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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE ex rel. LILIA GARCIA-BROWER, as Labor Commissioner, etc.,

Plaintiff and Appellant,

v.

KOLLA'S INC. et al.,

Defendant and Respondent.

G057831

(Super. Ct. No. 30-2017-00950004)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Martha K. Gooding, Judge. Affirmed in part, reversed in part and remanded with instructions.

Nicholas Patrick Seitz, Division of Labor Standards Enforcement, for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

INTRODUCTION

As we have previously stated, when a plaintiff seeks a default judgment, "it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through." (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868.) "That role requires the court to analyze the complaint for itself – with appropriate guidance from counsel – ascertaining what relief is sought as against each defaulting party, and to what extent the relief sought in one cause of action is inconsistent with or duplicative of the relief sought in another. The court must then compare the properly pled damages for each defaulting party with the evidence offered in the prove-up." (*Ibid*.)

Admirably, the trial court in this labor enforcement action took its role in that process to heart. It scrutinized carefully the contents of appellant's[1] application for default judgment, finding several defects in the claims. As a result, it greatly reduced the size and scope of the Labor Commissioner's recovery on two retaliation causes of action under Labor Code[2] sections 98.6 and 1102.5.

But the trial court's determinations in this case were based in part on incorrect understandings of the statutes at issue. Its error as to the section 1102.5 claim was harmless, as we find the claim was already defective. But the error as to the section 98.6 claim was not harmless. It requires reversal.

FACTS

In 2014, respondents Gonzalo Sanalla Estrada and Kolla's, Inc. (Kolla's) owned and operated an establishment by the name of Kolla's Night Club, located in Lake Forest.[3] They employed A.C.R., as a bartender.[4] On or about April 5, 2014, she told

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1 The complaint was originally filed by California Labor Commissioner Julie Su, who is succeeded in office by appellant commissioner Lilia Garcia-Brower. Hereinafter, we shall refer to appellant as the Labor Commissioner.

2 All statutory references are to the Labor Code unless otherwise indicated.

3 This appeal has since been dismissed as to Estrada, so Kolla's is the only remaining respondent.

4 The employee's name has remained confidential in the record. The Labor Commissioner identifies this individual as complainant, and for the sake of consistency, we will also use this designation when referring to the employee in question.

respondents she had not been paid wages for her previous three shifts. In response, Estrada threatened to report her to "immigration authorities," terminated her employment, and told her never to return to the night club. The termination was immediate; apparently the very day she complained.

On June 2, 2014, complainant filed a timely retaliation complaint with the Division of Labor Standards Enforcement (DLSE) and undertook an investigation. The investigation revealed Estrada was upset at complainant for challenging him about her wages, and he threatened her and terminated her employment because she had complained. While respondents largely failed to cooperate with the investigation, DLSE was able to contact Estrada on a single occasion in November 2014, at which time he acknowledged complainant had approached him about unpaid wages; he insisted he owed her only $92.

DLSE determined defendants had violated sections 98.6, 244, 1019, and 1102.5 and notified the parties involved of said determination on December 22, 2015. Respondents were ordered to do several things, including paying complainant lost wages and paying civil penalties of $20,000 each for violations of sections 1102.5 and 98.6. They never complied.

On October 17, 2017, the Labor Commissioner filed an enforcement action against both Estrada and Kolla's under authority of section 98.7, subdivision (c)(1)[5], alleging violations of these statutory provisions. The defendants, despite being properly served, did not answer the complaint and their respective defaults were taken on February 23, 2018.

The trial court set a default prove-up hearing for May 25, 2018, and the Labor Commissioner filed an application for default judgment in preparation for the

[5] Pursuant to section 98.7, subdivision (c)(1), the Labor Commissioner may "promptly" bring an action "in an appropriate court" if the employer fails to comply with the DLSE's determination. It is unclear why she did not bring this action until nearly two years after notifying the employer of the determination.

hearing. After reviewing it, the trial court vacated the May 25 date and set a status conference to "address the [a]pplication." Specifically, the trial court raised two issues: (1) whether the complaint adequately alleged that Estrada had corporate authority over Kolla's, and (2) whether the court could enter default judgment for specific forms of injunctive relief, including a mandatory injunction reinstating complainant to her former position. The trial court also had concerns about awarding relief directly in favor of an anonymous complainant.

Prior to the status conference, the Labor Commissioner filed a brief in support of the application to answer the trial court's questions. It argued Estrada was liable because he personally made the offending statements to complainant and the statutes permitted the relief requested. As to complainant's identity, the Labor Commissioner contended it was appropriate to identify her by her initials, because of the immigration-based nature of the threats. In any event, the defendants knew who she was, and any judgment could be worded as appropriate to maintain complainant's anonymity while still being specific.

The trial court denied the application. It found the Labor Commissioner had provided inadequate proof of damages. Also, the trial court had a problem with the request for statutory penalties. It questioned the basis for civil penalties in favor of both the Labor Commissioner and complainant. More importantly, the trial court believed the threat to report complainant to immigration and the termination of her employment constituted a "single alleged wrongful act by [d]efendants," and penalties could only be awarded for a single violation of section 98.6. It also denied injunctive relief because Kolla's was, by that time, no longer in operation. And it found the proposed form of judgment inadequate to meet its concern about awarding relief in favor of an as-yet unidentified individual.

The Labor Commissioner thereafter submitted an amended default prove-up packet, which explained the basis for the award of civil penalties. She sought two

$10,000 civil penalties to be paid to her for two violations of section 1102.5, subdivision (b) and two $10,000 civil penalties to be paid to her on complainant's behalf for two violations of section 98.6, subdivision (a). She dropped a good portion of her request for injunctive relief.

The trial court entered an order granting in part and denying in part the amended application for default judgment. It felt the Labor Commissioner had adequately stated a claim under section 98.6, but that the request for damages was deficient because there was insufficient evidence of complainant's wages. Regarding civil penalties, the trial court found there was only one violation of the statute, even though it acknowledged that termination of employment and threats to report an employee's immigration status both constituted adverse actions under the statute. It reasoned because "the immigration threat and firing were essentially simultaneous," occurring in "a single conversation in response to [c]omplainant's complaint about missed wages," there was "one indivisible act . . . not two separate, distinct violations."

The trial court determined the Labor Commissioner had not stated a claim under section 1102.5, however. Under its reading of subdivisions (a) and (b) of the statute, an employer is only prohibited from retaliating against an employee for "disclosing a violation of state or federal regulation to a governmental or law enforcement agency." Relying on the case of *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76-77, the trial court found there could be no violation of the statute where the complainant had not approached a governmental agency – here, the DLSE – about her employer's conduct until *after* her termination.

Judgment was entered for a single civil penalty of $10,000, for the benefit of and to be paid to complainant, plus attorney fees.

DISCUSSION

The Labor Commissioner asserts the trial court erred in two respects. First, she contends the trial court relied on a superseded version of the statute in

determining there was no violation of section 1102.5. Second, she argues the trial court erred in finding only one violation of section 98.6 instead of two. She believes the trial court should enter default judgment against Kolla's for violations of both statutes and for civil penalties of $40,000 (two violations of each statute at $10,000 each). While we agree with the Labor Commissioner on the first argument, we nevertheless uphold the trial court's judgment on the section 1102.5 claim. However, we reverse the judgment as to the section 98.6 claim against Kolla's.

I. Standard of Review

We undertake an independent review of the judgment where there is "no conflict in the evidence," "the decisive facts are undisputed and we are confronted with questions of law[.]" (*Mole-Richardson Co. v. Franchise Tax Bd.* (1990) 220 Cal.App.3d 889, 894.) This was a default judgment, and the facts upon which it is based have never been disputed. The issues the Labor Commissioner raises on appeal are questions of law under sections 1102.5 and 98.6.

