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May 24, 2022

Via TrueFiling

Presiding Justice Cole Blease
Associate Justice Harry E. Hull, Jr.
Associate Justice Peter A. Krause
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, California 95814

Re: *Vatalaro v. County of Sacramento*
Case No. C090896
Request for Publication of Opinion

Dear Honorable Justices:

We write on behalf of the League of California Cities and the California State Association of Counties to respectfully request that the Court publish its May 5, 2022 opinion in *Vatalaro v. County of Sacramento*, Case No. C090896, pursuant to California Rules of Court, rule 8.1120.[1]

INTEREST OF AMICI CURIAE SEEKING PUBLICATION

League of California Cities. The League of California Cities ("Cal Cities") is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

[1] This request for publication is timely under rule 8.1120(a)(3) because it was delivered to the rendering court within 20 days after the opinion was filed. No party or any counsel for a party in the pending appeal authored this request in whole or in part or made a monetary contribution intended to fund the preparation or submission of this request. (Cf. Cal. Rules of Court, rule 8.520(f).)

California State Association of Counties. The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

REASONS WHY PUBLICATION IS WARRANTED

As the Legislature and our Supreme Court have recognized, "'[g]enerally, … provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees.'" (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 330 [quoting Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended April 21, 2001 [2002], p. 2].) One such statute is Labor Code section 1102.5, which provides a retaliation cause of action for whistleblowers. (See Lab. Code, § 1106 [defining "employee" for purposes of section 1102.5 to include public employees]; *Campbell*, *supra*, 35 Cal.4th at p. 330 ["The addition of section 1106 to the Labor Code was intended to extend the rights available to private employees to include public employees …"].)

Apart from the obligations of the Fair Employment and Housing Act ("FEHA"), the whistleblower retaliation provision of Labor Code section 1102.5 is one of the primary ways that public entities face potential liability under state law in the employment realm. Like FEHA, the whistleblower retaliation protections of section 1102.5 serve an undeniably important purpose—particularly in the mine-run case of retaliation. However, in many instances of alleged retaliation, public employers have a legitimate, independent reason for taking adverse action against an employee. Public employers thus have a particularly strong interest in receiving greater clarity regarding the application of the standard for evaluating whistleblower retaliation claims under Labor Code sections 1102.5 and 1102.6 and the components of a prima facie case for such claims.

Rule 8.1105 of the California Rules of Court provides, in part, that an appellate opinion "should be certified for publication in the Official Reports if the opinion": "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions"; "[m]odifies, explains, or criticizes with reasons given, an existing rule of law; "[a]dvances a new interpretation, clarification, criticism, or construction of a provision of a...statute..."; or "[i]nvolves a

legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(2)-(4), (6).)

This Court's opinion in this case satisfies each of these criteria. In particular, the opinion is notable for the following reasons:

(1) it is one of the first courts to apply at summary judgment the recent California Supreme Court decision, *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 (*Lawson*), which held that the clear and convincing evidence framework from Labor Code section 1102.6 governs when an employer asserts that the adverse employment action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activity under section 1102.5 (Opn. at pp. 11-13.); and

(2) it examines decisions interpreting the "reasonable cause to believe" element of a prima facie case under Labor Code section 1102.5, questions whether prior decisions had correctly interpreted the statute to equate "reasonable cause to believe" with "reasonably believed," and offers a harmonizing alternative construction of the statute (Opn. at pp. 16-18).

For these and the following reasons, the Court's opinion in this case warrants publication.

I. The Court's Application of *Lawson* at Summary Judgment Warrants Publication Because It Explains an Existing Rule of Law, Applies It to a Significantly Different Set of Facts and Involves a Legal Issue of Continuing Public Interest.

For years, "widespread confusion" persisted as to "which evidentiary standard actually applies to [Labor Code] section 1102.5 retaliation claims" when an employer asserts that the adverse employment action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activity. (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 (*Lawson*) [quotation marks omitted].) The California Supreme Court recently resolved this confusion in *Lawson*, holding that section 1102.6, and not *McDonnell Douglas*—which is widely used to adjudicate similar defenses in Title VII and FEHA actions—"supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Id.* at p. 712.)

In some respects, however, the Supreme Court's decision created more questions than answers—particularly with respect to how courts must apply the clear and convincing standard in Labor Code section 1102.6. The opinion in this case provides much-needed guidance on how that standard applies in the summary judgment setting and the evidentiary showing needed to show by clear and convincing evidence that a challenged employment action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by section 1102.5.

In this case, Vatalaro alleged that the County released her from probation because she engaged in protected whistleblower activity under Labor Code section 1102.5. (Opn. at p. 1.) To evaluate the plaintiff's claim at the summary judgment stage, this Court applied the clear and convincing evidence framework as described by *Lawson* and section 1102.6. (Opn. at pp. 11-13.) The section 1102.6 framework is as follows: first, the employee must demonstrate by a "preponderance of the evidence" that s/he engaged in protected activity; second, if s/he meets that burden, the employer has the burden 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 protected activity. (Lab. Code, § 1102.6.)

