 1102.5 require only that he show that his protected activity was "a contributing factor," not the sole or even predominating factor in the adverse employment action. See California Labor Code § 1102.6. The burden then shifts to Appellee to prove by clear and convincing evidence that it would not have taken the same action against Lawson even if he had not opposed or complained of Moore's directive to mis-tint. Id. Although there is robust evidence that Lawson's protected activity was indeed the predominating factor in the adverse employment actions, that is not the standard under § 1102.6.

standard for an employer to prevail on summary judgment than does *McDonnell Douglas*. Appellee, however, has not come close to meeting either standard.[5]

III. Appellee and the District Court Improperly Parse the Facts

Upon close examination, it becomes apparent that there is a contrived duality to the structure of the District Court's recounting of the facts. The District Court treats Moore's criticisms of Lawson's performance prior to the PIP as being part of a fact pattern that is somehow separate and independent from Lawson's reporting of Moore's fraudulent scheme. (*See* pg. 3 of the opinion below, "Amid all this, something else was happening…") (ER 3.) In essence, the District Court presumed that Moore's critiques of Lawson's performance were detached from, and unrelated to, Lawson's protected activity, including and his vocal objections to Moore's fraudulent scheme. In fact, however, they were closely interlinked and part of a unified fact pattern. The District Court's parsing of the facts in this fashion betrays an unwarranted bias in favor of Appellee and violates Rule 56's

[5] Appellee, on page 21 of its brief, asserts that Lawson "concedes that the *McDonnell Douglas* test was correctly applied to his claim for wrongful termination in violation of public policy." This, however, is a distortion Lawson's position. While the *McDonnell Douglas* test is the correct test to analyze a claim for wrongful termination in violation of public policy, the district court did not correctly perform the *McDonnell Douglas* analysis, as the district court's analysis was heavily dependent on disputed facts favoring Appellee and inferences in favor of Appellee. Moreover, this does not change the fact that the district court committed reversible error by failing to analyze Lawson's §1102.5 claim according to §1102.6.

fundamental mandate to draw all reasonable inferences in favor of the non-moving party.

In its answering brief, Appellee, like the District Court, treats Moore's critiques of Lawson's performance as though they were a thing separate from Lawson's protected activity and pretends that the critiques settle the issue of whether Lawson would have been terminated had he not complained. Indeed, whether Moore's critiques of Lawson's performance were infected by retaliatory intent was shown to be at issue by the District Court's own acknowledgement that Lawson "submitted evidence that undermined the credibility of [Moore's] testimony," consisting of Moore's denials during his deposition, as addressed herein at pp. 8-10 (ER 6-7 (citing ER 173, 195-196)). Appellee fails entirely to address this aspect of the District Court's opinion. If Moore's credibility is at issue, as the District Court found, so too are his critiques of Lawson's performance used to justify his firing.

Moore's actions permit a reasonable inference that he was setting Lawson up to fail after Lawson's report of fraud and his refusal to participate in the same, and a jury could reasonably conclude that Moore's true motive was to retaliate against Lawson for having defied him and having reported him regarding the mis-tinting scheme. Indeed, this appears to be the conclusion of PPG's own personnel

involved in the investigation of Moore's conduct. The District Court erred in failing to draw factual inferences such as these in Lawson's favor.

IV. Further Key Issues of Material Fact Appellee Fails to Acknowledge

A. Irregularities in Moore's Market Walks Raise Factual Issues

Appellee fails to explain Lawson's receipt of accolades on his earlier reviews by his prior manager, Paul Stanton, within a year of his termination by Moore, and the anomalous decline in Lawson's market walk score from 92 to 40 less than a year later.[6] (ER 97.) Appellee also fails to address the key issue of unexplained irregularities in the scoring of the market walks detailed at pp. 28-30 of Lawson's Appellate Brief suggestive of retaliation. One further example of such irregularities consists of Moore's penalization of Lawson in his final market walk by nine points, awarding him zero points in two categories worth four and five points, respectively, because Lawson had imperfectly marked which days he trained Lowe's associates in particular stores.[7] (ER 84; ER 342). Lawson would

[6] Stanton summarized Lawson's mid-year performance in the general comment section of his review as follows: "Wally, great job of goal setting! …You took the words right out of my mouth! Keep up the great work in your stores!" (ER 97.) Lawson was also well-regarded in the field and never had a single complaint from a Lowe's associate or customer during his entire time working for Appellee. (ER 173, ¶¶15-17.)

