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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2018 Issue

This is not a race

CALIFORNIA'S WHISTLEBLOWER PROTECTIONS ARE NOT LIMITED TO THE FIRST REPORT OF UNLAWFUL CONDUCT

California Labor Code section 1102.5 is a whistleblower protection statute designed to incentivize employees to report unlawful conduct in the workplace without fear of retaliation by their employer. (§ 1102.5(a)-(b).) The statute also protects employees who are retaliated against for refusing to participate in illegal activities. (§ 1102.5(c).)

Asking an employee to report an employer's wrongful conduct is a tall order. The mere thought invokes the idiom: "Don't bite the hand that feeds you." It takes a brave, strong-willed individual, who is not afraid to stand up for what is right while risking his or her livelihood.

In order to encourage employees to take this brave step, the Legislature created broad protections against whistleblower retaliation and has amended the statute over time. With each successive amendment, the statute's protections have broadened, but the statute's current iteration still contains ambiguities that could discourage would-be whistleblowers from coming forward. This article discusses the purpose and protections of section 1102.5, the evolution of the statute, situations that have prompted the changes thus far, and what can be done to further broaden the scope of the protections to embolden whistleblowers to come forward and prevent retaliation.

A brief review of section 1102.5 and how it protects whistleblowers

Section 1102.5 provides remedies to employees who disclose their employers' unlawful conduct or refuse to participate in such conduct. An employer who has retaliated against a whistleblower may be ordered to (1) reinstate the employee with backpay and benefits (Lab. Code, § 98.6(b)), (2) pay the employee's actual damages (Lab. Code, § 1105), and (3) pay civil penalties to the affected employee(s) (Lab. Code, §§ 1102.5(f), 98.6(b)(3)).

As stated by our Supreme Court, the statute reflects a "broad public policy interest in encouraging workplace whistleblowers to report unlawful acts without fearing retaliation." (*Green v. Ralee Eng. Co.* (1998) 19 Cal.4th 66, 77.) For example, courts have construed the statute as protecting a terminated employee even where the employer *mistakenly* believed that the employee had made a complaint to licensing authorities. (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 922.)

Courts analyzing section 1102.5 claims apply the U.S. Supreme Court's burden-shifting analysis from *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-803. The plaintiff has the initial burden to establish a prima facie case of retaliation. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the termination. If the employer meets this burden, the plaintiff must then show that the employer's stated reasons are pretextual.

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The plaintiff's initial burden requires a showing that (1) they engaged in a protected activity, (2) they were subjected to an adverse employment action by their employer, and (3) there was a causal link between the two. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287-288, citation and internal quotations omitted.)

Causation may be established through inferences derived from circumstantial evidence, such as the proximity of time between the protected activity and the adverse employment action. (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.) But, in order to make a case for retaliation, the employer must have something to retaliate against. For this reason, to demonstrate a causal link, it is "essential" to present "evidence that the employer *was aware* that the plaintiff had engaged in the protected activity." (*Morgan v. Regents of Univ. of Calif.* (2000) 88 Cal.App.4th 52, 69-70, emphasis added.)

Legislative amendments to Section 1102.5 have strengthened incentives and protections for whistleblowers over time

Since section 1102.5's initial enactment in December 2003, the Legislature has amended the statute three times to address various shortcomings and perceived ambiguities in the broad protections that the statute was intended to provide to whistleblowers. These potential limitations on whistleblower protections were at odds with the statute's purpose: "to 'encourag[e] workplace whistleblowers to report unlawful acts without fearing retaliation.'" (*Soukup*, *supra*, 39 Cal.4th at 287, quoting *Green*, *supra*, 19 Cal.4th at 77.) With each successive amendment, the Legislature has either broadened or clarified the broad scope of the statute, in line with this purpose.

As originally enacted in December 2003, section 1102.5 protected disclosures made to government or law enforcement agencies, but not internal disclosures of unlawful conduct to persons within the employer's organization. Additionally, the statute's original version applied only to disclosures of violations of state or federal statutes or noncompliance with state or federal regulations and did not cover disclosures of noncompliance with state or federal *rules* or *local* rules or regulations. (§ 1102.5(a)-(b).)

In December 2013, the statute was amended to add noncompliance with state or federal *rules* to the list of protected disclosures. (§ 1102.5(a)-(c).) More significantly, the 2013 amendment added protections for employees who refuse to participate in illegal or noncompliant activities. (§ 1102.5 (c).) In addition to other changes, this amendment also specified that reports of unlawful conduct made by public employees to their employers are "disclosures" of unlawful conduct as that term is used in subdivisions (a) and (b). (§ 1102.5(e).)