Prior to reaching its decision, this Court requested supplemental briefing to account for *Lawson*, which was decided after the parties had submitted their initial appellate briefs. (Opn. at pp. 2, 19.) After evaluating the supplemental briefing and the summary judgment record, this Court concluded that the County "supplied sufficient evidence to satisfy the more demanding standard under section 1102.6" because it "demonstrated by clear and convincing evidence that it would have released Vatalaro from probation for legitimate, independent reasons even if Vatalaro had not engaged in the allegedly protected conduct." (Opn. at p. 19; see also *id.* at pp. 19-24.)

The opinion warrants publication under subdivisions (c)(2), (c)(3), and (c)(6) of rule 8.1105.

First, the Court "explain[ed]...an existing rule of law"—the clear and convincing evidence framework under section 1102.6—and how it applies to section 1102.5 claims at the summary judgment stage. (Opn. at pp. 11-13; see Cal. Rules of Court, rule 8.1105(c)(3).)

Second, the Court applied the clear and convincing evidence framework as described in *Lawson* to the plaintiff's claim. (Opn. at pp. 18-24.) This is one of the first decisions to apply *Lawson* in the public employment context and at the

summary judgment stage. Thus, these "are [a] set of facts significantly different from those stated in" *Lawson*, which involved private employers and a certified question to the high court, rather than a motion for summary judgment. (See Cal. Rules of Court, rule 8.1105(c)(2).) Through this evidentiary framework, the Court held that the County "presented sufficient undisputed evidence to satisfy its burden under section 1102.6 on summary judgment" and "that Vatalaro failed to raise any triable issue of material fact that would preclude summary judgment in this case." (Opn. at p. 22; see also *id.* at pp. 19-24.)

Third, the Court's application of *Lawson* "[i]nvolves a legal issue of continuing public interest" because it provides further guidance to litigants and courts on how to evaluate section 1102.5 claims (which are increasingly more common against public employers) on motions for summary judgment. (See Cal. Rules of Court, rule 8.1105(c)(6).)

II. The Court's Interpretation of the Prima Facie Case under Labor Code Section 1102.5 Warrants Publication Because It Criticizes an Existing Rule of Law and Advances a New Interpretation of a Statute.

In addition to providing critical guidance to future litigants and courts on how to apply section 1102.6's burden-shifting framework after *Lawson*, the opinion provides guidance on section 1102.5's prima facie requirements by examining how other California courts have interpreted the "reasonable cause to believe" element, questioning whether the text of the statute supports those courts' interpretation, and offering a harmonizing construction of the statute.

As the opinion explains in some detail, other courts have treated the requirement that plaintiffs have a "reasonable cause to believe" that the information they disclosed concerned a violation of law as equivalent to plaintiffs merely having a "reasonable belief" of such. (Opn. at pp. 16-18.) But as the opinion explains, "reasonable cause to believe" and having a "reasonable belief" are "not equivalent." (*Id.* at p. 17.) Despite this apparent incongruity, this Court offered a harmonizing construction by looking to similar language in Evidence Code section 1024, where "courts have construed 'reasonable cause to believe' to mean 'reasonable cause to believe' *and* actually believes." (*Ibid.*) As this Court noted, "[p]erhaps similar considerations could favor a similar reading of section 1102.5." (*Id.* at p. 18.)

Accordingly, the opinion warrants publication because it (1) "criticizes with reasons given[] an existing rule of law" and (2) "[a]dvances a new interpretation...of

a provision of a...statute," by pointing out the flaws in prior decisions involving the "reasonable cause to believe" element of section 1102.5 claims and offering a harmonizing construction to guide future litigants and courts. (See Cal. Rules of Court, rule 8.1105(c)(3), (c)(4).)

* * *

For the foregoing reasons, Cal Cities and CSAC respectfully request that the Court publish its opinion in *Vatalaro v. County of Sacramento*.

Sincerely,

Ryan P. McGinley-Stempel (SBN 296182)
Imran Dar (SBN 326502)
Shajuti Hossain (SBN 322162)

RENNE PUBLIC LAW GROUP

cc: Service List

PROOF OF SERVICE

I, the undersigned, am employed by RENNE PUBLIC LAW GROUP. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104. I am readily familiar with the business practices of this office. I am over the age of 18 and not a party to this action.

On May 24, 2022, I served the following document(s):

REQUEST FOR PUBLICATION OF OPINION (Case No. C090896)

by the following method(s):

☒ The parties below were served *via TrueFiling* at the email addresses shown below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 24, 2022 at San Francisco, California.

Bobette M. Tolmer

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RENNE PUBLIC LAW GROUP
Attorneys at Law