II. Guiding Principles

"The fundamental purpose of statutory interpretation is to ascertain the intent of the Legislature in enacting the statute." (*People v. Jacobo* (2019) 37 Cal.App.5th 32, 42.) When interpreting a statute, "'we must look first to the words of the statute, "because they generally provide the most reliable indicator of legislative intent." [Citation.] If the statutory language is clear and unambiguous our inquiry ends. "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. . . . Thus, we 'avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend. [Citations.]' (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.) 'We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.]' (*Murphy* [*v. Kenneth Cole*

Productions, Inc. (2007) 40 Cal.4th 1094,] 1103; cf. *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82 (*Smith*) [purpose of § 203 is to compel prompt wage payment upon separation from employment].)" (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1394.)

"The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*).) ". . . [I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed (*Metropolitan Water Dist. v. Adams* (1948) 32 Cal.2d 620, 630-631)." (*Lungren, supra*, 45 Cal.3d at p. 735.) "We must give 'the language its usual, ordinary import and accord [ ] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided." (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110.)

III. Section 1102.5

The Labor Commissioner's second cause of action under section 1102.5 is premised on subdivisions (a) and (b) of the statute. Section 1102.5, also known as California's whistleblower statute, was first enacted in 1984. Up until 2013, subdivisions (a) and (b) of the statute made it unlawful for employers to prohibit employees from disclosing violations of state and federal law to government agencies, and for them to retaliate against employees who had done so. (See former § 1102.5, subds. (a) & (b).) [6] But the Legislature made amendments in 2013 in order to "expand these provisions" so they would apply to reports of violations of local law (in addition to state or federal law), and also reports made "to a person with authority over the employee or another employee

[6] There is no evidence in the record that the employer enacted policies preventing employees from reporting violations to government authorities, and the Labor Commissioner does not argue in her brief that Kolla's violated subdivision (a); instead, she consistently cites to subdivision (b). Thus, as a practical matter, we presume the whistleblower claim in this case is premised solely on subdivision (b) of the statute.

who has the authority to investigate, discover, or correct the violation . . . ." (*Id.*; see Legis. Counsel's Dig., Sen. Bill No. 496, ch. 781 (2013-2014 Reg. Sess.), p. 2 at p. 6.)

These amendments went into effect on January 1, 2014. (Stats. 2013, ch. 781, § 4.1; Gov. Code, § 9600, subd. (a).) Because the incident occurred in April 2014, the amended version of the statute was in effect at the time of complainant's termination.

"The elements of a section 1102.5[, subd.] (b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 (*Patten*).) Given that the defendants never filed an answer, the Labor Commissioner's task before the trial court was to make a prima facie showing as to the following three elements: (1) complainant "engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Ibid.*)

The Labor Commissioner urges us to reverse the trial court's conclusion with respect to the whistleblower claim because she argues Estrada was "a person with authority over" complainant at the time she made her complaint to him and the statute no longer requires that the complaint or report be made to a government agency. We agree – under the amended statute, reporting a violation to Estrada instead of a government agency would clearly be sufficient. But, pursuant to our standard of review, the analysis does not end there. We must consider whether the Labor Commissioner adequately *alleged* protected activity by the complainant.[7]

"The Supreme Court has consistently stated the guideline that 'a plaintiff is required only to set forth the essential facts of his case with reasonable precision and with

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[7] We are confident the acts alleged – termination and threats to report complainant to immigration authorities – are sufficient to constitute adverse employment actions under the statute. (See § 244, subd. (b); see also *Patten, supra,* 134 Cal.App.4th at p. 1387 [concluding an adverse action for purposes of section 1102.5 is an action materially affecting the terms and conditions of employment.].)

particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action.' (*Youngman v. Nevada Irrigation Dist., supra*, 70 Cal.2d at p. 245; *Smith v. Kern County Land Co., supra*, 51 Cal.2d at p. 209.) It has also been stated that '(t)he particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff.' [Citations.]" (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

That notwithstanding, basic standards must be followed. A default only admits those facts well-pleaded in the complaint. (See *Buck v. Morrossis* (1952) 114 Cal.App.2d 461, 466.) If the complaint fails to plead an essential element of a cause of action, or facts from which an essential element may be inferred, the element is not admitted and default judgment can appropriately be denied as to the deficient cause of action. (See *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 900-901.)

Thus, when assessing the adequacy of the Labor Commissioner's showing in support of default judgment on its section 1102.5 claim, we look for sufficient factual allegations to support each element of the cause of action so we may be satisfied all elements have been admitted by the defaulted defendants. Reviewing the record, we believe an essential element of this claim is missing.

Section 1102.5, subdivision (b) prohibits retaliation "for *disclosing* information, or because the employer believes that the employee *disclosed* or *may disclose* information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for *providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry*, 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." (Italics added.) The italicized verbs are the activity protected under this portion of the statute – "disclosing" or "providing information to, or testifying before, any public body."[8]

There is no evidence in the record showing complainant provided information to or testified before any public body prior to her termination. Thus, complainant's activity was not protected unless she was "disclosing" a violation of law to Estrada – the owner of the night club, and thus, a person with authority over her. The word "disclose" means "to make known" or "open up to general knowledge," especially "to reveal in words (something that is secret or not generally known)". (Webster's 3d New Internat. Dict. (1981) p. 645, col. 2.) Foundational, in our view, to a disclosure is the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made.[9] The legislature's choice of that word, rather than words like "report" or "tell" seems to us significant.

The complaint alleges the following relevant facts: On or about April 5, 2014, complainant told Estrada she had not been paid wages for her previous three shifts and he "became upset" that she had complained to him about unpaid wages. The retaliation was immediate. He threatened to report her to immigration, terminated her employment, and warned her never to return to the nightclub. The DLSE determined these actions violated section 1102.5.

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[8] We are aware that protected activity under subdivision (b) entails a double disclosure, since the word "disclose" is used in the statutory language in two different contexts. The first is the one we have already highlighted – revealing information to a government agency, supervisor, or other employee with investigative power. The second has to do with the employee's subjective belief about the information being disclosed. The employee must have "reasonable cause" to believe that the information she is disclosing *itself discloses* a violation of law. We concern ourselves here only with the first context.

[9] Our dissenting colleague points out "the same dictionary cited by the majority contains a definition of the word disclose that is not restricted to communications that reveal something previously unknown. That dictionary also defines the term disclose as meaning 'to expose to view' as in 'the curtain rises to [disclose] once again the lobby.' (Webster's 3d New Internat. Dict., supra, p. 645, col. 2.)" (Con. & dis. opn., p. 6.) But even this definition implies previous concealment of the thing disclosed. The term "disclosure" is thus inconsistent if used in connection with information widely understood, seen, or known.

Nowhere in the complaint, however, did the Labor Commissioner specifically allege complainant "disclosed" the fact of her unpaid wages to Estrada. The word "disclose" is not used to describe her conversation with Estrada, nor is there any allegation that Estrada was unaware complainant was owed wages prior to the confrontation. Instead, the allegations in the complaint lead us to the very opposite inference: they suggest Estrada was at least aware of – if not responsible for – the non-payment of wages, and he became upset only because complainant confronted him about it. As the owner of the business, Estrada had an obligation to ensure payment of wages. His furious reaction to, and immediate punitive measures against, complainant strike us as completely counter-intuitive if indeed he was unaware of her unpaid wages. For us, it strains credulity to think that an innocent supervisor, when first being apprised by an employee of an issue requiring his attention, would – rather than inquiring into the situation – immediately punish the employee in the manner described in the complaint. Therefore, we cannot reasonably infer disclosure from the complaint's factual allegations.

