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Supreme Court of California
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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

ANSWERING BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule of Court 8.208, PPG Architectural Finishes, Inc. submits the following statement:

PPG Architectural Finishes, Inc., a wholly owned subsidiary of PPG Industries, Inc. PPG Industries, Inc. is a publicly held company whose shares are traded on The New York Stock Exchange under the ticker symbol PPG. PPG Industries, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of PPG Industries, Inc.'s stock.

Dated: May 13, 2021

HOPKINS & CARLEY
A Law Corporation

By: */s/ Karin M. Cogbill*
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PPG ARCHITECTURAL FINISHES, INC.

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INTRODUCTION

This case is before the Court for the narrowed purpose of addressing whether, at summary judgment, "the evidentiary standard set forth in section 1102.6 of the California Labor Code **replace[s]** the *McDonnell Douglas* test[1] as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of California's Labor Code." (*Lawson v. PPG Architectural Finishes, Inc.* (9th Cir. 2020) 982 F.3d 752, 753 [emphasis added].) The text and legislative history of California Labor Code section 1102.6 ("Section 1102.6") requires that the answer be "no."

Section 1102.6 provides in relevant part,

> [O]nce 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.

(Emphasis added.)

Plainly, Section 1102.6 sets forth an affirmative defense and, like affirmative defenses generally, it lays the burden of proof against the defendant to be asserted only *after* the plaintiff establishes his case. Where a plaintiff fails to make his case at trial, no affirmative defense is necessary.

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[1] *See McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 ("*McDonnell Douglas*").

The affirmative defense articulated in Section 1102.6, also referred to as the "same decision" defense, only enters the picture, if at all, after a plaintiff employee proves to the trier of fact that the employer took an adverse employment action with a retaliatory motive, and the defendant then argues that the adverse action it took would have occurred even without the retaliatory motive. In other words, the defendant argues it would have made the same decision regardless of its retaliatory motive. With the passage of Section 1102.6, if the employer now presents this defense after a plaintiff proves his case, the employer will face a heightened burden to prove this "same decision" defense by "clear and convincing evidence."

This "same decision" defense, however, was not at issue in the successful summary judgment motion filed by PPG Architectural Finishes, Inc. ("PPG"). PPG never argued that even if former employee Wallen Lawson ("Lawson") *could* "demonstrate[] by a preponderance of the evidence" that his protected activity was a contributing factor to his termination, PPG *nevertheless would have* terminated him anyway. Instead, PPG argued, in the parlance of Section 1102.6, that there was no evidence by which Lawson could "demonstrate by a preponderance of the evidence" any retaliation in the first place. PPG's motion aimed squarely at *Lawson's* burden under the *McDonnell Douglas* test. Though Lawson claims that the District Court should have applied Section 1102.6 instead of *McDonnell Douglas* at summary judgment, there is no reason to believe that the purpose

of Section 1102.6 was to *lower* a plaintiff's burden of proof for a Section 1102.5 claim. Indeed, legislative materials for Section 1102.6 include the heading, "**Standard of proof in whistleblower suit is raised**." Clearly, the intent of Section 1102.6 was *not* to lower a plaintiff's burden of proof from the *McDonnell Douglas* standard. Rather, Section 1102.6 *raised* the defendant's burden of proof for a potential affirmative defense.

Before reaching the defendant's burden on the affirmative defense set forth in Section 1102.6, the jury must first find that the plaintiff met his burden to "demonstrate[] [retaliation] by a preponderance of the evidence." At summary judgment, the test for determining whether a plaintiff is entitled to proceed to trial on that question remains the burden-shifting analysis originating in the United States Supreme Court in *McDonnell Douglas*.

This Court should hold that the *McDonnell Douglas* analysis, as adopted in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 [100 Cal. Rptr. 2d 352] for discrimination claims and *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 [32 Cal.Rptr.3d 436] for retaliation claims under the Fair Employment and Housing Act ("FEHA"), controls a summary judgment motion for a Section 1102.5 claim. The ultimate result of the complete *McDonnell Douglas* test is for "the employee to prove intentional retaliation"—which is, essentially, the predicate to the Section 1102.6

affirmative defense. (*See Yanowitz,* 36 Cal.4th at 1042.[2])

Lawson's brief, however, provides no workable method for determining at the summary judgment stage whether he "demonstrate[d] 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. . . ." Indeed, Lawson all but states that summary judgment should never be granted on a Section 1102.5 claim. But that cannot be the intent of Section 1102.6, which is not implicated until the plaintiff "demonstrate[s] [retaliation] by a preponderance of the evidence" – an achievement that does not occur until trial.

The only way for Lawson to have "demonstrated" that he was subject to a retaliatory termination "by a preponderance of the evidence," as Section 1102.6 requires, is by clearing the initial hurdle noted in *Yanowitz*, "to prove intentional retaliation," which means surviving the *McDonnell Douglas* analysis at summary judgment *and then* demonstrating retaliation by a preponderance of the evidence at trial. After all, Lawson's claim is a Section 1102.5 claim, not a Section 1102.6 claim, and Section 1102.5 plainly requires that he prove his employer "retaliate[d] against an employee ***for*** disclosing information . . . [which] discloses a violation of state or federal statute . . ."

[2] Though *Yanowitz* is a FEHA case, it has been applied to Section 1102.5(b) retaliation cases for the "materiality" test. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1388 [37 Cal.Rptr.3d 113].)

(Cal Lab Code § 1102.5(b) [emphasis added]). But Lawson could not establish a genuine issue of material fact, let alone prove, that he was retaliated against ***for*** his protected activity, so consideration of the affirmative defense in Section 1102.6 is unnecessary. Consistent with its precedent, this Court should continue to apply *McDonnell Douglas* burden-shifting analysis to motions for summary judgment on retaliation claims under Section 1102.5 to determine if there is a triable issue of material fact as to the plaintiff-employee's claim of retaliation.

FACTUAL AND PROCEDURAL BACKGROUND

The District Court's factual recitation is summarized here for the Court's convenience. (*See Lawson v. PPG Architectural Finishes, Inc.* (C.D. Cal., June 21, 2019, No. SACV1800705AGJPRX) 2019 WL 3308827, at *1-2.)

I. FACTUAL BACKGROUND

PPG manufactures and sells interior and exterior paints, stains, caulks, repair products, adhesives and sealants for homeowners and professionals. During Lawson's employment, PPG sold its products through its own retail stores, and through other retailers such as The Home Depot, Menards, and Lowe's. (*Id.* at *1.)

Lawson, a Territory Manager ("TM"), managed PPG's sales at several Lowe's stores in and around Orange County, California. (*Id.*) Lawson

reported directly to Regional Sales Manager ("RSM") Clarence Moore, who reported to Divisional Manager ("DM") Sean Kacsir. (*Id.*)

Lawson's performance was measured using two metrics, his monthly sales goals and his score on "Market Walks". (*Id.*) Market Walks entailed the RSM visiting stores with TMs to ensure TMs were building relationships with store employees, that PPG product was properly placed in the store, and TMs were training and helping customers. (*Id.*)

Between October 2016 and August 2017, Lawson participated in six Market Walks, the first of which earned him an "exceptional" score, but the others resulting in "marginal" or "unsuccessful" scores. All but the first Market Walk were conducted with RSM Moore. (*Id.*) RSM Moore observed Lawson struggling to establishing relationships and train key store members, and with completing PPG product demonstrations and displays. (*Id.*)

Further, for the year leading up to March 2017, Lawson missed his monthly sales goals eight times. (*Id.* at *2.) This, along with Lawson's Market Walk scores, caused PPG to decide in mid-April 2017 to place Lawson on a Performance Improvement Plan ("PIP"). (*Id.*) The PIP required Lawson to earn a Market Walk score of "successful" by the time the PIP expired in July 2017, but he failed to do so. (*Id.*) PPG nevertheless extended Lawson's PIP by thirty days. (*Id.*) RSM Moore supported the extension "because he recognized that he had not been able to check-in with Lawson as frequently as intended" during the progression of Lawson's PIP.