[7] At his termination session, Lawson attempted to remind Moore this was human error attributable to malfunctioning of the training roster software on his company–

have had a score more in line with his previous scores had Moore scored Lawson correctly on these items.

Most importantly, Moore's formal warning expressly acknowledged that he was unfairly scoring TM's based upon whether they would carry out his illegal directives and ordered him to cease it. Lawson was an obvious casualty of that practice, which as PPG acknowledged in the warning letter, egregiously violated company policies and its Global Code of Ethics. Such radical departures from company policy and unexplained discrepancies cast greatly undermine Appellee's reliance on Moore's market walk scoring of Lawson and are suggestive of retaliation. Appellee's failure to address them is fatal to its motion for summary judgment.

B. Irregularities in Moore's Stated Justification for and Administration of the PIP Raise Further Factual Issues

Appellee further neglects in its answering brief to deal with Moore's intentionally withholding of assistance from Lawson during his PIP, in contravention of Appellee's internal policies, which required Moore to counsel Lawson on a weekly basis during the course of his PIP. (ER 523.) Appellee does not challenge the fact that not a single counseling session occurred until Lawson

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issued tablet and in no way intentional falsification, but Moore responded that "it didn't matter" and he was going to fire Lawson regardless. (ER 84.)

alerted HR to Moore's failure to follow the policy, requiring HR to extend Lawson's PIP by another 30 days. (ER 194; 288-289; 523.)

Further, while Moore claims to have relied upon the sales metrics of Lawson's stores in placing Lawson on a PIP, those metrics are largely fictional. In order to justify the terms of the PIP, Appellee strains to characterize Lawson as a salesperson, contending in the very first line of its answering brief that it terminated Lawson "for failing to perform his most essential job duty – *developing and delivering sales plans* to sell PPG products in his assigned territory." Appellee's Answering Brief ("AAB"), p. 1 (emphasis supplied). In reality, TMs were not salespersons, and instead were essentially retail merchandising clerks whose primary duties were to ensure that PPG paint displays in the Lowe's stores were properly stocked and in good condition and to train Lowe's associates on the products, as Lawson confirmed in his Declaration. (ER 82-83.)[8] Lawson's merchandising duties did not include "developing or delivering sales plans," a vague and meaningless term appearing in the job description that is nowhere defined in the record. The only "sales plan" Lawson was familiar with was "a plan-o-gram dictated by Lowe's that specified down to the inch were everything supposed to be." (ER 83, ¶ 4.)

[8] While the activities of TMs may have, subject to the cooperation of the managers of a particular store, indirectly helped PPG gain a small market share of paint sold in the store, they had no means to influence the number of customers who came to a particular Lowe's store to buy paint or the quantity of paint sold. *Id.*

As the United States Supreme Court has acknowledged, "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties…" *Garcetti v. Ceballos*, 547 U.S. 410, 424-25 (2006). This case is a perfect example of that, and Lawson's testimony as to the true nature of his job duties must be credited by the Court in deciding whether there are further genuine issues of fact concerning Appellee's core justification for the PIP and termination – that Lawson failed the "sales quotas."