And, because of the way in which the complaint is pleaded, Estrada's state of awareness is, in our view, absolutely necessary to establishing a violation of the statute. ". . . [T]he employee's report to the employee's supervisor about the supervisor's own wrongdoing is not a 'disclosure' and is not protected whistleblowing activity, because the employer already knows about his or her wrongdoing . . . . Moreover, criticism delivered directly to the wrongdoers does not further the purpose of . . . the California whistleblower laws to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 859 (*Mize-Kurzman*).) Since the Labor Commissioner failed to allege – either specifically or through material facts supporting the inference – that complainant was disclosing information to Estrada, the cause of action under section 1102.5 is deficient, and the defect was not waived by the defendants' failure to answer the complaint. (See Code Civ. Proc., § 430.80, subd. (a).)

While the complaint alleged DLSE's determination that a violation of section 1102.5 had occurred, we find this allegation a tenuous one from which to infer disclosure. For one thing, the allegation is a legal conclusion, and so is not well-pleaded. (See *Dino, Inc. v. Boreta Enterprises, Inc.* (1964) 226 Cal.App.2d 336, 340 [discussing the issue in the context of demurrer].) But more importantly, the documents submitted by the Labor Commissioner in support of default judgment contained averments substantially the same as the complaint's allegations – they fail to mention the required disclosure or to detail facts supporting disclosure. Indeed, they leave us with the impression that DLSE did not consider whether the necessary element of disclosure was present in this case.

Our dissenting colleague feels our construction of the term "disclosure" is too restrictive given subdivision (e) of section 1102.5, which 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 pursuant to subdivisions (a) and (b)." Citing *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1549-1550 (*Hager*), he believes the terms "disclose" and "report" are to be construed

interchangeably in light of subdivision (e) and the remedial purpose of section 1102.5.[10] We respectfully disagree.

"The Legislature's choice of words is usually the best indicator of its intent. (*In re Carr* (1998) 65 Cal.App.4th 1525, 1530; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.) . . . . The courts cannot 'ignore the actual words of the statute in an attempt to vindicate [the court's] perception of the Legislature's purpose in enacting the law.' (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993.) 'Courts may not rewrite statutes to supply omitted terms or to conform to an assumed, unexpressed legislative intent. [Citation.] It is, of course, up to the Legislature, and not the courts, to rewrite statutes.' (*Western/California Ltd. v. Dry Creek Joint Elementary School Dist.* (1996) 50 Cal.App.4th 1461, 1488; *Warmington Old Town Associates v. Tustin Unified School Dist.* (2002) 101 Cal.App.4th 840, 857.)" (*People v. Harper* (2003) 109 Cal.App.4th 520, 524.)

We believe our interpretation better aligns with these principles. Subdivision (e) of the statute applies specifically in the context of *government* whistleblowers. It appears to us the legislature chose different rules for different types of

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[10] The California Supreme Court said in *Green*, supra, 19 Cal.4th 66: "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated." (*Id.* at pp. 76-77.) (As we have already stated, the statute has been amended to protect a plaintiff who reports suspicions directly to his employer.) Despite our dissenting colleague's reliance on *Green*, it made no pronouncement on the definition of the term "disclose." The issue in *Green* was whether violation of federal regulations could give rise to a *Tameny* claim. The high court cited section 1102.5 as evidence that the Legislature believes regulatory violations to be significant enough to warrant protection for employees who report them to authorities. Interestingly, Justice Baxter's dissent in *Green* suggests an agreement with our construction of section 1102.5: "In enacting section 1102.5, the Legislature made a policy judgment that employees deserve protection from employer retaliation *when they go so far as to contact a public agency that will enforce the public's interest on the matter*. Unlike the majority, I see no basis for second-guessing that legislative judgment in a way that will otherwise allow regulatory violations to remain *hidden from the view* of public officials." (*Green, supra*, 19 Cal.4th at p. 95; italics added.) Even though an employee now need not go to a public agency in order to be protected, the Legislature's requirement that the recipient of the information have "authority" to investigate the violation indicates it feels a protected "disclosure" is made to someone in a position to fix the violation – not the person engaged in the wrongdoing.

employees. It chose the term "disclose" in subdivision (b), not "report." Had it wished to create the same rule, we would have expected it to use the same words. If it meant "disclose" to mean "report," it could easily have used the term "report" in subdivision (b) as well, or it could have so defined "disclose" as a general matter. Instead, it chose different terms – "disclose" is applicable generally to workplace whistleblowers and "report" is applicable to government whistleblowers. We must accord this choice some significance. We feel that if we were to take our colleague's suggestion and use "report" and "disclose" interchangeably, we would be rewriting the statute, which is not our place.

We also believe our interpretation comports with what the Supreme Court called the "general/specific canon" of statutory construction. (See *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* (2012) 566 U.S. 639, 645-646.) This canon avoids interpretations which render statutes internally contradictory or words or provisions in the statute superfluous. So, in a statute containing both a general enactment comprehensive enough to include the matter at issue, as well as a particular enactment directly on point, the particular enactment controls. (*Ibid.*) But if the particular provision is *not* on point, the general provision should be applied. (*Id.* at p. 646, citing *United States v. Chase* (1890) 135 U.S. 255, 260.) This is the interpretation for which we advocate. A "report" suffices in the government whistleblower context, but since this is not a government whistleblower case, a "disclosure" is required.

This construction of subdivision (e) fits with the California Whistleblower Protection Act applicable to government employees. (See Gov. Code, § 8547 et seq (CWPA).) The Legislature's decision to use the term "report" in subdivision (e) may follow from its stated purpose in passing the CWPA. According to Government Code section 8547.1, the CWPA was passed because the Legislature thought "state employees should be free to *report* waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution." (*Ibid*; italics added.) It went on to state "that public servants best serve the citizenry when they can be candid and honest without

reservation in conducting the people's business." (*Ibid*.) These stated concerns are uniquely applicable to government whistleblowers because government entities occupy positions of public trust and the free flow of information is critical in fulfilling such obligations. Such concerns are simply not at stake in this case, as much as we abhor the conduct admitted here.

While both *Hager* and *Mize-Kurzman* involved government whistleblowing, *Mize-Kurzman* is more on point. The Labor Commissioner's pleading is reasonably susceptible to an interpretation that the complainant was reporting wrongdoing directly to the wrongdoer. The plaintiff in *Mize-Kurzman* had also reported what she believed to be illegal activity to the very supervisors whom she believed were engaging in said activity. (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 841-842.) The *Mize-Kurzman* court did not deem this a disclosure – not just because a wrongdoer is already aware of his or her own conduct, but also because "criticism delivered directly to the wrongdoers does not further the purpose of either the federal [Whistleblower Protection Act] WPA or the California whistleblower laws to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it," (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at 859), a distinction we believe undervalued in our colleague's dissent.

The plaintiff in *Hager* had not reported illegal conduct to the wrongdoers. Instead, the County of Los Angeles in *Hager* argued there was no disclosure because the plaintiff had communicated information previously reported by others. Thus, the *Hager* court had to examine whether or not section 1102.5 entails a "first report" rule, i.e. a rule requiring a whistleblower to be the first one to report illegal conduct in order for it to be protected. (*Hager*, *supra*, 228 Cal.App.4th at pp. 1549-1550.) The County of Los Angeles relied on *Mize-Kurzman* to argue the communication was not protected by the statute. (*Id.* at p. 1548.) But as the *Hager* court correctly stated, *Mize-Kurzman* did not address whether a first report rule must be read into section 1102.5. (*Hager*, *supra*, 228

Cal.App.4th at p. 1549.) So it was in the context of a first report rule that the *Hager* court criticized *Mize-Kurzman*'s construction of section 1102.5. (*Id.* at p. 1550.) We do not advocate for a first report rule.