In December 2014, the Legislature amended the statute to include *internal disclosures* to persons with authority over the employee or other employees with authority to investigate and correct unlawful or noncompliant conduct. (§ 1102.5(a)-(b).) This amendment also added violations of or noncompliance with *local rules or regulations* to the list of protected disclosures. (§ 1102.5(a)-(c).)

Additionally, the December 2014 amendment specified that such internal disclosures are protected even if disclosing such information is a part of the employee's job duties. (§ 1102.5(a)-(b).) Although this amendment codified the protection of disclosures made pursuant to the employee's job duties, numerous California courts held that the statute protected such disclosures even before the 2014 amendment. (See, e.g., *McVeigh*, 213 Cal.App.4th at 469; *Mize-Kurzman v. Marin Cmty. Coll. Dist.* (2012) 202 Cal.App.4th 832, 856-858; *Patten v. Grant Joint Union High Sch. Dist.* (2005) 134 Cal.App.4th 1378, 1385-1386; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1312-1313.)

These successive amendments to section 1102.5 each strengthened incentives for whistleblowers to report unlawful conduct in response to perceived loopholes and ambiguities. For example, under the 2013 version of section 1102.5, only complaints or reports made to government agencies were protected, whereas complaints or reports made "internally" to the employer were not protected. (See, e.g., *Green, supra*, 19 Cal.4th at 77 ["Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer"].) In *Green*, our Supreme Court acknowledged "the broad public policy interest in encouraging workplace whistle blowers to report unlawful acts without fearing retaliation," but without a legislative amendment, was hamstrung to apply such protections to an employee who had "made all of his complaints internally, and at no time … complain[ed] to outside government sources." (*Id*. at 73, 77.)

Although section 1102.5 provides after-the-fact protections for whistleblowers who are retaliated against, it is important to remember that employees who bring unlawful conduct to light would prefer not to be retaliated against. The primary reason any employee would make the difficult decision to report unlawful conduct by their employer or its agents is to remedy the conduct. The same remedial effect is obtained where an employer is put on notice of the illegal conduct and self-corrects.

As evidenced in *Green*, *supra*, 19 Cal.4th at 77, before the December 2014 amendment, such internal disclosures were not protected. However, including internal disclosures of unlawful conduct to the employer not only benefits employees, but is also in the best interests of employers. If the underlying goal of incentivizing whistleblowers is to bring unlawful conduct to light so that it does not continue, the same goal of preventing unlawful conduct is achieved where the employer self-corrects in response to internal reporting. Without protections for internal reporting, whistleblowers will only report illegal conduct to government agencies and law enforcement, likely resulting in fines and other punitive measures taken against the employer for having engaged in and/or ratified unlawful conduct.

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It is therefore understandable that internal reports of unlawful conduct to an employee's supervisor should benefit from the same protections as if made to government agencies. The December 2014 amendment reflects the Legislature's intent to apply the broad protections of section 1102.5 to such internal reports of unlawful conduct, benefiting whistleblowers and employers alike.

The "report" versus "disclosure" conundrum

Other ambiguities resolved by the judiciary include whether the statute protects reporting of publicly known unlawful conduct and whether a "publicly known" rule would limit whistleblower protections to the first employee to disclose such conduct.

At least one recent, published California decision has limited the protections of section 1102.5 to the disclosure of *unknown* illegal acts, despite the legislative intent that the statute be interpreted broadly to incentivize whistleblowers. In *Mize-Kurzman*, *supra*, 202 Cal.App.4th 832, the trial court's special jury instructions included federally based limitations respecting what constitutes a "disclosure" for purposes of the plaintiff's section 1102.5(b) whistleblower claims. (*Id*. at 844-845.) The trial court turned to federal law for guidance, noting that section 1102.5 does not define the phrases "'disclosing information'" and "'a disclosure of information.'" (*Id*. at 848.) Among the five federally based limitations on "disclosures" challenged in *Mize-Kurzman* was that "[r]eporting publicly known facts is not a protected disclosure." (*Id*. at 849.)

The appellate court held that it was not error to instruct the jury that reporting of publicly known facts is not a "disclosure" protected by section 1102.5. (*Id*. at 859.) In so ruling, the court reasoned that in drafting the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.), the Legislature created a "somewhat similar structure" to the federal whistleblower protection act (Whistleblower Protection Act of 1989, Pub. L. No. 101-12 (Apr. 10, 1989) 103 Stat. 16), and therefore, the trial court could properly include language "limiting[] the disclosures protected under California law as 'whistleblowing' in accord with federal cases interpreting the parallel federal WPA." (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at 846-847, 849.)