Appellee further contends that HR manager Andrew Mayhew and Divisional Sales Manager Sean Kacsir exercised "oversight" over Moore in his administration of Lawson's PIP. (AAB, p. 1.) Mayhew, however, a young and inexperienced HR manager, failed to curb Moore in any way, even after being advised by Lawson that Moore had placed him on the PIP based on an HR policy that TMs with certain sales metrics would automatically be placed on PIPs. After telling Lawson that this was false and there was no such policy, there is no evidence in the record that Mayhew took any corrective action. (ER192-194; 523).

There is no evidence in the record that Mayhew thereafter exercised any meaningful authority over Moore either. For example, Mayhew admitted that he

was unaware of any territory managers, other than Lawson, being subjected to such a high frequency of market walks as was imposed by Moore. (ER 192, ¶¶12-18.) When Lawson was terminated and tried to explain why the stated reasons for termination were wrong, and that Clarence Moore was aware of that, Mayhew cut him off and would not even let him finish, saying, "This meeting is over, I'm hanging up right now." (ER 205, ¶¶ 7-20.) A jury may reasonably infer that Mayhew merely rubber-stamped Moore's decision to put Lawson on a PIP and fire him.

Sean Kacsir's level oversight over Moore is equally questionable. It was discovered during the investigation that two other regional managers under who were also under Kacsir's supervision, Brian Wells and David Larson, also directed their TMs to engage in the mis-tinting practice in their respective territories. (ER 146, 156-57, 160). Although Kacsir claimed that he was not involved in orchestrating the practice, his implausible deposition testimony, in which he claimed that Moore never instructed his TMs to mis-tint, suggests that Kascir may actually have been complicit with Moore:[9]

> "Q. You're aware that Clarence Moore directed his territory managers to mistint the Rescue-It product?
> A. No, he didn't do that.
> Q. Oh, he didn't do that?
> A. No.
> Q. And why do you say that?

A. Just, that's -- I don't believe he would have done that.
Q. Because -- because why? Why do you believe he wouldn't have done that?
A. *Because I didn't do it.*
Q. Okay. Do you think if he did it, that somehow implicates you?
A. No. I didn't do it, so."

(ER 459, ⁋⁋ 9-25) (emphasis supplied). This odd equivocating testimony by Kascir, at minimum, creates factual issues as to his role in "oversight" of the Lawson's PIP. Moreover, Lawson's testimony regarding Kascir's "complete[] change" in demeanor toward him after he complained to Moore further calls into doubt Kacsir's alleged role in "oversight" of Moore. (ER 245, ⁋⁋ 1-17.) Lawson observed this during Kacsir's participation in Lawson's final market walk with Moore, in which Kacsir photographed Lawson's handwritten notes. Lawson therefore had reason to believe that Kacsir "knew without a doubt that [he] had filed a complaint." *Id.*

C. Irregularities in Moore's Manipulation of Lawson's Territory Raise Further Factual Issues

In attempting to defend is justification for putting Lawson on a PIP and firing him, Appellee fails entirely to address in its answering brief the effect of its realignment of Lawson's territory and resultant reduction of Lawson's store metrics by removing two high-performing stores from his eleven-store territory and replacing them with low-performing stores that eventually closed. (ER 78, 79, 84.) This manipulation of Lawson's territory naturally caused a significant

reduction in his sales metrics and creates yet another significant issue of fact regarding the legitimacy of Moore's stated reasons for placing Lawson on a PIP and later firing him for failure to meet the PIP objectives. It is reasonable to infer, as might a jury, that Lawson's alleged failure to meet "sales goals" for eight of the twelve months (which served as Moore's justification for putting him on the PIP) was entirely caused by Appellee's substitution of two under-performing stores for high performing stores. The jury may also view Appellee's reliance upon such a justification as pretextual. See e.g., *Lees v. Thermo Electron Corp.*, Case No. C2-06-984, 2008 U.S. Dist. LEXIS 86367, *10, *27 (S.D. Ohio, Sept. 4, 2008) (holding that, where the employer terminated the plaintiff for failure to meet his sales quotas, "while the employer knew that meeting numbers in the realigned territory [the plaintiff] had been given was a challenge," the jury could conclude that such business justification for the Plaintiff's termination are pretextual).