In fact, we find the *Hager* court's disagreement with *Mize-Kurzman* to be completely consistent with our conclusion herein. While it did seemingly take note of subdivision (e) of section 1102.5, *Mize-Kurzman* failed to incorporate it into its interpretation of the word "disclosure." (*Hager, supra*, 228 Cal.App.4th at pp. 1550-1551.) In that sense, *Mize-Kurzman* failed to employ the "general/specific" canon of construction; subdivision (e) was directly on point and should theoretically have been applied.[11] We do not have the same issue here. Subdivision (e) is inapplicable to our case.

Hager noted: "To the extent *Mize-Kurzman* has highlighted an inconsistency in the statute, that is, a public employee must merely 'report' unlawful conduct, and other employees must 'disclose,' unlawful conduct, it is up to the Legislature to resolve this issue, not this court." (*Hager, supra*, 228 Cal.App.4th at p. 1550.) We feel similarly constrained. Because subdivision (e) of the statute is inapplicable here, we assume the Legislature meant what it said in subdivision (b) until it tells us otherwise.

Our restraint is reinforced by the fact that, in the seven years since the *Hager* decision issued, the Legislature has chosen not to resolve the "inconsistency" that opinion identified. Indeed, while our dissenting colleague points out Congress has modified the WPA since *Mize-Kurzman* to protect disclosures of previously known information or reports to wrongdoers, our Legislature has *not* made similar amendments to section 1102.5, even though it amended the statute in 2013 presumably with

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[11] As *Hager* correctly pointed out, *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236 and our decision in *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811 permit public employees to bring section 1102.5 claims even when they report wrongdoing to the wrongdoer. (*Hager, supra*, 228 Cal.App.4th at p. 1551.) But those holdings do not carry the day here because, again, the complainant herein was not a public employee.

knowledge of both the federal amendments and of *Mize-Kurzman*. "The Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted, and to have enacted and amended statutes ''"in the light of such decisions as have a direct bearing upon them.'"' [Citations.]" (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.) We are construing section 1102.5, not the WPA. We are guided by what our Legislature chose *not* to do to section 1102.5 in 2013 as opposed to what Congress chose to do to the WPA the year before. Therefore, we do not think *Mize-Kurzman*'s interpretation of section 1102.5 is outdated or unreasonable.[12]

We must affirm the trial court's denial of judgment on the second cause of action.

IV. Section 98.6

The outcome is different on the Labor Commissioner's retaliation claim under section 98.6. In pertinent part, section 98.6, subdivision (a) prohibits discharging an employee or "in any manner" discriminating, retaliating, or taking "adverse action against any employee . . . because the employee . . . has . . . made a[n] . . . oral complaint that . . . she is owed unpaid wages" or because she has exercised any rights afforded to her. "In addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation." (§ 98.6, subd. (b)(3).)

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[12] We do not agree with our dissenting colleague's conclusion that *Mize-Kurzman* relied only on federal authority in making its conclusion. (See con. & dis. opn. at p. 8.) The *Mize-Kurzman* court itself clearly felt such a communication did not fit within the plain meaning of the word "disclosure." (*Mize-Kurzman*, *supra*, 202 Cal.App.4th at pp. 858-859.)

Complainant's conduct was protected by the statute because she was complaining about unpaid wages.[13] Indeed, it is a crime for an employer to willfully refuse to pay agreed-upon wages to an employee. (See § 216, subd. (a).) The only question is whether Kolla's violated this statute once or twice by threatening to report her to immigration and then firing her, all in the same breath. We conclude there were two violations.

The statute itself does not define a violation, nor are there any cases interpreting this aspect of it. But we require neither; we can resolve the question on the plain meaning of the words used by the Legislature.[14]

A violation is "the act or action of violating," as in an "infringement or transgression." (Websters 3d New Internat. Dict. (1981), p. 2554, col. 2.) Under section 98.6, subdivision (a), it is unlawful to "discharge" a person for making a written or oral complaint about unpaid wages. It is also unlawful to "take any adverse action against any employee" for making such a complaint. Under section 244, subdivision (b), the Legislature has specified that "[r]eporting or threatening to report an employee's . . . suspected citizenship or immigration status . . . to a federal, state, or local agency because the employee . . . exercises a right under the provisions of [the Labor] [C]ode . . . constitutes an adverse action for purposes of establishing a violation of an employee's . . . rights." Thus, the plain language of section 98.6, subdivision (a) itself stipulates that the two actions taken in this matter – discharge *and* threats to report complainant to immigration authorities (inasmuch as they constitute "adverse actions") – are separate and distinct transgressions. If we are to give effect to each word, the separation of the

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13 As such, we disagree with our dissenting colleague's view that our denial of the Labor Commissioner's claim under section 1102.5 "as a practical matter results in barring relief for an employee whose employment has been terminated for having complained about wage theft." (Con. & dis. opn. at p. 3.) Section 98.6 provides exactly such relief. The very existence of a separate retaliation statute related to complaints about unpaid wages bolsters our interpretation of section 1102.5.

14 For this reason, we deny the Labor Commissioner's request for judicial notice of legislative materials related to section 98.6.

word "discharge[]" from other "adverse actions," means the Legislature intended them to be distinct forms of retaliation.

The trial court's construction finds no support in the language of the statute. There is no indication the Legislature intended to penalize separate violations only if they occurred on separate occasions.[15] Indeed, section 98.6 is a remedial statute protecting employees, and is to be construed liberally. "Public policy has long favored the 'full and prompt payment of wages due an employee.'" (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.) The trial court's reasoning is "not in relative equipoise with the application of a commonsense understanding of the [statutory] language, which understanding is consistent with and promotes the Legislature's protective purpose." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1271.) We further note that the Labor Commissioner's request for civil penalties was not inflated; it was eminently reasonable within the meaning and purpose of the statute.

We conclude the trial court was incorrect when it awarded the Labor Commissioner only $10,000 in civil penalties for a single violation of section 98.6 and we reverse and remand that portion of the judgment.

DISPOSITION

The default judgment is affirmed as to the second cause of action against Kolla's and reversed and remanded as to the first cause of action against Kolla's with an instruction that the trial court enter judgment against Kolla's awarding the Labor Commissioner, on behalf of complainant, $20,000 in civil penalties, payable by Kolla's,

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15 It may be the trial court's thinking here was informed at least somewhat by the rule against splitting a cause of action. (See *Paladini v. Municipal Markets Co.* (1921) 185 Cal. 672, 676, quoting *Hall v. Susskind* (1895) 109 Cal. 203, 210 [where a cause of action is based "'upon one single or continuous tortious act, . . . it cannot be divided into distinct demands, and be made the subject of separate actions.'"].) Whatever the case may be, whether two violations occur in one conversation or over a period of days or weeks seems an arbitrary distinction to us.

for two separate violations of section 98.6. Upon receipt, this money is to be paid by the Labor Commissioner to complainant pursuant to subdivision (b)(3) of the statute.

BEDSWORTH, ACTING P. J.

I CONCUR:

THOMPSON, J.

Fybel, J., Concurring and Dissenting,

I concur in the majority opinion's conclusion that the trial court erred in analyzing the claims brought under both sections 98.6 and 1102.5 of the Labor Code.[1] I also concur in the majority opinion's conclusion that the trial court's error in applying section 98.6 was prejudicial.

I respectfully dissent because the trial court's error in applying section 1102.5 was also prejudicial. I would therefore reverse the judgment in its entirety and remand with directions to the trial court to enter a new judgment that awards required statutory penalties under section 1102.5, subdivision (f).

I respectfully urge the Supreme Court to grant review because (1) this case involves important recurring issues of whistleblower protection and wage theft under threat of a report to immigration authorities, and (2) the majority opinion's interpretation of subdivision (b) of section 1102.5 (section 1102.5(b)) is contrary to the intent of the Legislature and the rules of statutory construction, is based on outdated law, is in conflict with existing Court of Appeal authority, takes away an issue from the trier of fact, imposes an unprecedented and unjustified pleading requirement, and unduly burdens an aggrieved whistleblower employee's right to relief under the statute.