(*Id.*) But after Lawson received another unsuccessful Market Walk score in August 2017, RSM Moore and DM Kacsir recommended Lawson be terminated. Lawson was then terminated on September 6, 2017. (*Id.*)

Notwithstanding his performance issues, Lawson claims that, beginning in April 2017, RSM Moore started instructing TMs to "mis-tint" PPG's paint products at Lowe's stores. (*Id.*) According to Lawson, mis-tinting forced the store to place the mis-tinted paint "on an 'oops' rack next to the paint desk and [sell it] at a deep discount" while allowing PPG to avoid buying back unsold inventory. (*Id.*)

On April 21, 2017, Lawson filed an anonymous report with PPG about the alleged directive to mis-tint PPG's paint products.[3] (*Id.*) PPG tried to follow up with the anonymous reporter, but never heard back, so it closed the investigation. (*Id.*)

On June 15, 2017, Lawson submitted another anonymous complaint, again alleging RSM Moore directed TMs to mis-tint paint. (*Id.*) As part of its investigation, PPG's compliance department contacted Lawson (who at that time was known only as the anonymous complainant) to ask if he would speak with David Duffy, PPG's Senior Manager of Investigations and Corporate Security. (*Id.*) Lawson agreed, so on June 28, 2017, Duffy and

[3] Lawson alleges that at some point thereafter, he also told RSM Moore over the phone that he believed mis-tinting was wrong and that there was "no way" Lawson was going to participate in it. (*Id.*)

Lawson spoke about the mist-tinting allegations. (*Id.*) That conversation led John Dalton, PPG's Forensic Audit and Loss Prevention Specialist, to interview RSM Moore about the alleged mis-tinting. (*Id.*) During that interview, Dalton told RSM Moore to direct his TMs not to mis-tint PPG's paint products and to re-read PPG's Global Code of Ethics. (*Id.*)

Although Lawson admits he never told RSM Moore (or anyone at PPG) that he submitted the two anonymous complaints, he now claims that he "believed" RSM Moore knew Lawson reported his alleged misconduct. (*Id.*) Lawson further "believed" that RSM Moore gave him poor scores on his July and August 2017 Market Walks, and eventually recommended his termination, in retaliation for anonymously reporting RSM Moore. (*Id.*) These "beliefs" were conclusory, based on the theory that RSM Moore *possibly could have* guessed that Lawson was the anonymous reporter. (*Id.* at *4.)

II. PROCEDURAL HISTORY

A. The Summary Judgment Order

The District Court granted summary judgment for PPG on Lawson's First and Second Causes of Action for retaliation and wrongful termination in violation of public policy. (*Id.* at *4-5.) More specifically, after applying the *McDonnell Douglas* burden shifting analysis, the District Court determined that Lawson "failed[ed] to create triable issues regarding pretext, necessitating summary adjudication on [Lawson's] first claim." (*Id.* at *5.)

In granting PPG's motion, the District Court found that **(1)** Lawson had stated a *prima facie* case of retaliation based on the conclusion that Lawson's supervisor *might have* "deduced [Lawson] reported his alleged misconduct" (*id.* at *4); **(2)** PPG set forth a "legitimate, nonretaliatory reason" for terminating Lawson, in that he "fail[ed] to meet the performance expectations set forth in the PIP" (*id.*); and **(3)** Lawson failed to raise triable issues of fact regarding any pretext in PPG's justification for terminating Lawson's employment (*id.*). In so doing, the District Court noted that Lawson consistently performed poorly on his Market Walks with RSM Moore even before Lawson reported RSM Moore's alleged misconduct. (*Id.*) The District Court also found that Lawson failed to offer any evidence of inconsistent, shifting, or conflicting justifications that might show pretext. (*Id.* at *5.)

B. The Ninth Circuit Court of Appeals' Order

Lawson appealed the District Court's judgment to the Ninth Circuit Court of Appeals. Following the conclusion of briefing and oral argument, the Ninth Circuit certified the following question to this Court on the ground that it would be "dispositive" to the appeal before it, but that "no clear controlling California precedent exists":

> Does the evidentiary standard set forth in section 1102.6 of the California Labor Code replace the *McDonnell Douglas* test as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of California's Labor Code?

(*Lawson v. PPG Architectural Finishes, Inc.* (9th Cir. 2020) 982 F.3d 752, 753.)

The Ninth Circuit's Order summarized a number of different authorities allegedly in tension or conflicting in their application of *McDonnell Douglas*, but then went on to suggest that Section 1102.6 requires an "initial burden" for plaintiff to prevail on a Section 1102.5 claim by showing that protected activity "was a contributing factor in the alleged prohibited action." (*Id.* at 759.) The Ninth Circuit added that the burden of persuasion would then shift to the defendant with a much heavier "clear and convincing evidence" burden, citing to federal case law for discussion of that term. (*Id.* at 759-760.) Finally, the Ninth Circuit speculated that the "lower" *McDonnell Douglas* standard does "damage to workers' rights." (*Id.* at 760.) The Ninth Circuit did not explain how an employee who could not clear the low hurdle of *McDonnell Douglas* on a motion for summary judgment would be entitled to recover for a retaliation claim, nor any justification for the assumption that the procedural *McDonnell Douglas* approach harms employees who actually were subjected to unlawful retaliation.

ARGUMENT

I. The Plain Language of Section 1102.6 Provides an Affirmative Defense That Arises at Trial Only After a Plaintiff Claiming Retaliation Satisfies His Burden of Proof.

It is telling that Lawson did not point to, or even mention, Section 1102.5 *or* Section 1102.6 in his opposition to PPG's motion for

summary judgment in the District Court. Instead, Lawson's own brief applied the *McDonnell Douglas* approach. On appeal, however, Lawson abruptly changed tactics, claiming for the first time that the District Court misapplied the burden of proof by applying *McDonnell Douglas* burden-shifting, rather than Section 1102.6, to Lawson's Section 1102.5 claim.

Lawson's First Cause of Action asserted that PPG violated California Labor Code Section 1102.5(b), which states in relevant part:

> An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.[4]

California Labor Code Section 1102.6 provides that:

> In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have

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[4] The Second Amended Complaint incorrectly cited Section 1102.5(a). Lawson also cited Section 1102.5(c), which is substantially identical for purposes of this appeal. Section 1102.5(c) prohibits retaliation for refusal to participate in an activity that would result in a violation of a state or federal statute. Because Section 1102.5(b) and Section 1102.5(c) differ only in the nature of the protected activity, and it is assumed for the purposes of this appeal only that Lawson engaged in protected activity, there is no difference between the two for the certified question.

> occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.

Section 1102.6 sets forth an affirmative defense. This Court's precedent makes plain that the defendant generally bears the burden of proof when it introduces "new matter," that is, allegations not part of the complaint. (*Goddard v. Fulton* (1863) 21 Cal. 430, 436.) Where the defendant simply denies the allegations in the complaint, there is no affirmative defense. (*Id.*) But where a plaintiff could otherwise prevail, an affirmative defense may prevent the plaintiff from prevailing or otherwise limit the remedies available. (*See, e.g., Salazar v. Maradeaga* (1992) 10 Cal.App.4th Supp. 1, 5 [tenant's affirmative defense prevented landlord from prevailing in unlawful detainer action even where there was a basis for eviction].)

II. The Fourth Appellate District and The Judicial Council of California's Civil Jury Instructions Are in Accord.

The application of Section 1102.6 as an affirmative defense at trial was demonstrated by the Fourth Appellate District in *Willis v. City of Carlsbad* (April 22, 2020) 48 Cal.App.4th 1104. In *Willis*, the plaintiff asserted a claim of retaliation in violation of Labor Code section 1102.5(b). Following trial, the jury returned a verdict finding that plaintiff's protected activity was a contributing factor in the employer's decision to deny him a promotion. However, on consideration of the employer's affirmative defense under Section 1102.6, the jury also found that the employer would have

denied the plaintiff his promotion anyway for legitimate independent reasons.

The Judicial Council of California Civil Jury Instruction 4604, citing to Section 1102.6, outlines the "same decision" affirmative defense:

4604. Affirmative Defense - Same Decision (Lab. Code, § 1102.6)

If [name of plaintiff] proves that [his/her/nonbinary pronoun] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her/nonbinary pronoun] [discharge/[other adverse employment action]], [name of defendant] is not liable if [he/she/nonbinary pronoun/it] proves by clear and convincing evidence that [he/she/nonbinary pronoun/it] would have [discharged/[other adverse employment action]] [name of plaintiff] anyway at that time for legitimate, independent reasons.

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. 4603, Whistleblower Protection - Essential Factual Elements.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even 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.(Lab. Code, § 1102.6.)

Sources and Authority

• Same-Decision Affirmative Defense. Labor Code section 1102.6.

• "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the

contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)

• "[W]hen we refer to a same-decision showing, we mean proof that the employer in the absence of any discrimination, would have made the same decision at the time it made its actual decision."(*Harris, supra*, 56 Cal.4th at 224, original italics.)