The appellate court agreed with federal cases holding that "the report of information that was already known did not constitute a protected disclosure." (*Id*. at 858, citing *Huffman v. Office of Pers. Mgmt.* (Fed. Cir. 2001) 263 F.3d 1341, 1349-1350; *Meuwissen v. Department of Interior* (Fed. Cir. 2000) 234 F.3d 9, 12-13; *Francisco v. Office of Personnel Management* (Fed. Cir. 2002) 295 F.3d 1310, 1314.) It also reasoned that this interpretation was consistent with the plain meaning of the word "disclosure," which common dictionaries define as "to reveal something that was hidden and not known." (*Id*. at 858-859, citations omitted.)

The *Mize-Kurzman* court further justified its interpretation as consistent with another line of federal cases holding that an employee's report to a supervisor of the supervisor's own wrongdoing is not a protected "disclosure" because the supervisor "*already knows* about his or her wrongdoing." (*Id*. at 859, original emphasis, quoting *Huffman, supra,* 263 F.3d at 1349-1350; citing *Reid v. Merit Systems Protection Bd.* (Fed. Cir. 2007) 508 F.3d 674, 678; *Horton v. Dep't of Navy* (Fed. Cir. 1995) 66 F.3d 279, 282.) Although the court acknowledged California cases where whistleblower protections applied to an employee's reporting of wrongdoing to his or her own employer, it reasoned that the distinguishing factor in each of these cases was that the supervisor to whom the report was made was not the alleged wrongdoer. (*Id*. at 859, citing *Colores, supra,* 105 Cal.App.4th at 1312-1313; *Patten, supra,* 134 Cal.App.4th at 1386.)

Hager distinguishes *Mize-Kurzman*: there is no "first report" rule in California

Two years later, *Hager v. Cty. of Los Angeles* (2014) 228 Cal.App.4th 1538, provided an in-depth analysis of *Mize-Kurzman*, largely disarming it. In *Hager*, a deputy sheriff reported information to commanding officers that he had received from a confidential informant concerning another deputy's alleged involvement in drug trafficking and the murder and cover-up of a fellow deputy. (*Hager*, *supra*, 228 Cal.App.4th at 1542.) After a series of reports and investigations, some corroborating, and others discrediting the plaintiff's disclosures of deputy misconduct, the Internal Affairs Bureau ("IAB") investigated the plaintiff, concluding that he had recklessly accused a deputy of criminal acts and made false statements to his supervisors to support his theory. (*Id*. at 1546-47.) The Chief reviewed the IAB investigation, ignored the 10- to 15-day recommended suspension, and terminated the plaintiff. (*Ibid*.)

The defendant employer relied heavily on *Mize-Kurzman*, arguing that other officers had previously disclosed the same alleged deputy misconduct that the plaintiff reported and that the plaintiff therefore did not "disclose information" under section 1102.5(b) because the employer was already aware of this information. (*Hager*, *supra*, 228 Cal.App.4th at 1548, citing *Mize-Kurzman*, *supra*, 202 Cal.App.4th 832.) The *Hager* court distinguished *Mize-Kurzman*, which concerned a report of publicly known information (i.e., whether the plaintiff's supervisors were aware that their conduct and the employer's policies actually violated the law), and not whether another employee's prior disclosure of the same unlawful activity would preclude application of section 1102.5(b) whistleblower protections to the plaintiff. (*Hager*, *supra*, 228 Cal.App.4th at 1549, citing *Mize-Kurzman*, *supra*, 202 Cal.App.4th at 840-842.)

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Hager analyzed the plain language of section 1102.5(b), holding that it does not limit whistleblower protections to the first employee to disclose unlawful conduct. (*Hager*, *supra*, 228 Cal.App.4th at 1549.) Despite acknowledging that the verb "disclose" is not defined in the statute, *Hager* disapproved of the dictionary definition the *Mize-Kurzman* court cited: "to 'reveal something that was hidden and not known.'" (*Hager*, *supra*, 228 Cal.App.4th at 1549, quoting *Mize-Kurzman*, *supra*, 202 Cal.App.4th at 858, internal citations omitted.) *Hager* noted that *Mize-Kurzman* "did not construe the statutory language in the context of the statute as a whole," specifically section 1102.5(e). (*Hager*, *supra*, 228 Cal.App.4th at 1550.)

Section 1102.5(e) states that a "report" made by a government employee to his or her employer is a disclosure protected under section 1102.5(b). Contrary to the definition of "disclose" employed in *Mize-Kurzman*, nothing about a "report" requires the revelation of hidden or unknown information. (*Hager*, *supra*, 228 Cal.App.4th at 1550.) *Hager* acknowledged a possible inconsistency in the statute, requiring public employees to "report" unlawful conduct (known or unknown) and private employees to "disclose" (unknown) unlawful conduct, but deferred resolution of this issue to the Legislature. (*Ibid*.)

Hager also reasoned that a "first report" rule is contrary to the legislative intent of the whistleblower statute. Such a rule would "discourage whistleblowing" and thereby "defeat the legislative purpose of protecting workplace whistleblowers." (*Supra*, 228 Cal.App.4th at 1550.) If only the first employee to disclose a wrongdoing were protected, "employees would not come forward to report unlawful conduct for fear that someone else already had done so." (*Ibid*.)