THE STATUTE, THIS CASE'S COMPLAINT, AND THE MAJORITY OPINION

The statute at issue is section 1102.5. Section 1102.5(b) prohibits an employer from retaliating against an employee for disclosing information to a person with authority over the employee if the employee has reasonable cause to believe that the information discloses a violation of law. Our Supreme Court has explained that California has a broad public policy interest in encouraging workplace whistleblowers to

[1] Undesignated statutory references are to the Labor Code.

report unlawful acts without fearing retaliation. (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77.)

The complaint filed by the Labor Commissioner stated a claim for section 1102.5 whistleblower retaliation. It alleged: (1) the complainant employee (the employee) complained to Gonzalo Sanalla Estrada[2] that she had not been paid for her prior three shifts; (2) the employee had a "good faith, reasonable belief that her foregoing complaint disclosed a violation of state or federal statute, or a violation or noncompliance with a local, state, or federal rule or regulation"; and (3) Estrada thereafter became upset, terminated her employment, threatened to report her to immigration authorities, and warned her never to return to the workplace.

After defendant failed to respond to the complaint, its default was taken and the factual allegations of the complaint were thereby deemed admitted. (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303 [default admits the allegations of the complaint].) The trial court should have thereafter entered judgment in favor of the Labor Commissioner and awarded statutory penalties under section 1102.5, subdivision (f).

The majority opinion concludes the trial court's erroneous dismissal of the section 1102.5 claim was not prejudicial for one reason—the complaint did not plead a disclosure under section 1102.5. The majority opinion's conclusion is *entirely* based on its application of an incorrect and unduly restrictive definition of the term disclosure. According to the majority opinion, information is not disclosed unless it reveals something new, or at least believed by the discloser to be new, to the recipient of the information at the time of the communication. The majority opinion thereby imposes a new and unjustified pleading requirement which, as demonstrated in this case, results in

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[2] The complaint alleged that Estrada is "a shareholder, director, officer, and/or managing agent" of defendant Kolla's, Inc. (defendant). The complaint also alleged the employee worked as a bartender at a nightclub called "Kolla's Night Club" that is owned and operated by Estrada and defendant.

the dismissal of a well-pleaded cause of action for whistleblower retaliation under section 1102.5.

FUNDAMENTAL REASONS WHY THE MAJORITY OPINION IS INCORRECT

The reasons the majority opinion's conclusion constitutes prejudicial error can be summarized as follows:

- The majority opinion's definition of disclosure is at odds with the governing rules of statutory interpretation. By testing the majority opinion's definition by applying it *uniformly* throughout the statute, we will see that it yields facially incorrect results. The analysis in the majority opinion is thoroughly inconsistent with clear legislative intent.

- The majority opinion heavily relies upon *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832 (*Mize-Kurzman*). That opinion was incorrectly decided because it followed a flawed statutory analysis presented in federal cases that incorrectly interpreted section 1102.5's federal counterpart. Specifically, the majority opinion advances a similar restrictive definition of disclosure based on *Mize-Kurzman*'s use of that definition, which, in turn, was based on Federal Circuit cases that used a similar definition in their interpretation of the federal Whistleblower Protection Act of 1989 (Pub.L. No. 101-12 (Apr. 10, 1989) 103 Stat. 16) (WPA). The *Mize-Kurzman* court considered the WPA to be "parallel" to section 1102.5. (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 849.) Those Federal Circuit cases, however, were proven to have incorrectly interpreted the scope of disclosure under the WPA when Congress passed the Whistleblower Protection Enhancement Act of 2012 (Pub.L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1465) (WPEA). The WPEA by its terms *clarified* that the WPA widely defines protected disclosures, including situations where the recipient already knows about the subject of the complaint. *Mize-Kurzman* is

therefore not only outdated but rests on a discredited statutory interpretation. The majority opinion does not cite any legislative history showing the California Legislature intended a more restricted scope of protected disclosures under section 1102.5 than is provided under the WPA.

- The Second Appellate District in *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 (*Hager*) has directly criticized the use of the same definition of disclosure in section 1102.5 as applied in the majority opinion. In *Hager, supra,* 228 Cal.App.4th at page 1541, the appellate court held that an employee who is not the first to complain of a violation of law may nevertheless proceed with a section 1102.5 claim *notwithstanding the employer's prior awareness of the information underlying the complaint.* The majority opinion claims it does "not advocate for a first report rule," and appears to attempt to reconcile with *Hager* by appending to the *Mize-Kurzman* definition of disclosure a second prong to include reports the discloser *believed* were previously unknown to the recipient. No legal authority (other than the majority opinion) has ever proposed such a definition for disclosure under section 1102.5. *Hager* itself does not qualify its rejection of the first report rule on the disclosing employee's perception of the recipient's prior knowledge and thus the majority opinion creates a conflict with existing law.

- As illustrated by the applicable jury instruction, CACI No. 4603, whether a communication constitutes a disclosure for purposes of section 1102.5 is a question of fact for the jury. There is nothing in the standard jury instruction that asks the jury to consider the recipient of a report's awareness, or perceived awareness, of the underlying information of the report at the time the employee complained. The majority opinion ignores this point entirely.

- The majority opinion runs afoul of the basic rules for constructing pleadings under Code of Civil Procedure section 452, which provides: "In the

construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." The majority opinion not only concludes the complaint failed to adequately plead "disclosure," it also improperly looks behind the pleading and makes factual inferences against the pleading, speculating that Estrada must have already known the employee had not been paid at the time of her complaint.[3]

- The majority opinion's disclosure definition is not only inconsistent with the purpose of the statute but, as a practical matter, it results in barring relief under section 1102.5 for an employee whose employment has been terminated for having complained about an employer's illegal conduct—excluding the exact type of person the whistleblower statute was enacted to protect. The majority opinion contends section 98.6 covers this situation so not to worry. I cannot be so dismissive of whistleblower protection, the issue under section 1102.5.

DISCUSSION

I.

THE MAJORITY OPINION'S DEFINITION OF DISCLOSURE IS AT ODDS WITH THE GOVERNING RULES OF STATUTORY INTERPRETATION.

In *Martinez v. Combs* (2010) 49 Cal.4th 35, 51, the California Supreme Court stated: "'[O]ur fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citation.] In this search for what the Legislature meant, '[t]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary

[3] The majority opinion expresses incredulity that Estrada had no prior knowledge because, in reacting to the employee's complaint about not being paid, he fired her, and threatened to report her to immigration authorities. (Maj. Opn., *ante*, p. 11.) Why make this inference? More likely, Estrada reacted that way because he is a jerk and jerks act like jerks.

meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.'"

In support of its interpretation of section 1102.5(b), the majority opinion cites the following portion of a dictionary definition, stating: "The word 'disclose' means 'to make known' or 'open up to general knowledge,' especially 'to reveal in words (something that is secret or not generally known)'. (Webster's 3d New Internat. Dict. (1981) p. 645, col. 2.)"[4] (Maj. Opn., *ante*, p. 10.) The majority opinion concludes: "Foundational, in our view, to a disclosure is the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made. The legislature's choice of that word, rather than words like 'report' or 'tell' seems to us significant." (*Ibid.*, fn. omitted.)

If the majority opinion's definition accurately reflects the Legislature's intended meaning, it should make sense in the context of the entire statute when applied to each one of the five instances in which a variation of the word "disclose" appears in section 1102.5(b). It does not.

Section 1102.5(b) provides: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for *disclosing* information, or because the employer believes that the employee *disclosed* or may *disclose* information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct

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[4] "[A] dictionary definition, though always a good starting point, does not necessarily settle how the Legislature meant a term to be understood within a statutory scheme." (*Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 894-895.)

the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, 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." (Italics added.)