Jury Instruction 4604 clearly sets forth the "same decision affirmative defense" that applies only in a "mixed-motive case." The Jury Instruction relies on *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239. In *Harris*, this Court held,

> In FEHA employment discrimination cases **that do not involve mixed motives**, we have adopted the three-stage burden-shifting test established by [*McDonnell Douglas*]. As explained in [*Guz*], a plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. . . .
>
> The framework above presupposes that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate. By hinging liability on whether the employer's proffered reason for taking the action is genuine or pretextual, **the *McDonnell Douglas* inquiry aims to ferret out the "true" reason for the employer's action**. **In a mixed-motives case, however, there is no single "true" reason for the employer's action**.

(*Harris* at 214-215 [emphasis added].)

In other words, the *Harris* decision establishes that the burden-shifting process of *McDonnell Douglas* remains the method for "ferreting out" the true reasons for an employer's actions at summary judgment. If, however, the plaintiff survives summary judgment and then proves retaliation by a preponderance of the evidence at trial, the employer may still attempt to show that it would have made the same decision *despite* having a discriminatory or retaliatory motive that contributed to the adverse employment action. Section 1102.6 merely provides that this mixed motive defense, also known as a "same decision defense,"[5] requires the employer to satisfy a more rigorous burden of proof by "clear and convincing evidence" where the employer claims that it would have taken the same actions even if it had not been improperly motivated.

Put another way, Section 1102.6 is only implicated when the plaintiff has already survived summary judgment and persuaded the jury that retaliation was a contributing factor in the adverse action (*i.e.*, that the employer's stated "legitimate non-retaliatory reason" for the adverse action *was* pretextual), giving the employer an opportunity to prove by clear and convincing evidence that the adverse action would have occurred

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[5] One report in the legislative history of SB 777 (the bill enacting Section 1102.6) describes one function of the bill as "Codification of a 'Same-Decision' Defense for Employers." (California Bill Analysis, Assembly Committee on Judiciary, 2003-2004 Regular Session, Senate Bill 777, June 17, 2003, p. 3.) A copy of this report is available on Westlaw and at www.leginfo.legislature.ca.gov.

notwithstanding the improper motive. Because Lawson did not offer evidence undermining PPG's proffered reasons for its decision as pretext for retaliation, however, the trial court properly granted PPG's motion for summary judgment without even needing to consider how Section 1102.6 might be implicated at trial to provide PPG with an affirmative defense (now subject to a heightened burden) in the event the jury found that Lawson met his burden to demonstrate retaliation by a preponderance of the evidence.

III. Nothing in Section 1102.6's Legislative History Implies a Departure From the Application of *McDonnell Douglas* at Summary Judgment.

A. The Legislative History Shows the Legislature Was Not Trying to "Replace" the *McDonnell Douglas* Framework for Summary Judgment.

Lawson mentions summary judgment once in his entire argument, where he states, "As stated by the Ninth Circuit, the district court's application of section 1102.6 in lieu of the *McDonnell Douglas* framework would enable Lawson to defeat PPG's motion for summary judgment." (Op. Br. pp. 15-16.) But the point of Section 1102.6 is not to enable plaintiffs to defeat motions for summary judgment. Rather, it is to heighten a defendant's burden of proof *on its own defense* when it asserts that *even though* the employee's protected activity was a "contributing factor" to adverse employment action, the employer would have taken that action in the absence of a retaliatory motive. Accordingly, the legislative material quoted by Lawson (Op. Br. at 14) is consistent with PPG's approach, as it states that

under the *then-existing law*, "***after a plaintiff shows by a preponderance of evidence** that the action taken by the employer is proscribed by the whistleblower statute*, the burden shifts to the employer to show by a preponderance of the evidence that the alleged action would have occurred for legitimate, independent reasons . . ." (*Id.*, emphasis added.) **Crucially, that statement of "existing law" is not a repudiation of the *McDonnell Douglas* burden-shifting standard**. The Senate's report states that "existing law" requires a plaintiff to prove his case by a preponderance of the evidence before "the burden shifts to the employer to show by a preponderance of the evidence that the alleged action would have occurred for legitimate, independent reasons." However, "the requisite level of proof necessary for a plaintiff to establish a *prima facie* Title VII case at the summary judgment stage [under the *McDonnell Douglas* standard] 'is minimal and does not even need to rise to the level of a preponderance of the evidence,'. . ." (*Weil v. Citizens Telecom Servs. Co., LLC* (9th Cir. 2019) 922 F.3d 993, 1003.) The *McDonnell Douglas* burden-shifting mechanism also does not require an employee to prove retaliation *by a preponderance of the evidence* as the first step, nor does it require an employer to prove a legitimate non-discriminatory reason *by a preponderance of the evidence* to avoid liability. Rather, with the *McDonnell Douglas* test, the burden of persuasion stays with the plaintiff throughout, and the employer carries its

burden by *producing* a legitimate reason for the adverse action. (*Texas Dep't of Cmty. Affairs v. Burdine* (1981) 450 U.S. 248, 254.)

On the other hand, at the time of this legislation, the employer *did* have the burden of proof (by a preponderance of the evidence) for a "same decision" defense, as shown in *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379, which was decided a year prior to Section 1102.6's enactment, and stated, "[o]nce the [employee] establishes . . . that an illegitimate factor played a motivating or substantial role in an employment decision, **the burden falls to the [employer] to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account**" [emphasis added].

Thus, the existing law that the legislature sought to change was not the use of *McDonnell Douglas* at summary judgment, but the burden of proof for the employer's same decision affirmative defense; raising it from the preponderance of the evidence standard identified in *Grant-Burton*, to the clear and convincing standard adopted by Section 1102.6.[6]

[6] This change makes intuitive sense, as the legislature did not want to let a proven retaliatory employer off the hook in the absence of very compelling evidence. What does *not* make intuitive sense is permitting an employee who was *not* retaliated against to get a trial in the absence of *any* evidence that the employer's legitimate reason for the termination was a pretext.

B. The Legislature Intended Section 1102.6 to Raise Defendant's Burden of Proof on Its Defense From a "Preponderance" to a "Clear and Convincing" Standard, Not to Lower Plaintiff's Burden.

The legislative history must be considered *as a whole*, or it should not be considered at all. (*See Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30 ["Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole*."] [emphasis in original].) While Lawson cites to a report from the California Senate dated August 18, 2003, that same day the California Assembly issued its own bill analysis of Section 1102.6, stating among the effects of the bill:

> 4) ***Provides an affirmative defense*** **against retaliation claims**, ***even when*** **the employee demonstrates that a proscribed activity was a contributing factor to the adverse employment action**, if employer shows by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons.

(California Bill Analysis, Assembly Floor, 2003-2004 Regular Session, Senate Bill 777, August 18, 2003, p. 1 [emphases added].)[7]

Further, in the Analysis of Senate Bill 777 prepared for the Senate Judiciary Committee, the legislature was presented with the following

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[7] This legislative report is available on Westlaw and at www.leginfo.legislature.ca.gov.

discussion under the header "**Standard of proof in whistleblower suit is raised**":

> c. Standard of proof in whistleblower suit is raised
>
> According to the proponents, one of the problems encountered in civil actions or administrative proceedings where an employee was retaliated against or discharged for whistleblowing activities is the standard of proof used by the courts. The rule has been, in California and in most states, that after the employee makes a showing, by a preponderance of evidence, that an employer's adverse action is prohibited under Section 1102.5, the burden shifts to the employer to show, by a preponderance of evidence, that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in whistleblowing activities. This, proponents state, has made it almost impossible for whistleblowers to win a challenged whistleblower lawsuit under Section 1102.5.

(California Bill Analysis, Senate Judiciary Committee, 2003-2004 Regular Session, Senate Bill 777, April 8, 2003, p. 5.)[8]

Accordingly, Lawson's presentation of the legislative history is a selective one. The legislative history belies the notion that the legislature intended to "replace" the *McDonnell Douglas* burden-shifting, as opposed to augmenting the already-existing "same decision" affirmative defense. Even if the Senate report cited by Lawson supported his position, and it does not

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[8] This legislative report is available on Westlaw. Additionally, for the Court and parties' convenience, a copy is attached hereto as Exhibit A.

for the reasons discussed above, the identification of Section 1102.6 as an affirmative defense, as well as the intention to raise the burden of proof on that defense, is clearly in the legislative record and cannot be ignored. (*See Kaufman*, 133 Cal.App.4th at 30.)