As it was, Lawson missed the alleged goals by only a thin margin. Although Appellee misleadingly suggests Lawson "missed" his goals for eight out of twelve months and "six consecutive months beginning in October of 2106, examination of the sales data contained in his PIP reveals that for ten of the twelve months, his percentages ranged from 88.5 percent to 111.9 percent, and his lowest month ever was 83.4 percent. Further examination of the sales data reveals that Lawson's average monthly percentage based upon the sales was 95.1 percent, or within only

5 percent of goal. (ER 349-52.) It is therefore fair to posit that Lawson would have significantly exceeded the alleged sales goals *for every single month* – both at the time of his PIP, and at the time of his firing – had he not been handicapped by Appellee's adverse store substitution. Hence, at the very least, factual issues abound concerning the Appellee's core justification for putting Lawson on a PIP.

D. Appellee's Distortions of the Record Reveal Disputed Facts

Appellee engages in a broad-scale, continual distortion of the record. Representative examples include:

APPELLEE DISTORTION	**RECORD FACTS AND REASONABLE INFERENCES**
Lawson had "some initial success" (AAB, p. 16)	Following successful three-decade career with Sherwin Williams, Lawson joined PPG and worked for over a year for Stanton, with highest market walk score in the country and accolades in August 2016 review. (ER 87-99)
Moore decided to extend Lawson's PIP so that he could meet his goal (AAB, p. 26)	Mayhew, not Moore, extended Lawson's PIP, because Lawson complained about Moore's failure to follow requirements for regular meetings. (ER194; 288-289; 523). Other possible inference is PIP was extended to create further distance from original ethics report and because Moore needed more time to create paper trail supporting a retaliatory firing.
Moore was "unaware" that any complaint had been made (AAB, p. 12)	Lawson complained directly to Moore that practice amounted to stealing from Lowe's, etc. ("John Dean conversation.") (ER119-121, ER125-130). Moore told him to "stop." (ER 129, ¶ 11 – ER 130, ¶13.)

APPELLEE DISTORTION	RECORD FACTS AND REASONABLE INFERENCES
Lawson repeatedly missed his "sales goals" (AAB, p. 16)	Lawson's sales metrics would have exceeded all alleged goals, absent adverse realignment of stores. (ER 78, 79 84, 349-52.) Appellee did not assign Lawson individual sales goals. Instead, Appellee tracked product sales at each store. TMs simply assist stores with merchandising of products, spending only a few hours a month in each Lowe's store, primarily to train Lowe's employees regarding products. Factors unrelated to TMs merchandising activities drive store performance. (ER82-84).
Lawson "struggled" on his market walks with Moore (AAB, p. 17)	Moore's history of deception and his formal warning by the company for unfair scoring based upon whether TMs complied with mis-tinting directives renders his market walk scoring of Lawson inherently unreliable. (ER 165-166.) Anomalous that Lawson's market walk score declined from 92 to 40 in less than a year. Moore scored market walks in an arbitrary fashion and violated the instructions from management. (ER84; 341-342). (See pages 14-15 herein.)
The decision to put Lawson on a PIP was "ultimately made" by HR (AAB, p. 19)	Mayhew rubber-stamped Moore's decision to put Lawson on a PIP. Moore represented to Lawson there was HR policy that TMs with certain sales metrics would automatically be placed on PIPs. Mayhew told Lawson this was untrue and no such policy. (ER192-194; 523). Moore personally procured Lawson's termination. (ER, 429, ¶¶ 2-15; ER, 279, ¶¶17-25; ER, 139, ¶¶ 16-21.)
The PIP "occurred before Moore was aware of the	Moore put Lawson on a PIP on May 12, 2017, shortly <u>after, not before,</u> Lawson's "John Dean