Moreover, whistleblowing may be more effective if more than one employee comes forward. For instance, in light of multiple reports of wrongdoing, the recipient of the information may be more likely to give the reports credence and take appropriate action. Multiple whistleblowers may also present a more nuanced account than would a single whistleblower. Given these benefits and section 1102.5's "broad purpose" to encourage whistleblowing, the statute requires a "broad construction." (*Id.* at 1552.)

Federal cases have held that reports to the wrongdoer himself (e.g., a supervisor who engages in illegal conduct) are not protected because the wrongdoer already knew of the misconduct. (See, e.g., *Huffman*, *supra*, 263 F.3d at 1349-1350.) The *Huffman* court did not consider whether whistleblower protections are limited to the first employee to report unlawful conduct. Nonetheless, the defendant in *Hager* attempted to analogize to *Huffman*. There, the defendant argued that the second of two employees to report unlawful conduct is not "disclosing" anything that the employer or government agency does not already know, in the same way that a wrongdoer does not learn any new information if an employee reports the wrongdoer's own unlawful conduct to them: "As the *Huffman* court noted, the purpose of the federal Act is to encourage disclosures to those that are likely to remedy the wrong, and '[t]he wrongdoer is not such a person.'" (*Hager*, *supra*, 228 Cal.App.4th at 1551, quoting *Huffman*, *supra*, 263 F.3d at 1350.)

In *Huffman*, the court found it significant that in enacting the federal whistleblower statutes, Congress used the word "disclosure" and not a broader word, such as "report" or "state," which might have applied to an employee's reporting a supervisor's own unlawful conduct to the supervisor. In such circumstances, the employee does not "disclose" any new information. (*Huffman*, *supra*, 263 F.3d at 1350.)

Hager contrasted *Huffman* with California cases applying section 1102.5(b) where employees report unlawful conduct to the very person who engaged in the wrongdoing. (*Hager*, *supra*, 228 Cal.App.4th at 1551, citing *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 825-826; *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 240, 242-243.) In *Jaramillo*, the plaintiff, an assistant sheriff, was terminated by the sheriff after confronting the sheriff about his illegal use of a sheriff's department helicopter to facilitate personal rendezvous with women and his illegal sale of badges and concealed-weapons permits to campaign contributors. (*Jaramillo*, *supra*, 200 Cal.App.4th at 815-816.) The court held that there was "*no question* that [the plaintiff's] warning to [the sheriff about the sheriff's own unlawful acts] fits within the literal definition of whistleblowing under Labor Code section 1102.5. [The plaintiff] did indeed 'disclos[e] information' to a 'law enforcement agency,' … and the information 'disclose[d]' violations of state and federal statutes." (*Id*. at 825-26.)

Clarification needed that reporting of "publicly known" information is a "disclosure"

Although the amendments thus far have increased the scope of protected activities and strengthened incentives for whistleblowers, section 1102.5's current version should be further clarified to resolve other ambiguities.

In a recent unpublished opinion, Division 4 of the Second Appellate District distinguished *Hager's* rejection of a "first report" rule and upheld the grant of summary judgment against the plaintiff. (*Heller v. Regents of Univ. of California* (Cal. Ct. App. July 31, 2017) No. B271468, 2017 WL 3224852, at *9.) In *Heller*, the unlawful conduct at issue was the subject of "an 'urban legend' [that] was well known before [the plaintiff] made his complaints." (*Ibid*.) The court held that in such situations, there was no concern that a "first report" rule would discourage whistleblowers for fear that, "unbeknownst to them," someone had previously disclosed the same information. (*Ibid*.)

Heller does not concern two employees who reported the same unlawful conduct. At issue there was whether reporting allegedly publicly available information constituted the necessary "disclosure" under section 1102.5(b). (*Ibid*.) No published California opinion has cited *Mize-Kurzman* for the proposition that Section 1102.5(b) does not protect an

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employee who discloses allegedly publicly known information. In any event, such a rule would not make sense as, contrary to the reasoning in *Heller*, like a "first report" rule, a "publicly known" rule would serve as yet another hurdle to would-be whistleblowers who might not be privy to the "urban legend" or other source of "public" information.

For example, if the source of the "public" information at issue is a newspaper article, then the whistleblower statute would not serve as an incentive to non-English-speaking or illiterate persons who would have no means of verifying whether the unlawful activity they are reporting had previously been disseminated in print. This would run afoul of the broad scope of section 1102.5 and the intent of the Legislature to encourage workplace whistleblowers to report unlawful acts without fearing retaliation. (*Soukup*, *supra*, 39 Cal.4th at 287.)

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