Accordingly, if Lawson cannot raise a triable issue of fact to carry *his* burden for a Section 1102.5 claim, there is no reason for a trial. If Lawson cannot even raise a triable issue in the face of a legitimate, non-retaliatory reason for termination, then no reasonable jury could find that Lawson proved retaliation by a preponderance of the evidence, which is the plaintiff's predicate burden in Section 1102.6.

Even if the Court believed Section 1102.6 supplanted the *McDonnell Douglas* mechanism adopted in *Guz* and *Yanowitz*, this Court should also underscore that plaintiff's burden to "demonstrate[] by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor" requires more than a "prima facie" showing as articulated in *McDonnell Douglas*.[9]

[9] *See Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-355 [100 Cal.Rptr.2d 352, 8 P.3d 1089] ["At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled."].

IV. Use of the *McDonnell Douglas* Burden-Shifting Procedure at Summary Judgment Is Consistent with the Application of Section 1102.6 at Trial Because it Is the Best Measure of Whether an Employee Can Meet His Preliminary Burden at Trial (*i.e.*, Whether the Employee's Claim Should Survive Summary Judgment).

Contrary to Lawson's argument, there is nothing inconsistent between the use of the *McDonnell Douglas* burden shifting analysis at summary judgment with the application of Section 1102.6 at trial. If a plaintiff-employee cannot survive summary judgment under the *McDonnell Douglas* burden shifting analysis, then there is no basis for the trial court to conclude the plaintiff-employee could meet his burden under Section 1102.5 at trial. And, until a plaintiff-employee meets his evidentiary burden under Section 1102.5 at trial, the defendant-employer's affirmative defense – and corresponding evidentiary burden – under Section 1102.6 is not implicated.

A. The Purpose of the *McDonnell Douglas* Burden-Shifting Analysis Is to Determine the Employer's Intent.

As noted by this Court, "the *McDonnell Douglas* inquiry aims to ferret out the 'true' reason for the employer's action." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215.) This Court has also remarked, "by successive steps of increasingly narrow focus, the [*McDonnell Douglas*] test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz,* 24 Cal. 4th at 354.)

Under the *McDonnell Douglas* test applied at summary judgment, the plaintiff bears the initial burden (of production, not persuasion) to establish a prima facie case of discrimination. (*Id.*) If the plaintiff establishes a prima facie case, a presumption of discrimination arises. (*Id.* at 355.) At that point, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to raise "a genuine issue of fact" and to "justify a judgment for the employer," that its action was taken for a legitimate, nondiscriminatory reason. (*Id.* at 355-56.) The "legitimate" reasons "in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*." (*Id.* at 358 [italics in original].) If the employer sustains this burden (again, of production, not persuasion), the presumption of discrimination disappears. (*Id.* at 356.) Then the plaintiff will have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. (*Id.*) Evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. (*Id.*) Ultimately, "an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational

inference that the employer's actual motive was discriminatory." (*Id.* at 361.)[10]

B. This Court Adopted the *McDonnell Douglas* Burden-Shifting Analysis to Determine Intentional Retaliation.

Importantly, this Court has applied the *McDonnell Douglas* burden-shifting analysis on summary judgment to retaliation claims under the Fair Employment and Housing Act (FEHA). (*Yanowitz,* 36 Cal.4th at 1042.) Similarly, California appellate courts have applied the *McDonnell Douglas* burden-shifting analysis on summary judgment to retaliation claims based on the California Family Rights Act. (*Choochagi v. Barracuda Networks, Inc.* (2020) 60 Cal.App.5th 444, 458; *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248-250.) This makes sense, because the ultimate issue in a retaliation claim is the same as the ultimate issue in a discrimination case: the employer's intent. California courts have consistently employed the *McDonnell Douglas* analysis to determine employer intent. (*Guz*, 24 Cal. 4th at 354.)

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[10] Lawson devotes a section of his brief to discussing the application of *McDonnell Douglas* in federal court. *See* Op. Brief, p. 17, Section III. Though PPG disagrees with Lawson's assertions (*see Snead v. Metropolitan Prop. & Cas. Ins. Co.* (9th Cir. 2001) 237 F.3d 1080, 1094 ["when entertaining motions for summary judgment in employment discrimination cases arising under state law, federal courts sitting in diversity must apply the *McDonnell Douglas* burden-shifting scheme as a federal procedural rule"]), it notes that this Court did not certify a question of federal procedural law, so this argument is irrelevant.

C. The Burden-Shifting Analysis in *McDonnell Douglas* Establishes Intent, or Lack Thereof, Prior to Application of a "Same Decision" Defense.

The *McDonnell Douglas* burden-shifting analysis and the affirmative defense in Section 1102.6 are easily reconciled simply by performing the *McDonnell Douglas* test *first*. The *McDonnell Douglas* analysis at summary judgment remains unchanged by the introduction of Section 1102.6. Assuming the plaintiff-employee gets to trial and proves retaliation, the defendant-employer *then* bears the burden of proving that it would have made the "same decision" notwithstanding a retaliatory motive. This approach is consistent with a number of authorities stating that employers are permitted to present this defense **at trial** after the plaintiff-employee established liability (which might also be done at trial through the use of the *McDonnell Douglas* burden-shifting).

For example, in a "failure to hire" case arising under the Civil Rights Act, *Ruggles v. Cal. Polytechnic State Univ.* (9th Cir. 1986) 797 F.2d 782, the Ninth Circuit Court of Appeal set forth the following analysis for Title VII retaliation claims *at trial*. After walking through a traditional *McDonnell Douglas* analysis, the Court confirmed that at trial, the plaintiff had the burden to "prove by a preponderance of the evidence" that the adverse employment decision was the product of retaliatory intent. Once that plaintiff met his evidentiary burden at trial, the *Ruggles* court then introduced the potential for an affirmative defense: "**[t]he defendant may rebut this**

presumption by showing by a preponderance of the evidence that the adverse action would have been taken even in the absence of discriminatory or retaliatory intent." (*Id.* [emphasis added].) That is exactly how Section 1102.6 should apply: after the employee *proves at trial* that the employer's legitimate, non-retaliatory reason for its actions were pretextual, the employer still may establish a "same-decision" defense, but it bears the heightened burden of proof by clear and convincing evidence.

Similarly, in *Chen v. General Accounting Office* (D.C. Cir. 1987) 821 F.2d 732, the D.C. Circuit Court of Appeals confirmed that at trial, the *McDonnell Douglas* test would apply, followed by consideration of a defense very similar to Section 1102.6 as a final step after the plaintiff-employee establishes liability:

> The petitioner must make out a prima facie case of retaliation before the case may proceed and before the employer must make any showing whatsoever. Once that prima facie case is made, however, the burden of coming forward shifts to the employer to demonstrate a legitimate, non-retaliatory reason for the adverse action against the plaintiff, in this case, the denial of a within-grade salary increase followed by discharge. If the employer fulfills that burden, the employee must then come forward and show, by preponderance of the evidence, that the employer's articulated rationale for the allegedly retaliatory action, is pretextual. **Finally, in most situations, the employer is permitted one last defense: by clear and convincing evidence, the defendant must prove that the plaintiff would have been fired anyways, even absent retaliation.**

(*Chen v. General Accounting Office* (D.C. Cir. June 26, 1987) 821 F.2d 732, 738-739 [emphasis added].)[11]

The *Chen* court's approach is precisely the one this Court should use when applying Section 1102.6. *After* the plaintiff-employee proves retaliation **at trial**, the defense is *then* introduced.

This construction of the statute is supported not only by a plain reading of the statutory language, but also by the jury instructions, precedents addressing the "same decision" defense in mixed-motive cases at trial, and precedents espousing the usefulness of *McDonnell Douglas* for determining intent. The purpose of Section 1102.6 was to heighten an employer's burden in establishing its defense after retaliation has been proved. Application of the *McDonnell Douglas* burden-shifting analysis prior to examining the defense set forth in Section 1102.6 is consistent with Section 1102.6's heightened burden for a defendant asserting the "same decision" defense.

[11] *See also Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 117 ["If the plaintiff has made a showing of 'pretext,' the defendant employer must then demonstrate by clear and convincing evidence that the plaintiff would have lost his job anyway absent retaliation for the plaintiff's participation in protected conduct. This standard is plainly correct, as it not at all precludes a finding of a Title VII violation when an employer acts from mixed motives."]; *Childers v. Slater* (D.D.C. March 22, 1999) 44 F. Supp. 2d 8, 15-16 ["Should the defendant meet its burden, the plaintiff must prove that the employer's proffered reasons are a pretext for discrimination. The D.C. Circuit has additionally held that 'in most situations, the employer is permitted one last defense: by clear and convincing evidence, the defendant must prove that plaintiff would have been subjected to the adverse action anyway, even absent retaliation.'"].