APPELLEE DISTORTION	RECORD FACTS AND REASONABLE INFERENCES
hotline report" (AAB, p. 22)	conversation." (ER119-121, ER125-126, occurring in late April 2007); (ER 348, PIP issued May 12, 2017.)
By the time Appellee became aware of Lawson's protected activity, the process of termination was already set in motion through the PIP (AAB, p. 22)	Moore decided to fire Lawson, and was acutely aware of Lawson's protected activity because of John Dean Conversation, occurred before the PIP. (ER 537-538.)
Appellee's investigator, David Duffy, "did not know" he was speaking with Lawson (AAB, p. 24)	Duffy heard Lawson's voicemail greeting which plainly identified him as "Wally Lawson." (ER 84, 100-108.)
Lawson was fired for "falsifying" his training roster and in a conversation with Mayhew "acknowledged he knew such action was falsifying company records" (AAB, p. 18)	Lawson never admitted to any falsification, just to making errors transposing data. (ER195-205). Errors were caused by technical problems with company-supplied i-Pad, including roster data crashes and problems with data entry, of which Moore was aware. ("It was a nightmare fixing a combination of things that happened. Not only just…the iPad, it crashed, but then to try to reduplicate all those training records on a new system, a new tablet..")(ER 281, ⁋⁋ 12-17, ER 189)

V. Moore's Implausible Denial of the Core Misconduct Reported by Lawson in this Case Precludes Summary Judgment

The District Court found that Lawson *had* stated a prima facie case of retaliation, and had produced sufficient evidence that Moore was aware that of

protected activity because of Lawson's vociferous objections to mis-tinting practices in late April 2017. (ER 6.)(*See* Appellant's Opening Brief, at pp. 8-9 for expanded discussion and citations to record.) Lawson testified that his relationship with Moore thereafter "completely changed" and it became obvious he "without a doubt knew I filed a complaint." (ER 128, ⁋⁋1-17; ER 130, ⁋⁋ 14-25.)

Because Appellee has presented no evidence challenging Lawson's testimony about his crucial conversation with Moore, there is a considerable issue of fact precluding summary judgment. Moore's denial that he directed his TMs to mis-tint is in irreconcilable conflict with the findings of Appellee's internal investigators, who concluded, after interviewing all fourteen of Moore's TMs—each of whom confirmed it—that Moore gave the unlawful directive. (ER 173.)

Moore's denial of the very misconduct that was the subject of Lawson's report is simply incredible. Appellee's motion for summary judgment ultimately relies on Moore's testimony and his denial that Lawson's protected activity was a contributing factor to the adverse employment decision. A jury could reasonably disbelieve Moore's testimony *in toto* and look with skepticism upon his market walk scoring of Lawson, the PIP that he produced, his shifting focus from an alleged sales quota to market walk scores, and then to alleged falsification of records.

VI. Application of the Statutory Standard of Review for California Labor Code Retaliation Claims is a Pure Question of Law Which Precludes Waiver

Asserting a waiver argument, Appellee seeks to evade application of § 1102.6 of the California Labor Code, for reasons that are obvious. This Court must apply the governing standard embedded in the statute, because it represents a pure question of law. It therefore does not matter whether the statutory standard was specifically argued or considered at the district court level. In the recent case of *Planned Parenthood of Greater Wash. v. United States HHS*, 946 F.3d 1100, 1111 (9th Cir. 2020), this Court succinctly defined a purely legal issue as "one for which the factual record is so fully developed as to render any further development irrelevant." *Id.* at *20. The question of whether to apply the §1102.6 standard to Lawson's retaliation claim does not require further development of the factual record, and therefore this Court should decide that question.

In *Planned Parenthood*, this Court explained that a purely legal issue may be considered for the first time on appeal because it "could not possibly be affected by deference to a trial court's fact-finding or fact application, or a litigant's further development of the factual record." *See id.* at *20; *see also United States v. Goldberg*, No. 87-3162, 1988 U.S. App. LEXIS 22308, *8 (9th Cir. June 13, 1988) (holding that "although the record could be developed more fully, it contains enough facts so that we may consider the [new] argument").