Of course, our case involves an instance where an employee reports wrongdoing to a person with authority over the employee. But what of the instance provided under the statute where an employee reports the employer's wrongdoing to a government or law enforcement agency? The majority opinion's definition would require the employee to prove that his or her communication to the agency revealed something new, or at least believed by the employee to be new information, to that agency. No case cited in the majority opinion supports the conclusion that the awareness or perceived awareness of such an agency that receives a whistleblower complaint is a requirement of a section 1102.5 claim.

Section 1102.5(b)'s penultimate use of a variation of the term disclose also requires an employee to have "reasonable cause to believe that the information *discloses* a violation of state or federal statute." (Italics added.) If the majority opinion's definition for disclose is applied, it logically follows the employee would be required to prove not only the fact of the reported wrongdoing but also that the illegal nature of that wrongdoing were *both* previously unknown, or at least believed by the employee to be previously unknown, to the recipient of the information.

For example, let's say an employee reported to a law enforcement agency that her employer was stealing from customers, and she was fired for making that report. Under the majority opinion, she would not be able to recover under section 1102.5(b) unless she was able to plead and prove that, at the time she made her report, the law

enforcement agency did not know, or at least the employee believed it did not know, of both the theft *and the illegal nature of theft*. It is fair to say such an interpretation of the statute is illogical and inconsistent with its goals.

The problem of importing the majority opinion's new definition of disclosure uniformly into and throughout section 1102.5(b) is demonstrated in its own statement: "We are aware that protected activity under subdivision (b) entails a double disclosure, since the word 'disclose' is used in the statutory language in two different contexts. The first is the one we have already highlighted—revealing information to a government agency, supervisor, or other employee with investigative power. *The second has to do with the employee's subjective belief about the information being disclosed.* The employee must have 'reasonable cause' to believe that the information she is disclosing *itself discloses a violation of law*. We concern ourselves here only with the first context." (Maj. Opn., *ante*, p. 10, fn. 8, some italics added.)

It appears the majority opinion might use a different and less onerous definition for the term disclose in the latter context than that which it applies to the former. The majority opinion's statement suggests that in the latter context, the meaning of disclosure is more akin to "show" such that the employee's disclosure of wrongdoing must itself show illegal conduct was afoot without regard to the recipient's prior or perceived prior understanding of the illegality of the reported conduct. No legal authority demonstrates the Legislature intended that different meanings of disclosure apply within different parts of the same subdivision.

Given that section 1102.5 "reflects the broad public policy interest in encouraging workplace whistle-blowers to *report* unlawful acts without fearing retaliation" (*Green v. Ralee Engineering Co., supra*, 19 Cal.4th at p. 77, italics added), the majority opinion's definition needlessly impedes effecting such important public policy.

II.

THE MAJORITY OPINION HEAVILY RELIES ON *MIZE-KURZMAN* WHICH IS OUTDATED AND ALSO RELIED ON FEDERAL CIRCUIT DECISIONS THAT HAVE BEEN SINCE DETERMINED BY CONGRESS TO HAVE INCORRECTLY INTERPRETED THE WPA.

How did the majority opinion arrive at its new definition for the term disclosure in the context of section 1102.5(b)? The majority opinion cites the same portion of the same dictionary definition utilized by the appellate court in *Mize-Kurzman*, *supra*, 202 Cal.App.4th at page 858, a case upon which the majority opinion heavily relies. (Maj. Opn., *ante*, pp. 11, 15-17.) *Mize-Kurzman* is not only outdated, but it based its analysis on the flawed and overly restrictive statutory interpretation of the WPA in Federal Circuit decisions. Congress has since clarified that the WPA has always broadly defined what constitutes a protected disclosure. For the same reasons the federal decisions were incorrectly decided, *Mize-Kurzman* was also incorrectly decided.

In *Mize-Kurzman*, *supra*, 202 Cal.App.4th at pages 844-848, the issue before the court was the correctness of several jury instructions that had been given with regard to the plaintiff's whistleblower claims brought under former section 1102.5 and Education Code section 87160 et seq. In determining the scope of the statutory claims, the court acknowledged "the language and purpose" of the California statutes before it were "sufficiently close" to the WPA "to permit the court to use federal authorities as a guide to interpretation of these California whistleblower protection statutes." (*Mize-Kurzman, supra*, 202 Cal.App.4th at pp. 848-849 [adding "the California Supreme Court has noted in interpreting provisions of the California WPA that although the Legislature did not adopt language identical to that of the federal WPA, 'it did create a somewhat similar structure'"].) The *Mize-Kurzman* court therefore concluded the trial court could properly give jury instructions that define protected disclosures "under California law as 'whistleblowing' *in accord with federal cases interpreting the parallel federal WPA*." (*Id.* at p. 849, italics added.)

Given the dearth of California authority on the subject, the *Mize-Kirzman* court cited the analysis of decisions out of the Federal Circuit interpreting the WPA to conclude that under former section 1102.5, "the report of information that was already known did not constitute a protected disclosure." (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858.) The *Mize-Kurzman* court quoted one such Federal Circuit case, *Huffman v. Office of Personnel Management* (Fed.Cir. 2001) 263 F.3d 1341 (*Huffman*), in its reliance on a dictionary definition for the term disclosure as meaning "'to reveal something that was hidden and not known.'" (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858.)

At the time of *Mize-Kurzman, supra*, 202 Cal.App.4th 832, the WPA prohibited federal officials from taking personnel actions against employees because of "any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." (5 U.S.C. § 2302(b)(8)(A).) The WPA did not include a definition of "any disclosure." Federal Circuit decisions relied upon by the *Mize-Kurzman* court such as *Huffman* narrowly interpreted the otherwise broad language of the WPA. (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858.)

In 2012, Congress passed the WPEA to amend the WPA "to *clarify* the disclosures of information protected from prohibited personnel practices." (Pub. L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1465, italics added.) The WPEA amended the WPA by, as relevant to the issue before us, adding the following at the end of section 2302(a)(2) of title 5 of the United States Code: "(D) 'disclosure' means a formal or informal *communication* or *transmission*, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure

evidences—[¶] (i) any violation of any law, rule, or regulation; or [¶] (ii) gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." (Pub. L. No. 112-199, § 101 (Nov. 27, 2012) 126 Stat. 1465, italics added.)

The WPEA also amended the WPA by adding subdivision (f) to section 2302 of title 5 of the United States Code to provide:

"(1) A disclosure shall not be excluded from subsection (b)(8) because—

"(A) the disclosure was made to a supervisor or to a person *who participated in an activity* that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

"(B) *the disclosure revealed information that had been previously disclosed*;

"(C) of the employee's or applicant's motive for making the disclosure;

"(D) the disclosure was not made in writing;

"(E) the disclosure was made while the employee was off duty; or

"(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

"(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure." (Pub. L. No. 112-199, § 101 (Nov. 27, 2012) 126 Stat. 1465, italics added.)

In *Kerr v. Jewell* (9th Cir. 2013) 549 Fed.Appx. 635, 640 (*Kerr*), the Ninth Circuit refused to apply "doctrines arising from cases in the Federal Circuit" such as

Huffman, supra, 263 F.3d 1341. Instead, the court decided whether the plaintiff's complaints constituted protected disclosures "as a straightforward issue of statutory interpretation." (*Kerr, supra,* 549 Fed.Appx. at p. 640.) The Ninth Circuit concluded: "Clearly, we must take the language 'any disclosure' at face value, which compels us to conclude that [the plaintiff]'s complaints fall within the broad protective scope of § 2302(b)(8)(A)" of title 5 of the United States Code. (*Ibid*.)