There is no reason to assume that Section 1102.6 was intended to *replace* the *McDonnell Douglas* approach, rather than revise the "final step" with a heightened burden of clear and convincing evidence rather than a preponderance of evidence.

V. The Facts of This Case Demonstrate the Need for the Burden Shifting Procedure in *McDonnell Douglas* at Summary Judgment.

In this case, it is clear that Lawson did *not* "demonstrate[] by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor" to his termination. (*See* Section 1102.6.) Indeed, the District Court concluded that Lawson could raise no triable issues to dispute the legitimate, performance-based reason for the termination of his employment. (*See Lawson*, 2019 WL 3308827, at *4.) He showed no direct evidence of retaliation. (*Id.*) He could not dispute that he had poor sales numbers and received poor market walk scores both before and after his alleged protected activity. (*Id.*) He showed no evidence of any inconsistencies in or deviation from the application of PPG's policies. (*Id.* at *5.) He showed no conflict in PPG's reasoning for his termination. (*Id.*) Due to these failures of proof, **no reasonable jury could find that he experienced retaliation**, because he had nothing more than speculation to suggest that PPG acted with retaliatory intent.

To get to trial on a Section 1102.5 claim, plaintiff must *at least* be able to provide evidence raising a *rational inference* that he was subject to

retaliation. And a "rational inference" is exactly what the *McDonnell Douglas* test is designed to yield at the summary judgment stage. (*Arnold v. Dignity Health* (2020) 53 Cal.App.5th 412, 423-426 [266 Cal.Rptr.3d 253].) "[S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a *rational inference* that discrimination occurred." (*Guz,* 24 Cal.4th at 362 [italics added]; *see also Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 377 [summarizing *McDonnell Douglas* analysis, "A plaintiff's burden is, as stated above, to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a substantial motivating factor in the employer's actions toward the plaintiff"]; *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388-389 [48 Cal.Rptr.3d 313] ["the employee 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence *infer* 'that the employer did not act for the asserted non-discriminatory reasons'"], italics added.)

In this action, permitting Lawson to proceed to trial in the absence of any substantive, non-speculative evidence of intentional retaliation would be

absurd. The mere fact that an employee engages in a protected activity should not end the at-will nature of his employment. (*See* Cal. Lab. Code, § 2922.) Where a manager *might have* known about protected activity but terminates an employee for justified performance reasons, in the absence of any real evidence of retaliation, a rational jury could not find for the terminated employee merely because the manager might have known of the protected activity. (*Kortan v. California* (C.D. Cal. 1998) 5 F.Supp.2d 843, 854 [where employee produced no additional evidence to show that any of the proffered non-retaliatory reasons was pretextual, "no rational juror could find for the plaintiff on the retaliation claim"].) The District Court correctly concluded that Lawson should not be permitted a trial since he could not raise a rational inference of retaliation, that is, some evidence that PPG's legitimate, non-retaliatory explanation for its actions was pretextual.

VI. A Ruling in Lawson's Favor Will Not Advance the Policy Behind Section 1102.5.

No purpose of Section 1102.5 is served by permitting the trial of meritless retaliation claims. That cannot be the goal of Section 1102.6, as such a rationale would be absurd. (*Barragan v. Superior Court* (2007) 148 Cal.App.4th 1478, 1484 ["Courts do not interpret statutes in a manner that results in absurd consequences that could not have been intended by the Legislature."].) As described above, the goal of Section 1102.6 is to ensure that where employees can prove they *actually suffered retaliation*, an

employer must make a more robust showing if it claims that the employee would have been terminated *notwithstanding* the retaliatory motive. Again, this defense applies to a "mixed motive," and Section 1102.6 will require an employer to meet a higher burden *for that defense*.

Lawson's interpretation, applied to all retaliation claims across the board, will *only* send more meritless claims to trial, as it ignores the employee's burden of proof under Section 1102.6, and places a nearly impossible burden on defendants for summary judgment purposes. And that is what Lawson hopes every court will do—give plaintiff-employees a free pass straight to trial on Section 1102.5 claims. Lawson's interpretation of Section 1102.6 does not serve its purpose or its language, as it ignores his own burden of proof and promotes unnecessary trials.[12]

This Court should not interpret Section 1102.6 as a practical bar to summary judgment for meritless Section 1102.5 claims. Where an employer proves that it had a legitimate, non-retaliatory reason for terminating an employee, that employee should not be permitted a trial in the absence of

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[12] Even if this Court does apply Section 1102.6 to all retaliation claims across the board, that should not mean, as Lawson assumes, that Lawson's claim should go to trial. Lawson's burden in Section 1102.6—to show by a preponderance of evidence that the employer engaged in a retaliatory adverse employment action—is higher than the prima facie showing required under *McDonnell Douglas*. The enactment of Section 1102.6 did not alleviate Lawson of any evidentiary burden previously belonging to him. Lawson failed to meet that burden.

evidence that the non-retaliatory reason was a pretext for intentional retaliation, or that the employer otherwise intentionally retaliated against the employee.

This Court has repeatedly invoked the *McDonnell Douglas* burden-shifting process because it is the best way to determine if a plaintiff can prove by a preponderance of the evidence that he or she suffered an adverse employment action based on intentional retaliation. If the plaintiff cannot do so, Section 1102.6 is not implicated. Consistent with its history, the Court should affirm the *McDonnell Douglas* approach on motions for summary judgment of Section 1102.5 claims.

CONCLUSION

Because the language of Section 1102.6 requires plaintiff employees to meet a burden of proof by preponderance of the evidence, and the *McDonnell Douglas* burden-shifting process is the best way to measure a plaintiff's ability to meet their burden at summary judgment, this Court should reaffirm the burden-shifting process for Section 1102.5 claims notwithstanding Section 1102.6.

Dated: May 13, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

In accordance with rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that this Answering Brief on the Merits contains 7,717 words, as determined by the word processing system used to prepare this brief, excluding the cover information, the tables, the signature block, the attachment, and this certificate.

Dated: May 13, 2021

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EXHIBIT A

CA B. An., S.B. 777 Sen., 4/08/2003

California Bill Analysis, Senate Committee, 2003-2004 Regular Session, Senate Bill 777

April 8, 2003
California Senate
2003-2004 Regular Session

SENATE JUDICIARY COMMITTEE

Martha M. Escutia, Chair

2003-2004 Regular Session

SB 777

Senator Escutia

As Introduced

Hearing Date: April 8, 2003

Labor Code

GMO:cjt

SUBJECT

Whistleblower Protections

DESCRIPTION

This bill would:

1) Expand protections for whistleblowers by prohibiting an employer from retaliating against an employee for refusing to participate in illegal employer activity or for having been a whistleblower in any former employment, and by imposing a new civil penalty of up to $10,000 per violation if the employer is a corporation or limited liability company (LLC);

2) Provide that in a civil action or an administrative proceeding pursuant to the whistleblower statute, once the employee has demonstrated by preponderance of the evidence that a proscribed activity was a contributing factor to the adverse employer action, the employer must show by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons even if the employee did not engage in whistleblowing;

3) Create a whistleblower hotline in the Attorney General's office and require employers to post at the workplace a notice of employee's rights and responsibilities under the whistleblower laws, including the Attorney General's whistleblower hotline number;

4) Impose civil penalties of up to $10,000 on an officer or director of a corporation or member of an LLC and up to $5,000 on a financial manager of a corporation or LLC for failing to disclose to the Attorney General within 15 days of actual knowledge that the corporation or LLC, officer, director, member, manager or its agent is engaging or has engaged in specified finance-related activity intended to give a greater or lesser value of the company than it possesses or to deceive a regulatory agency;

5) Impose a civil penalty of up to $1,000,000 on a corporation or LLC for failing both to disclose to the Attorney General and to warn its shareholders and/or investors within 15 days of actual knowledge that the corporation or LLC, officer, director, member, manager or its agent is engaging or has engaged in specified finance-related activity intended to give a greater or lesser value of the company than it possesses or to deceive a regulatory agency.

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The provisions for civil penalties would not apply:

where a disclosure by an officer or director of a corporation, or LLC member, would violate client-lawyer privilege; or

where the corporation, LLC, or officer, director, LLC member, or manager reasonably believed in good faith that notification to an appropriate agency was in compliance; or

where disclosure would affect Fifth Amendment rights against self-incrimination of an officer, director, LLC member, or manager;

the wrongful or inappropriate conduct to be reported was abated within 15 days of actual knowledge of the wrongful or inappropriate conduct.