The issue now before the Court is whether claims brought under California Labor Code § 1102.5 should be evaluated on summary judgment using the evidentiary and burden-shifting standards contained in its companion section, §1102.6. That is purely a question of law. Deciding whether or not to apply the §1102.6 statutory standard established by the California Legislature to claims such as this one for violations of the California Labor Code § 1102.5 does not require any further development of the factual record.

Moreover, it is significant in addressing the issue that this Court's review of a grant of summary judgment is *de novo*. *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017). This requires the Court to review the evidence presented by the parties at the summary judgment proceedings in the lower court and make its own independent determination as to whether Appellee met its burden under §1102.6 and whether there are genuine issues of material fact, including the credibility of witnesses, which preclude summary judgment. *See, e.g., Hoover v. Switlik Parachute Co.,* 663 F.2d 964, 967-68 (9th Cir. 1981) (reviewing a voluminous record and reversing grant of summary judgment). Because the Court must make this same independent determination based on the existing factual record regardless of which standard is applied, the question of whether to apply the §1102.6 statutory standard is inherently a pure question of law.

The cases cited by PPG are inapposite. In *Turnacliff v. Westly*, the Court found that plaintiff's "due process challenge is not a pure question of law, but rather depends on a determination of facts *not* in the record." 546 F.3d 1113, 1120 (emphasis added.) No such situation exists in this case. Similarly, the record was *not* sufficiently developed as to the issue sought for review in *WildWest Institute v. Bull*, 547 F.3d 1162, 1172-73 (9th Cir. 2008)(emphasis added.) Likewise, the new arguments made in *Peterson v. Highland Music*, 140 F.3d 1313, 1321 (9th Cir. 1998) were "inherently factual in nature." Here, the Court should apply the statutory standard enacted by the California Legislature in §1102.6 for claims such as this one brought under §1102.5 because the new issue involves a purely legal question, for which the factual records are fully developed. To do otherwise would nullify the powerful whistleblower protections that the Legislature intended to the law of California.

VII. The Statutory Standard under California Labor Code §1102.6 is Controlling for all Retaliation Claims Asserted under §1102.5

A. The California Legislature Prescribed a Heightened Standard of Review for Retaliation Cases Like This One

The Legislature unmistakably intended to apply §1102.6's heightened standard of proof and burden-shifting favoring whistleblowers to all claims under §1102.5. Section 1102.6 begins with the following statement which expansively

defines the scope of its application: "In a civil action or administrative proceeding brought pursuant to §1102.5,…" Therefore, by its own terms, §1102.6 expressly covers *all* retaliation claims brought under §1102.5. This standard has been uniformly applied by courts addressing §1102.5 retaliation claims. *See e.g. Canupp v. Children's Receiving Home*, 181 F. Supp. 3d 767, 795 (E.D. Cal. 2016) (applying §1102.6 standard); *Mango v. City of Maywood*, CV 11-5641-GW, 2012 U.S. Dist. LEXIS 150929, *48-50, fn.13 (C.D. Ca. Oct. 5, 2012) (applying §1102.6 standard); *Yau v. St. Francis Mem'l Hosp.*, No. 13-cv-02558-DMR, 2015 U.S. Dist. LEXIS 76606, *46 (N.D.Ca. June 11, 2015) (applying clear and convincing evidence standard under §1102.6 and denying defendant's motion for summary judgment on §1102.5 claim).