In *Kerr, supra,* 549 Fed.Appx. at pages 640-641, the court stated that "[b]ecause we hold that the district court erred in granting summary judgment . . . we need not decide whether the WPEA should be retroactively applied." The court added, citing *Day v. Department of Homeland Security* (2013) 2013 M.S.P.B. 49: "We note that the Merit Systems Protection Board recently held that the WPEA does apply to conduct preceding its passage on the theory that the WPEA was merely a clarification of existing law." (*Kerr, supra,* 549 Fed.Appx. at p. 641, fn. 4; see *McCarthy v. Merit Systems Protection Board* (Fed.Cir. 2016) 809 F.3d 1365, 1368-1369 ["On June 26, 2013, the Board decided *Day v. Department of Homeland Security* . . . which held that § 101 of the WPEA [codified as amendments to 5 U.S.C. § 2302 discussed *ante*] could be applied retroactively to pending cases. The parties do not dispute that the WPEA could be applied retroactively here"].)

Consequently, the Federal Circuit opinions cited by and relied upon in *Mize-Kurzman* have been superseded by passage of the WPEA clarifying Congress's intent, summarized as follows: "It is true that the Federal Circuit has traditionally read the WPA as not protecting government employees who report 'misconduct by a wrongdoer to the wrongdoer.' *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1350 (Fed.Cir. 2001). It is also true that, in so doing, the Federal Circuit believed that such a rule was 'compelled by the purpose of the statute.' . . . Defendants' argument, however, suffers from a fatal flaw: As the Federal Circuit has recently acknowledged, *see Nasuti v.*

Merit Sys. Protection Bd., 504 Fed.Appx. 895, 2013 U.S.App.LEXIS 1039, 2013 WL 163827, at *1 (Fed.Cir. Jan. 16, 2013), its narrow interpretation of the WPA recently has been definitively overturned by Congress. *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 101(b)(2)(C), 126 Stat. 1465, 1465-66; *see also* 5 U.S.C.A. § 2302(f)(1)(A)-(B) (providing that '[a] disclosure shall not be excluded from' the WPA's protection either because 'the disclosure was made to a supervisor or to a person who participated in an activity' or because 'the disclosure revealed information that had been previously disclosed'). In rejecting the Federal Circuit's narrow reading of the WPA, Congress made crystal clear its intent that *any* whistleblower who reports misconduct via one of the enumerated channels be protected under federal whistleblower statutes. *See* S. Rep. No. 112-155, at 4-5 (2012) (criticizing the Federal Circuit for 'undermin[ing]' the 'plain language' of the WPA by 'imposing limitations on the kinds of disclosures by whistleblowers that are protected')." (*Leshinsky v. Telvent GIT, S.A.* (S.D.N.Y. 2013) 942 F.Supp.2d 432, 448-449, fn. omitted; see *Hager, supra*, 228 Cal.App.4th at pp. 1550, 1552, fns. 4, 5 [*Huffman* and another Federal Circuit case superseded by WPEA as to previous knowledge of reported information].)

Based on its reliance on these incorrectly decided federal cases, *Mize-Kurzman* concluded an "employee's report to the employee's supervisor about the supervisor's own wrongdoing is not a 'disclosure' and is not protected whistleblowing activity, because the employer *already knows* about his or her wrongdoing." (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 859.)

Like the interpretation of the WPA in the Federal Circuit opinions relied upon in *Mize-Kurzman*, the majority opinion undermines the plain language of section 1102.5(b) by applying its new definition of the term disclosure by which it unilaterally imposes unjustified limitations on the protections afforded to whistleblowers under the statute.

The majority opinion states that because the Legislature has not amended section 1102.5 to expressly define disclosure, *Mize-Kurzman*'s interpretation of section 1102.5 is therefore neither outdated nor unreasonable. (Maj. Opn., *ante*, pp. 16-17.)

The Federal Circuit opinions upon which *Mize-Kurzman*'s analysis was based, however, have been legislatively overruled, and no other authority supports its definition of disclosure. The majority opinion does not cite any legal authority, including legislative history, showing the Legislature intended to limit the scope of protected disclosures under section 1102.5 as compared to the scope of protected disclosures under the WPA as clarified by the WPEA. Under these circumstances, the correct course, until the California Legislature clarifies any contrary intent, is to interpret and apply the statute in a manner consistent with the legislative intent to broadly protect employees from whistleblower retaliation. Therefore, the term disclose in section 1102.5 should be interpreted as meaning to make a report or to communicate information that shows a violation of law, regardless of whether the recipient of the disclosure is already aware of that information.

III.

THE MAJORITY OPINION'S DEFINITION OF DISCLOSURE CONFLICTS WITH THE HOLDING OF *HAGER*.

In 2014, Division Three of the Second Appellate District in *Hager, supra*, 228 Cal.App.4th at pages 1549-1550, criticized the use of essentially the same definition relied upon in the majority opinion and in *Mize-Kurzman* (issued two years before *Hager*) as inappropriate in the context of section 1102.5 in its entirety, concluding that interpreting section 1102.5(b) to protect only the first employee to disclose unlawful acts would defeat the legislative intent. As a consequence, *Hager* is in direct conflict with the majority opinion's pleading requirement that the whistleblower employee know or

believe that the recipient of the report of wrongdoing has no prior knowledge of the wrongdoing.

The *Hager* court stated: "The plain language of former section 1102.5(b) . . . does not limit whistleblower protection only to an employee who discloses unlawful conduct that had not been previously disclosed by another employee. The verb 'disclose' is not defined in the statute, and the *Mize-Kurzman* court gave the statutory term its plain and commonsense meaning. [Citation.] But words and phrases are construed according to context and approved usage of language. [Citation.] While we accept the dictionary definition of 'disclosure' as used by the court in *Mize-Kurzman, supra,* 202 Cal.App.4th 832, the court did not construe the statutory language in the context of the statute as a whole. [¶] Subdivision (e) of former section 1102.5 provides that a 'report' by an employee of a government agency to his or her employer is a disclosure of information under former section 1102.5(b). A report does not necessarily reveal something hidden or unknown. To the extent *Mize-Kurzman* has highlighted an inconsistency in the statute, that is, a public employee must merely 'report' unlawful conduct, and other employees must 'disclose,' unlawful conduct, it is up to the Legislature to resolve this issue, not this court." (*Hager, supra,* 228 Cal.App.4th at pp. 1549-1550.)[5]

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[5] It is also notable that the same dictionary cited in the majority opinion contains a definition of the word disclose that is not restricted to communications that reveal something previously unknown. That dictionary also defines the term disclose as meaning "to expose to view" as in "the curtain rises to [disclose] once again the lobby." (Webster's 3d New Internat. Dict., *supra,* p. 645, col. 2.) That definition does not require that whatever is exposed to view had been previously unknown to the viewer. The

The majority opinion analyzes the use of the term "report" in subdivision (e) of section 1102.5 (section 1102.5(e)) as follows: "Subdivision (e) of the statute applies specifically in the context of *government* whistleblowers. It appears to us the legislature chose different rules for different types of employees. It chose the term 'disclose' in subdivision (b), not 'report.' Had it wished to create the same rule, we would have expected it to use the same words. If it meant 'disclose' to mean 'report,' it could easily have used the term 'report' in subdivision (b) as well, or it could have so defined 'disclose' as a general matter." (Maj. Opn., *ante*, pp. 13-14.)

The majority opinion concludes that the use of the term "report" in section 1102.5(e) suggests, if not establishes, that the Legislature intended to apply different rules to determine whether a communication is a protected disclosure under the statute depending on whether the whistleblower works in the public or private sector. (Maj. Opn., *ante*, at pp. 13-14.) The majority opinion draws an incorrect conclusion which does not comport with the history of section 1102.5(e).