The bill would apply only to corporations and LLCs that are required to register securities with the Securities and Exchange Commission and are publicly traded on a stock exchange.

The bill would clarify that under the whistleblower statute, a report made by a government employee to his or her agency is a disclosure of information made to a government or law enforcement agency, thus codifying Gardenhire v. City of Los Angeles Housing Authority (2000) 85 Cal. App.4th 236.

BACKGROUND

Except for two provisions and some clarifying changes, this bill is identical to SB 783 (Escutia, 2002). SB 783 contained the entire language of SB 1452 (Escutia, 2002), which was passed by this Committee and the Senate prior to the summer recess. SB 783 was vetoed by the Governor, with a message that he would sign legislation this year that would incorporate all of the components of SB 783, except for the provision imposing civil liability on "individuals who did not actually commit the wrongful act themselves." The Governor's veto message specifically objected to the civil liability of officers, directors and managers of corporations and members of limited liability companies for failing to report certain activities to the Attorney General or the shareholders.

Between the time SB 1452 was heard in this Committee and the enrollment of SB 783 to the Governor, Congress enacted the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley addressed accounting industry reform and oversight, some corporate governance and financial reporting issues, and increased the penalties for criminal conduct by executives. Comparison of SB 777 and the Sarbanes Oxley Act is further detailed in Comment 5.

The sponsor of this bill, the Foundation for Taxpayer and Consumer Rights, contends that while the Sarbanes-Oxley Act addresses major corporate accounting and reporting problems, the Act imposes penalties on corporate executives mostly for actions related to SEC filings and, where fraud is involved, only after damage has been done to shareholders, investors and employees. The sponsor states that SB 777 is needed in order to prevent the kind of damage to shareholders, investors, employees and the market that Enron and WorldCom, and now HealthSouth (see Comment 1) continue to cause.

CHANGES TO EXISTING LAW

1. Existing law prohibits an employer from adopting or enforcing any rule, regulation, or policy that prevents an employee from disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal law or regulation. [Labor Code Section 1102.5(a). All references are to the Labor Code, unless otherwise indicated.] This statute is commonly known as the "Whistleblower Protection Statute" or "whistleblower statute."

Existing law prohibits an employer from retaliating against an employee for making these disclosures. [Section 1102.5(b).]

This bill would provide that an employer may not retaliate against an employee for refusing to participate in illegal activity or activity that may result in violations of state or federal statute or regulation.

This bill would provide that an employer may not retaliate against an employee for having exercised his or her whistleblower rights in any former employment.

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2. Existing law, for purposes of the above provisions, defines an "employee" to include persons who are employed by a state agency or its political subdivisions, a county or city and county, municipal or public corporation or political subdivision, a school district or community college district, or the University of California. [Section 1106.]

This bill would provide that for government agency employees, reporting by the employee to the employer shall be deemed reporting to a government agency.

3. Under existing law, a violation of Section 1102.5 (the whistleblower protection statute) as well as other prohibited employer activity, is a misdemeanor, punishable by imprisonment of up to one year or a fine of up to $1,000 in the case of an individual and up to $5,000 in the case of a corporation, or both imprisonment and fine. [Section 1103.]

This bill would make an employer that is a corporation or limited liability company liable for a civil penalty not exceeding $10,000 for each violation.

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

This bill would instead require the employer to make that showing by clear and convincing evidence.

5. This bill would require the Attorney General to maintain a whistleblower hotline to receive calls about possible violations of state or federal statutes, rules or regulations, or violations of fiduciary responsibility by a corporation or LLC to its shareholders, investors or employees.

This bill would require the AG to refer calls received on the whistleblower hotline to the appropriate government authority for review and possible investigation, and to hold in confidence information disclosed through the hotline.

This bill would require an employer to display at the workplace a notice of an employee's rights and responsibilities under the whistleblower statutes, including the number of the Attorney General's whistleblower hotline.

6. Existing federal law, the Sarbanes-Oxley Act of 2002, imposes severe criminal penalties on various corporate fraud-related activities, including a provision for a maximum 25-year sentence and substantial fines for knowingly executing a scheme to defraud persons in connection with any security.

This bill would make an officer or director of a corporation or a member of a limited liability company, liable for a civil penalty of up to $10,000 per violation, and a manager responsible for financial transactions in a corporation liable for a civil penalty of up to $5,000 per violation, to actually know and then to fail to notify the Attorney General or appropriate government agency within 15 days of acquiring that knowledge of specified improper activity by the corporation or LLC, an officer or director, or a LLC member, or agent.

This bill would make a corporation or LLC liable for a civil penalty of up to $1,000,000 per violation for similar knowledge and inaction, including the failure to warn shareholders and investors in writing.

This bill would not require disclosure if the wrongful conduct is abated within the time period for reporting (15 days).

This bill would provide that the penalties would not apply for a failure to duly notify the Attorney General or appropriate government agency if the person has actual knowledge that the Attorney General or appropriate government agency has been notified, and, in the case of a corporation or LLC, that shareholders and investors have been warned. Further, no penalties would apply for the failure to duly notify the Attorney General if the corporation or LLC, officer, director, LLC member, or manager notified an appropriate governmental agency and reasonably and in good faith believed that such notification was compliance.

This bill would apply only to corporations and limited liability companies that are required to register securities with the United States Securities and Exchange Commission and are publicly traded on a stock exchange.

This bill would provide that the duty to disclose information is not intended to affect the Fifth Amendment right against self-incrimination of an officer or director of a corporation, LLC member, or financial manager, nor would it require a person to violate lawyer-client privilege.

This bill would provide that a civil action to assess the civil penalties under this bill may be brought by the Attorney General, a district attorney or a city attorney in the name of the people of the state.

COMMENT

1. Need for the bill

The sponsor of the bill, the Foundation for Taxpayer and Consumer Rights, states that if enacted, SB 777 would be the strongest whistleblower protection and corporate accountability law in the nation.

According to the sponsor, "while little can be heard above the din of war coverage, day after day, [newspaper] business sections around the country report new stories of corporate chicanery and financial fraud. Time and again, however, the information comes too late to prevent the damage and protect workers, pensioners, investors, and others hurt by corporate fraud and misbehavior." Besides last year's major corporate newsmakers, they cite recent cases involving firings and guilty pleas from top executives of healthcare giant HealthSouth that surfaced only after more than a billion dollars' worth of accounting fraud was discovered, and "accounting trickery at an El Segundo, California-based technology firm [that] may cost retirees and other investors tens of millions of dollars."

The sponsor and other supporters of the bill state that despite passage of the Sarbanes-Oxley Act of 2002, these stories of corporate wrongdoing continue to surface because the new law largely ignored the invaluable role played by whistleblowers and the importance of requiring corporations to disclose fraud as soon as it becomes apparent. "Without an effective early warning system in place, the public cannot effectively preempt the devastation that comes with corporate fraud." SB 777, proponents hope, would give California an "early warning system."

2. SB 777 compared to enrolled version of SB 783/SB 1452

As stated above, SB 777 differs in only two respects from SB 1452, the bill passed by this Committee last year that was later amended into and became SB 783, which was enrolled to the Governor together with several other bills dealing with corporate responsibility:

a) the standard of proof to be applied in a civil action or administrative proceeding under the whistleblower statute is changed from "preponderance of evidence" to "clear and convincing evidence" for the employer to demonstrate that the alleged proscribed action would have been taken for other independent, legitimate reasons (see Comment 3c); and

b) the civil liability of corporate officers and directors and LLC members is

reduced to $10,000, and to $5,000 for managers. (See Comment 5a.)

3. Expansion of whistleblower protections

a. Employer retaliation prohibited

In 1984 the Legislature enacted Labor Code Section 1102.5, commonly known as the "whistleblower protection statute" or "whistleblower statute." In 1992, AB 3486 (Friedman, Chapter 1230, Statutes of 1992) included employees of the state and its subdivisions and other public agencies under the protective umbrella of Section 1102.5.

Section 1102.5 prohibits an employer from adopting or enforcing any rule that prevents an employee from disclosing information to a government or law enforcement agency where the employer has reason to believe that the information discloses a violation of state or federal law or regulation. The law also prohibits an employer from retaliating against an employee for making these disclosures.

SB 777 would expand the protections of the whistleblower statute to employees who refuse to participate in employer activity that is in violation of state or federal law or rule or regulation, or who exercised his or her whistleblower rights in a former employment.

