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Deputy Sheriff Protected by Whistleblower Retaliation Law, California Court of Appeal Rules

Article By:

Mitchell F. Boomer

The California Labor Code's Section 1102.5(b) whistleblower protections are not limited to the first employee reporting alleged misconduct, the California Court of Appeal has ruled, affirming a judgment in favor of a deputy sheriff on his whistleblower retaliation claim. Hager v. County of Los Angeles, No. B238277 (Cal. Ct. App. Aug. 19, 2014).

The Court further ruled the law applied to reports of misconduct of fellow employees. However, the Court reduced the employee's back pay and front pay awards as unsupported by the evidence.

Background

Darren Hager was a deputy sheriff in the Los Angeles County Sheriff's Department from 1988 to 2003, when he was terminated. During his employment, Hager served as a liaison to a federal Drug Enforcement Agency ("DEA") task force investigating a large methamphetamine organization in the Antelope Valley.

In June 1998, deputy sheriff Jonathan Aujay disappeared while on a long-distance run in Antelope Valley. In December 1999, homicide detective Larry Joseph Brandenburg learned from another deputy sheriff that Aujay may have been murdered and that deputy sheriff Richard Engels may have been involved. In March 2000, Brandenburg asked Hager to speak to an informant about "dirty deputies." The informant told Hager that Engels was involved in narcotics and, possibly, in Aujay's disappearance. Hager informed Brandenburg.

On March 23, 2000, Hager briefed then-assistant sheriff Larry Waldie regarding narcotics in Antelope Valley, telling him that deputy sheriff Engels may have been involved in Aujay's disappearance and narcotics. Following subsequent investigations, the Department concluded that Engels had no involvement in Aujay's disappearance or narcotics. Thereafter, Hager was terminated from employment for making false statements to his supervisors, among other things.

Hager sued the Department for whistleblower retaliation under the California Labor Code. Following a trial, the jury returned a substantial verdict in Hager's favor. The Department appealed.

Applicable Law

California Labor Code, Section 1102.5(b), prohibits employers from retaliating against an employee for disclosing information to a government or law enforcement agency of an alleged violation of state or federal law. Further, Section 1102.5(e) of the Code provides, “a report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency.”

To establish a claim for whistleblower retaliation under Section 1102.5(b), the employee must show he engaged in protected activity, his employer subjected him to an adverse employment action, and there is a causal link between the two. If the employee meets his prima facie burden, the employer must offer a legitimate, non-retaliatory explanation for its actions. To prevail, the employee must prove the explanation is a pretext for unlawful retaliation.

To prove that the employee engaged in protected activity, the employee must present evidence that he disclosed a suspected violation of the law. In Mize-Kurzman v. Marin Community College Dist., 202 Cal. App. 4th 832 (Cal. Ct. App. 2012), the California Court of Appeal construed “disclose” in Section 1102.5(b) in accordance with it plain meaning and dictionary definition — to “reveal something that was hidden and not known.” However, the Mize-Kurzman court did not consider whether a second employee who disclosed the same unlawful activity would be protected under Section 1102.5(b).

Protection Not Limited to First Report

Relying on Mize-Kurzman, the Department argued Hager did not “disclose information” under Section 1102.5(b) because it was not the “first report” as the Department already knew that Engels might have been involved in drug trafficking and in Aujay’s disappearance based on homicide detective Brandenburg’s investigation. The appellate court rejected that argument as unsupported by the statute’s language or policy.

The Court first noted that Mize-Kurzman did not apply because it did not address the “first report” issue.

The Court next considered the statute’s plain language. It observed that, under Section 1102.5(e), a report made by a law enforcement employee constitutes a disclosure under Section 1102.5(b) and the Mize-Kurzman court did not consider the relationship between the two provisions. The Court also observed that a “report does not necessarily reveal something hidden or unknown.” It found the Department’s proposed “first report” rule was inconsistent with Section 1102.5’s purpose. The Court explained that protecting only the first employee to disclose unlawful acts would prevent employees from coming forward to report unlawful conduct for fear that someone else already had done so. Thus, the “first report” rule would discourage whistleblowing and contradict the statute’s purpose.

The Court also rejected the Department’s contention that the statute did not apply to reports of misconduct by fellow employees, but only to corporate wrongdoing, as unsupported by the statute’s language. Accordingly, the Court affirmed the judgment in Hager’s favor on his whistleblower retaliation claim, although it reduced his award of back pay and front pay as speculative and unsupported by the evidence.

Employers should be careful not to dismiss “secondary” reports asserting discrimination, harassment or other public policy concerns just because a different employee had already reported the underlying

information. Such reports may constitute protected activity. Thus, taking adverse action against such a secondary reporter may result in a claim for retaliation.

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