Section 1102.5(e) was added when the statute was amended in 2003 to codify the holding of *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 237 (*Gardenhire*). (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385.) The version of section 1102.5(b) that was previously in effect was limited, as compared to the current version, as it provided: "No employer shall retaliate against an employee for 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 statute, or violation or noncompliance with a state or federal

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majority opinion, however, chose to rely on the more restrictive definition in contravention of the wide net the Legislature intended to cast.

regulation."[6] (Lab. Code, former § 1102.5, subd. (b), italics added; see *Gardenhire, supra*, 85 Cal.App.4th at p. 241.) Subdivision (e) codified the holding of *Gardenhire* to expressly confirm that a public employee was not required to report suspicions of illegal activity to an outside agency, but could make a report to the employee's employer for protection under the statute.[7]

Furthermore, section 1102.5(e), under the majority opinion's logic, would afford special protection to only a subset of public employees—namely those who are employed by a government agency and make a report to their employer. How about a public employee who discloses information to an outside governmental or law enforcement agency (and not to their employer)? The logic of the majority opinion's analysis would be that that employee, along with all private employees, must prove the report communicated new, or perceived to be new, information to the recipient. The majority opinion does not address this consequence of its definition.

Given the history of section 1102.5(e), there is no basis in the statutory language to infer the use of the term "report" was intended to provide a less onerous standard for public employees to attain protection under the statute. The Legislature's addition of subdivision (e) to codify *Gardenhire* and not to create a separate standard for public employees, if anything, reflects the Legislature's intent to use the terms report and disclosure interchangeably in section 1102.5. Had the Legislature intended to create

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[6] As pointed out in the majority opinion, section 1102.5(b) was amended in 2013 "in order to 'expand these provisions' so they would apply to . . . *reports* made 'to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation." (Maj. Opn., *ante,* pp. 7-8, italics added [noting an apparent recognition of the interchangeability of "report" and "disclosure" under the statute].)

[7] In light of the history of subdivision (e), the "general/specific canon of statutory construction" analysis applied in the majority opinion is irrelevant and otherwise unhelpful in resolving the Legislature's use of various forms of the term disclose in section 1102.5(b) and use of the term "report" in subdivision (e) of the statute. (Maj. Opn., *ante,* p. 14.)

different rules between public and private employees under the statute, it could have done so; it did not. It is not the role of the court to create them.

The majority opinion's statutory construction is also not supported by any other legal authority interpreting section 1102.5(e), including *Hager, supra*, 228 Cal.App.4th at pages 1549-1550, which points out the lack of uniformity in terminology and does not hold that such a dichotomy between public and private employees exists in the statute.

Aside from section 1102.5(e), the *Hager* court found the concept of a first report rule inappropriate within the language and intent of former section 1102.5(b). The *Hager* court stated: "We also view the 'first report' rule the County proposes as contrary to the legislative intent in enacting former section 1102.5(b). Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the County's interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra*, 228 Cal.App.4th at p. 1550.)

Significantly, although *Hager* acknowledges *Mize-Kirzman*'s disclosure standard, it nevertheless rejects a first report rule without *any* reference to whether the whistleblowing employee had any awareness that a prior report had been made or that the recipient of the communication had any prior knowledge of the information underlying the report. Although it involved a public employee, the *Hager* court also does not comment on, much less suggest, that a first report rule (barring recovery) might be appropriate in the private sector.

Stating that it does "not advocate for a first report rule" (Maj. Opn., *ante*, p. 16), the majority opinion appears to attempt to reconcile its direct conflict with *Hager*,

supra, 228 Cal.App.4th 1538 by appending to the *Mize-Kurzman* definition of disclosure a second prong to include reports of wrongdoing the discloser only *believed* were previously unknown to the recipient. No legal authority has proposed such a definition for disclosure. *Hager* itself does not qualify its rejection of the first report rule on the disclosing employee's perception of the recipient's prior knowledge.

Because the *Hager* court's wholesale rejection of a first report rule is not in any way limited by the whistleblower employee's prior awareness or whether the employee works in the public or private sector, *Hager* is in direct and irreconcilable conflict with the majority opinion's definition of disclosure. The majority opinion's efforts to distinguish and/or reconcile *Hager* miss the real significance of *Hager's* holding: Disclosure within the meaning of section 1102.5(b) occurs even if the recipient is already aware of the information reported to it.

IV.
THE STANDARD JURY INSTRUCTION FOR SECTION 1102.5 CLAIMS PROVIDES FURTHER SUPPORT THAT THE TERM DISCLOSURE IS AN ISSUE OF FACT FOR THE JURY.

The majority opinion approves the dismissal of a section 1102.5 claim simply because the complaint failed to *plead* that the employee's complaint revealed something new to Estrada, or at least believed by the employee to be new to Estrada. The majority opinion cites no case in which the court imposed such a pleading requirement to state a claim and, for the all the reasons discussed *ante*, it would not only be unprecedented, but unjustified.

CACI No. 4603, entitled "Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)," instructs that in retaliation claims based on an employee's disclosure such as is presented in this case, the following elements must be proven: (1) the defendant was the plaintiff's employer; (2) the plaintiff disclosed information to a person with authority over the plaintiff; (3) the plaintiff had reasonable

cause to believe that the information disclosed a violation of a law; (4) the defendant discharged the plaintiff or took other adverse employment action; (5) the plaintiff's disclosure of information was a contributing factor in the decision to discharge the plaintiff or take other adverse employment action; (6) the plaintiff was harmed; and (7) the defendant's conduct was a substantial factor in causing the plaintiff harm.

The jury instruction tracks the language of section 1102.5(b) and, like the statute, does not define the word disclose; the jury is instructed to decide, as the trier of fact, whether the employee made a disclosure. Nothing in this jury instruction or the statute suggests the term disclose means anything other than communicating information that shows a violation of law.

V.

THE MAJORITY OPINION RUNS AFOUL OF CALIFORNIA'S LIBERAL CONSTRUCTION OF PLEADINGS.

The majority opinion's imposition of its definition of disclosure as an essential element to state a claim conflicts with California's liberal construction of pleading principles. Code of Civil Procedure section 452 provides: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (See *Entezampour v. North Orange County Community College Dist.* (2010) 190 Cal.App.4th 832, 837 [in reviewing whether a pleading alleges sufficient facts to state a cause of action, courts "assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken"].) "The primary function of a pleading is to give the other party notice so that it may prepare its case." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240.)

The majority opinion not only concludes the complaint failed to adequately plead disclosure, but it also improperly looks behind the pleading and draws inferences

against the pleader by speculating that Estrada's angry response must have reflected his prior awareness the employee had not been paid. (Maj. Opn., *ante*, p. 11.) Another part of the majority opinion goes even further with its inferences *against* the pleader, stating the complaint "is reasonably susceptible to an interpretation that the complainant was reporting wrongdoing directly to the wrongdoer." (*Id.* at p. 15.)

VI.

THE MAJORITY OPINION DEPRIVES AN EMPLOYEE OF A BASIC RIGHT AND IS INCORRECT.

Preventing retaliation against an employee such as the employee here is exactly what section 1102.5 is designed to do. Requiring an employee to plead and prove what is in the mind of the supervisor to whom she complains about illegality—the supervisor's subjective awareness of the information underlying the complaint—is impractical and would effectively gut the protections of section 1102.5 for those whom it was designed to protect.

In sum, the majority's opinion, in my view, imposes a definition that does not make sense in the context of the statute; relies on legislatively superseded authority and is out of step with its federal counterpart; does not resolve its direct conflict with *Hager, supra*, 228 Cal.App.4th 1538; takes away an issue to be decided by the trier of fact; violates the governing rules of pleading; and ultimately, unjustifiably deprives the employee in this case and others in a similar position of the right to avail themselves of the protections of section 1102.5 and complain about a violation of the law without fear of retaliation. Judgment should be entered in favor of the Labor Commissioner on the section 1102.5 claim and statutory penalties awarded.

FYBEL, J.