Under SB 777, an employee would not have to be an actual whistleblower, but could have simply refused to participate in the improper activities to be protected under the proposed change. Thus, Sharon Watkins, the former Enron employee who blew the whistle on Enron, for example, may not be retaliated against, or treated differently or in a negative way, by a new employer because of blowing the whistle on top Enron executives who knew of questionable activities the company engaged in that affected the value of the company in the marketplace.

This bill also would codify the appellate court's ruling in Gardenhire v. City of Los Angeles Housing Authority, supra, that a government employee who has made a disclosure to his or her employing agency is deemed to have made the disclosure to a government or law enforcement agency under the whistleblower statute. Thus, a Department of Insurance employee's report of inappropriate activities at the department, for example, to his or her superior at the department would be deemed to be a protected whistleblower activity under this bill (but note that disclosures made by government attorneys regarding their agency-clients are covered by ethics rules governing attorneys generally and would probably be subject to other rules).

b. Additional civil penalty for corporate employers

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A violation of the whistleblower statute and other prohibited employer activities under the Labor Code is a misdemeanor, punishable by imprisonment in county jail for up to one year or a fine of up to $1,000 in the case of an individual or a fine of up to $5,000 in the case of a corporation, or both imprisonment and fine. [Sec. 1103.]

This bill would add a civil penalty, assessable against corporate employers only, of up to $10,000 for each violation of the whistleblower statute. This new civil penalty, according to proponents, would add a measure of deterrence to the whistleblower's corporate employer, because the standard of proof that would be required for a civil penalty would be less than the "beyond a reasonable doubt" required for the misdemeanor penalty under Section 1103. The usual standard of proof for prosecuting a civil penalty is "preponderance of the evidence," unless a statute specifically states otherwise. [Evidence Code Sections 115,160, 500.]

c. Standard of proof in whistleblower suit is raised

According to proponents, one of the problems encountered in civil actions or administrative proceedings where an employee was retaliated against or discharged for whistleblowing activities is the standard of proof used by the courts. The rule has been, in California and in most states, that after the employee makes a showing, by preponderance of evidence, that an employer's adverse action is prohibited under Section 1102.5, the burden shifts to the employer to show, by preponderance of evidence, that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in whistleblowing activities. This, proponents state, has made it almost impossible for whistleblowers to win a challenged whistleblower lawsuit under Section 1102.5.

SB 777 would raise the standard of proof required for the employer to overcome the employees showing to proof by clear and convincing evidence.

By raising the standard of proof that the employer must meet, potential whistleblowers, proponents state, would find a safer haven, encourage reporting, and thus foster the early detection of financial fraud by a company.

This standard is currently in use by some jurisdictions, the District of Columbia, for example. Proponents state that national watchdog organizations are encouraging other states to enact the same change to their whistleblowing statutes.

d. Notice re: employee whistleblower rights and responsibilities, hotline number

This bill would require an employer to post a notice, in 14-point pica type, of an employee's rights and responsibilities under the whistleblower statute, including the Whistleblower Hotline number in the Attorney General's office. (For a discussion of the hotline, see Comment 4.)

The notice, proponents contend, would alert employees to their rights under the whistleblower statute and encourage those who would otherwise be dissuaded by fears of retaliation to make relevant and substantive reports. Hopefully, they say, reports on this hotline will lead to substantive changes in the workplace or the prevention of Enron-type situations from occurring again. Specific notice of the employee's responsibilities would also give fair notice to employees and encourage them to act.

4. Whistleblower hotline in the Attorney General's office

This bill would establish a Whistleblower Hotline in the Attorney General's office. The hotline is for persons who have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company (LLC) to its shareholders, investors, or employees. It is expected that this hotline would be used mainly by persons who would have no obligation to report under another section of this bill (see Comment 5, regarding obligation of officers, directors, and managers to report to the Attorney General).

So that the Attorney General (AG) would not be burdened with having to investigate every call received on the hotline, SB 777 gives the AG the authority to refer any call to an appropriate authority, including to itself, for review and possible investigation. Any information disclosed through the hotline would be held in confidence by the AG or the appropriate agency to whom the call may have been referred, during the initial review of the call. The information held confidential would include the name of the caller and the name of the employer. Thus, this hotline would not process anonymous calls.

The sponsor states that this is an extremely important component of a multi-pronged approach to the Enron-type situations that seem to pervade corporations in these times. As examples, they cite numerous emails posted on the Enron Message Board, recovered only after Enron filed for bankruptcy. One email, published in an article by James Felton, Associate Professor of Finance, Central Michigan University, in the Journal of Investing, states:

"It will soon be revealed that Enron is nothing more than a house of cards that will implode before anyone realizes what happened. Enron has been cooking the books with smoke and mirrors. The Enron executives have been operating an elaborate con scheme that has fooled even the most sophisticated analysts. When the truth is uncovered, those analysts and ENE

investors will feel like a raped school girl. The first sign of trouble will be an earnings shortfall followed by more warnings. Criminal charges will be brought against ENE executives for their misdeeds. Class action lawsuits will complete the demise of ENE."

This email was number 11,460 on the message board, dated April 12, 2001, written by someone called "enron is a scam" and titled "Enron will soon collapse."

"ENE the virtual company. Profits for 10 years forward being taken in current years. When you shake it down what do you have? The paper mache company."

This was email number 238 from JanisJoplin298, dated June 17, 1998.

"Dig deep behind the Enron financials and you'll see a growing mountain of off-balance sheet debt which will eventually swallow this company. There's a reason they layer so many subsidiaries and affiliates. Be careful."

This email was posted on March 1, 2000 by arthur86plz.

The sponsor states that if the Whistleblower Hotline were in place at the time, whoever wrote these emails could have called in, knowing that his or her identity would be confidential as well as Enron's, during a review and possible investigation by the Attorney General or the Department of Corporations. The anonymity provided by the email, together with the privacy of the message board posting, makes it unlikely that a government agency with oversight responsibility over corporate reporting and disclosures could have ever discovered these warnings and initiated any investigation or review, the sponsor contends.

Last year's SB 1452/SB 783 contained similar hotline provisions, deemed by the Appropriations Committee to generate only minimal costs.

5. Civil penalties for failure to disclose knowledge of specified activity that distorts value of business

Section 6 of this bill would provide for civil penalties assessable against a corporation or its officers and directors or a limited liability company (LLC) or its members, and against managers who are responsible for financial transactions of the corporation or LLC, for having actual knowledge and then failing to disclose that knowledge of specific activities and statements that distort the value of the company or its shares.

This part of SB 777 is similar to provisions of the Corporate Criminal Liability Act of 1990 (Penal Code Section 387), which makes it a felony to know about and fail to report a hidden danger in the workplace setting or a product. SB 777 however would impose only civil penalties on offending corporations or their officers and directors or limited liability companies and their members and managers.

a. For officers or directors of corporations, members of a limited liability company (LLC), or financial managers of a corporation or LLC

This bill would provide civil penalties of up to $10,000 for an officer or director of a corporation or a member of an LLC, and up to $5,000 for a manager responsible for financial transactions, for failing to make a disclosure to the Attorney General within 15 days of acquiring actual knowledge of specific improper activities of the corporation or LLC.

These specified activities are similar to those listed in Corporations Code Section 2254 and are related to material statements or omissions designed to give a distorted value to a company or its shares. Corporations Code Section 2254 is part of California's "blue skies" securities laws. Under SB 777, disclosure would be required if the corporation or its officers or directors, LLC or its members, or their agent:

i) is making or has made, published or concealed material facts about
the condition of the company that are false and intended to give the
company a greater or lesser apparent market value than it really
possesses, whether made orally, or by written or electronic
communication; or

ii) is refusing or has refused to make any book entry or post any notice as required by law; or

iii) is misstating or concealing or has misstated or concealed material facts in order to deceive or mislead a regulatory agency so as to avoid a regulatory or statutory duty or prohibition or limitation.

Under this bill, the duty to disclose would be excused if, within the 15-day period, the activity that creates a distorted value or deceives a regulatory agency was abated or the disclosure would violate a lawyer-client privilege. The latter provision was added to ensure that an officer or director of a corporation (or an LLC member) who is also legal counsel to the corporation or LLC would not be subject to the civil penalty when the lawyer-client privilege prevents him or her from making such a disclosure.

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Also, under this bill an officer or director or an LLC member or a financial manager would not be relieved of the duty to disclose to the Attorney General if another person is also obligated to make the same disclosure. This, according to the sponsor of the bill, is important in order to encourage all of those with actual knowledge of what is going on with the financial condition of the corporation or LLC to come forward with information. Thus, the AG or appropriate agency would have more information, rather than less, to work with in reviewing or investigating the disclosure.

b. For the corporation or LLC, a higher civil penalty

SB 777 would impose a civil penalty of up to $1 million per violation on a corporation or LLC that has actual knowledge of the same actions or information as described above and failed to do two things: (1) make the disclosure to the Attorney General in writing, and (2) warn its affected shareholders and investors in writing, unless the corporation or LLC has actual knowledge that the affected shareholders and investors have been warned.