B. The McDonnell Douglas Burden-Shifting Framework Does Not Displace California Labor Code §1102.6

Appellee erroneously argues that the *McDonnell Douglas* burden-shifting framework applies to state law claims pursued in federal court and somehow displaces the statutorily-mandated standard of §1102.6. This argument flies in the face of the U.S. Supreme Court's holding in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). *Shady Grove* restricts the scope of federal procedural rules and dictates that they "shall not [alter] any substantive right." The Court specifically held that "[a] federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the

ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id*. at 423 (Stevens, J., concurring); *see also James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1217 (10th Cir. 2011) (acknowledging that Justice Stevens' concurrence provides the controlling analysis in *Shady Grove*).[10]

C. Appellee Misapplies Inapposite Case Law Predating §1102.6

Appellee fails to cite *a single California decision* applying *McDonnell Douglas* to a §1102.5 retaliation claim since the 2003 enactment of §1102.6. The cases it does cite, however, are inapposite. *Patten v. Grant Joint Union High School District*, 134 Cal. App. 4th 1378, 1381 (2005) predated the 2003 enactment of §1102.6.[11] *Mokler v. County of Orange*, 157 Cal. App. 4th 121, 138 (2007) similarly involves a 2003 firing and relies upon *Patten*. *Ferretti v. Pfizer Inc.*, No.

[10] This is in accordance with *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1091 (9th Cir. 2001), the sole case cited by Appellee for its contention that *McDonnell Douglas* should trump §1102.6 under the *Erie* doctrine. In *Snead*, the plaintiff argued for the application of an Oregon state law discrimination standard that was not outcome-determinative. *Id.* Because the use of the Oregon standard versus application of *McDonnell Douglas* was not outcome- determinative, it did not advance either of the twin aims of discouragement of forum shopping and avoidance in inequitable administration of the laws as set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In summary, *Snead* does not create a bright-line rule that *McDonnell Douglas* governs all state law retaliation claims pursued in federal court. Here, in contrast to *Snead*, the application of *McDonnell Douglas* in lieu of the statutory standard could be outcome-determinative, as Lawson could prevail at trial under the statutory standard even though the District Court erroneously held that he could not survive summary judgment under *McDonnell Douglas*.

[11] §1102.6 became effective on January 1, 2004.

11-CV-04486, 2013 U.S. Dist. LEXIS 4730, at *25 (N.D. Cal. Jan. 10, 2013) is a non-precedential federal district court opinion that is not controlling or authoritative and erroneously relies upon *Patten*'s dated holding. *Taswell v. Regents of University of California*, 23 Cal. App. 5th 343, 350-51 (2018) does not even apply *McDonnell Douglas*, nor does it address the defendant's burden in rebutting the plaintiff's prima facie case. Instead, the language from *Taswell* which Appellee cites governs only the plaintiff's burden to make a prima facie case to begin with, and the defendant's burden to show that the plaintiff has not done so. *Id.* In contrast, the clear and convincing evidentiary standard in §1102.6 applies to the defendant's burden to rebut a prima facie case, not the plaintiff's duty to produce one.

Finally, Appellee makes a circular argument that Lawson cannot make a prima facie case of retaliation, and therefore §1102.6's clear and convincing evidence standard is not triggered. As the District Court correctly found, however, Lawson could demonstrate a prima facie case of retaliation based on Lawson's April 2017 protests to Moore alone. Judicial Council of California Civil Jury Instruction 4604 confirms that a §1102.6 instruction is appropriate in cases where "there is evidence of both a retaliatory and a legitimate reason for the adverse action," as in this case. §1102.6 places the burden on Appellee to rebut evidence of

Lawson's protests with clear and convincing evidence that it would have fired Lawson even in their absence. Appellee cites no contrary authority on this point.[12]

CONCLUSION

For the foregoing reasons, the summary judgment granted by the court below should be reversed.

Date: April 27, 2020

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[12] Appellee cites *Mokler v. County of Orange,* 157 Cal. App. 4th 121, 138 (2007) in support of its contention that §1102.6 is triggered "only in mixed motive cases." To the contrary, *Moker* does not even address the issue, and instead, applied the *McDonnell Douglas* standard only because the termination at issue occurred prior to the January 1, 2004 effective date of §1102.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: April 27, 2020

/s/Bruce C. Fox, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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