SEYFARTH SHAW

Management Alert

Whistleblower Lawsuit Dismissed Because Employee Failed To File Claim With Labor Commissioner Within Six Months Of Termination

A favorite trick in the wrongful-termination plaintiff's playbook is a claim under Labor Code sections 1102.5 or 6310, which both prohibit employer retaliation against employees who have complained to certain government agencies about employer conduct the employee believed to be unlawful. These claims are popular because they retroactively convert an employee who makes a run-of-the-mill complaint unrelated to an eventual termination into a whistleblowing martyr. This trick also allows a crafty employee to blindside an employer in court, instead of first following proper channels and letting the employer respond to the responsible law enforcement agency first.

The Court of Appeal has now called foul on this trick. In *MacDonald v. State of California*, the Court of Appeal recently held that an employee who failed to file a complaint with the Labor Commissioner within six months of the allegedly retaliatory adverse employment action necessarily fails in any eventual 1102.5 or 6310 claims in court.

The Facts

Defendant State of California employed MacDonald in an office. MacDonald complained to his supervisors that a supervisor was "illegally and/or inappropriately smoking" at the office. That behavior would violate Labor Code section 6404.5 and Government Code section 7597. MacDonald's supervisor responded that "these smoking issues were a serious … problem [and] would be addressed." Defendant terminated MacDonald's employment two weeks later.

MacDonald then filed suit alleging two claims: (1) retaliatory discharge in violation of section 1102.5; and (2) retaliatory and discriminatory discharge in violation of section 6310. But MacDonald failed to file a claim first with the Labor Commissioner within six months of the termination that he believed was retaliatory.

Defendant demurred to the claims, arguing that the court lacked jurisdiction because MacDonald failed to exhaust his administrative remedies under section 98.7(a) by first filing a claim with the Labor Commissioner within six months of the termination. The trial court, following *Campbell v. Regents of University of California*, dismissed the case, determining that MacDonald was required to exhaust the administrative remedy of filing a claim with the Labor Commissioner within six months of the retaliatory event in order to state a viable claim under section 1102.5 or 6310.

The Appellate Court Decision

The Court of Appeal affirmed the dismissal, holding that section 98.7 controlled the administrative remedies for any claims under section 1102.5 or 6310. Although section 98.7 states that an employee "may" pursue a claim with the Labor Commissioner, the Court of Appeal reasoned that the California Supreme Court decision in *Campbell* made clear that the "relief must be sought from the administrative body … before the courts will act."

The Court of Appeal rejected MacDonald's argument that it should follow *Lloyd v. County of Los Angeles*, a decision issued after *Campbell*. The *Lloyd* court had held that "[t]here is no requirement that a plaintiff pursue the Labor Code administrative procedure prior to pursuing a statutory cause of action" and that section 98.7's permissive language rendered it "merely … an additional remedy." The Court of Appeal rejected this reasoning because *Lloyd* failed to address the binding precedent of *Campbell* and because *Lloyd* has been rejected by most federal courts considering the issue.

MacDonald also argued that *Campbell* was limited to an employer's internal administrative remedies and noted that *Campbell* did not address section 98.7. The Court of Appeal rejected these arguments because "the salient point is that *Campbell's* holding encompasses situations, such as this, where an administrative remedy is provided by statute."

What *MacDonald* Means For Employers

Employees who fail to file a claim first with the Labor Commissioner within six months of an adverse employment action (such as a termination) can never succeed on a whistleblower claim under section 1102.5 or 6310. Employers that are sued for violations of these sections should determine whether the employee has filed a claim with the Labor Commissioner within six months of the termination. If the employee has failed to do so, the employer should move for summary dismissal of the complaint. If the employee has failed to do so but six months have not yet passed, the employer should wait for the deadline to pass and then move for a summary dismissal of the complaint should the employee fail to exhaust his or her administrative remedy. The court addressed statutory claims only, and had no occasion to address whether MacDonald would have had a viable tort claim for wrongful termination, based on an alleged breach of public policy expressed in an underlying Labor Code provision.

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