Under the bill, the requirement to warn shareholders and investors is limited to the corporation or LLC, since it would have access to those who need to be warned and the facility for sending the warnings out.

This part of SB 777 is patterned after Section 387 of the Penal Code, which makes it a felony for a corporation to know about and then fail to report hidden dangers in the workplace or a product. That law, the only one of its kind in the country according to proponent Consumers Union (CU), has been used sparingly over the last twelve years since its enactment (only six times) and only in the most egregious cases of corporate wrongdoing. The CU believes that the existence of Penal Code Section 387 has had a deterrent effect on corporate crime. Therefore the group supports this bill as an "effort to prevent financial fraud before it grows large enough and serious enough to harm shareholders, pensioners, and consumers in the marketplace."

c. Limitations on liability for civil penalty

The bill limits applicability of the civil penalties imposed for failure to disclose as follows:

The duty to disclose would be excused if the specified conduct, knowledge of which triggered the duty to warn the Attorney General, was abated before the 15-day period expired.

The penalties would not apply for failure to notify the Attorney General if the corporation, LLC, officer, director, member or manager reasonably and in good faith believed that notification of an appropriate governmental agency was sufficient compliance with the duty to report to the Attorney General.

It would apply only to corporations or LLCs that issue stocks or shares or other securities that are regulated by the federal Securities and Exchange Commission and are publicly traded on a stock exchange.

It would not require disclosure that would result in a violation of the lawyer-client privilege. (See Comment 5a, page 11.)

It may not be interpreted to deprive a person of the privilege against self-incrimination (i.e., one would not be obligated to report his or her own criminal wrongdoing) or to prevent a person from exercising that privilege.

By limiting the application of this part of the bill to publicly traded companies, the bill casts a smaller net to catch egregious conduct such as what executives in Enron and similarly situated companies did or did not do, yet leave the smaller, private corporations alone to conduct their business. The rationale, according to the sponsor, is that the effect of WorldCom and Enron-type situations on the market and the economy as a whole is more widespread, catastrophic even, and should be abated without creating a new duty, hence a burden, on smaller private corporations going about their business in compliance with the law.

d. Action for civil penalty may be brought by Attorney General, district or city attorney, acting on behalf of the people

This bill would allow the Attorney General (AG), district or city attorney, acting on behalf of the people, to file a civil suit to assess the civil penalties provided under this bill.

Opponents contend that the civil penalties imposed by the bill would encourage the filing of lawsuits under Business and Professions Code Section 17200, thus resulting in "legal shakedown lawsuits." Because this bill does not provide a private cause of action by a private citizen acting as a private attorney general, this contention has no merit.

5. Sarbanes-Oxley Act and SB 777

Opponents of SB 777 state that the passage of the Sarbanes-Oxley Act makes SB 777 unnecessary. Below are some comments regarding pertinent provisions of both pieces of legislation.

A. Whistleblower protections

(1) Federal protection only for disclosures in limited cases

The federal Act would protect corporate whistleblowers only if information is disclosed to Congress or to a federal agency. The protections are also available when disclosure is made to a supervising internal authority in the corporation; however, this

would apply only when the protected disclosure is made in connection with an investigation by a Congressional committee or federal agency (see Comment 2A(3) below.) SB 777 would create a whistleblower hotline for financial fraud directly to the Attorney General, would require that the employer post whistleblower rights, and provide that the initial information provided on the hotline is confidential. Thus the protections afforded employees are greater than that available under the federal Act.

(2) Federal Act allows attorneys fees and costs, but not SB 777

The federal Act remedies for whistleblower violations allow for recovery of all "compensatory damages" (reinstatement with same seniority, back pay with interest, special damages, litigation costs and reasonable attorney's fees), and retention of rights under any state or federal law or collective bargaining agreement.

SB 777 does not provide for reasonable attorney's fees or costs of litigation (current Section 1102.5 does not), while current law already provides the rest of "compensatory damages" mentioned in the federal Act. SB 777 would not create any new recoverable damages for an employee who is discriminated against for whistleblowing.

(3) Federal Act protects only whistleblowers who provide information or participate in corporate fraud investigation; SB 777 does more

SB 777 would protect employees who refuse to perform illegal acts or conduct that would result in violations of law or regulations, whether state or federal. SB 777 also would protect from discrimination employees who were whistleblowers in former employment.

(4) Federal Act imposes more severe fines and jail terms; SB 777 imposes higher civil penalties

For violations of the federal whistleblowing statutes, Sarbanes-Oxley imposes severe fines and prison terms of up to 10 years, while SB 777 maintains the current penalties for misdemeanor violations but increases civil penalties on corporate or LLC employers from $5,000 to $10,000 per violation.

B. Obligations of officers, directors, LLC members and managers

(1) Federal Act focuses on financial statement filings; SB 777 on reporting specified acts to prevent fraud

Sarbanes-Oxley requires chief executive officers (CEOs) and chief financial officers (CFOs) only to certify financial statements submitted to the Securities and Exchange Commission or published for public consumption. It punishes officers, directors or their agents who coerce or influence an independent auditor for the purpose of rendering financial statements materially misleading.

SB 777 would require the CEO, CFO, and other directors and financial managers to report financial fraud to the Attorney General within 15 days, if they cannot stop the fraud internally. It also would require a warning to shareholders and investors. Proponents of SB 777 contend that this will help prevent corporate financial fraud while the federal Act will only come into play after the damage is done to investors and shareholders.

(2) Federal Act penalties for violations much heavier, but do not affect the goal of preventing fraud

Sarbanes-Oxley imposes penalties of up to 10 years in prison and/or up to $1 million in fines for violations regarding certification of the financial statements; for willful violations the penalty could be as high as 20 years imprisonment and/or up to $5 million in fines. The Act also requires disgorgement of certain profits and bonuses by a CEO/CFO, received during the 12-month period following the public issuance or filing of the misleading financial document with the SEC

SB 777 subjects a corporate executive or director or LLC member to a civil penalty of up to $10,000 and a manager to a penalty of up to $5,000 for a violation of the duty to warn the AG. For the corporation or LLC itself, the civil penalty could be as high as $1 million. The bill requires that the corporation or its officers/directors or the LLC or its members or financial managers have actual knowledge of fraudulent or misleading disclosures and that they each warn the Attorney General within 15 days (and in the case of corporations, shareholders also within the same 15 days), as a means of preventing financial disasters for investors, shareholders, and employees.

While the penalties under SB 777 are mild compared to those under Sarbanes-Oxley, proponents contend that SB 777 would be more effective in preventing the damage that corporate wrongdoing could cause. Their argument states that Sarbanes-Oxley penalizes acts or omissions related to filings with the SEC, and in the case of fraudulent activities, only after the damage is done. SB 777 would instead encourage early reporting of corporate misbehavior, thus perhaps giving investors, shareholders and employees the opportunity to reassess their investments in the corporation or LLC.

Support: Sierra Club of California; Older Women's League; Consumers Union; California Independent Public Employees Legislative Council; California Labor Federation, AFL-CIO; California Conference Board of the Amalgamated Transit

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Union; Hotel Employees and Restaurant Employees International Union; California Conference of Machinists; United Food and Commercial Workers Region 8 States Council; Engineers and Scientists of California, IFPTE Local 20; Professional and Technical Engineers, IFPTE Local 21; The Teamsters Union; Consumer Attorneys of California; California Public Interest Research Group (CALPIRG); Gray Panthers

Opposition: American Electronics Association

HISTORY

Source: Foundation for Taxpayer and Consumer Rights

Related Pending Legislation: None Known

Prior Legislation: SB 1452 (Escutia) and SB 783 (Escutia).
See Background and Comment 2

CA B. An., S.B. 777 Sen., 4/08/2003

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CERTIFICATE OF SERVICE

I, Leticia Cvietkovich, declare as follows:

I am employed in the County of Santa Clara, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 70 South First Street, San Jose, CA 95113. On May 13, 2021, I served the within:

ANSWERING BRIEF ON THE MERITS

to each of the persons named in the below service list at the address(es) shown, in the manner described below.

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed

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/s/ Leticia Cvietkovich
Leticia Cvietkovich

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Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/13/2021 by Regine Ho, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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