
California Supreme Court Confirms Employee-Friendly Test for Whistleblower Retaliation Suits, Rejecting McDonnell Douglas Standard

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The California Supreme Court's recent unanimous decision in *Lawson v. PPG Architectural Finishes, Inc.*, __ P.3d __, 2022 WL 244731 (Cal., Jan. 27, 2022) clarified the burden for employers that are defending against whistleblower retaliation claims brought by employees. The state high court confirmed that the employee-friendly standard articulated in Labor Code section 1102.6 applies to claims for whistleblower retaliation brought under Labor Code section 1102.5, and that the burden-shifting framework borrowed from the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) — which is applicable to employment discrimination cases — is not the appropriate standard to use.



Los Angeles, Calif. (February 17, 2022) - The California Supreme Court's recent unanimous decision in *Lawson v. PPG Architectural Finishes, Inc.*, __ P.3d __, 2022 WL 244731 (Cal., Jan. 27, 2022) clarified the burden for employers that are defending against whistleblower retaliation claims brought by employees. The state high court confirmed that the employee-friendly standard articulated in Labor Code section 1102.6 applies to claims for whistleblower retaliation brought under Labor Code section 1102.5, and that the burden-shifting framework borrowed from the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) — which is applicable to employment discrimination cases — is not the appropriate standard to use.

***Lawson* Highlighted Widespread Confusion Among California Courts as to Which of Two Evidentiary Standards Applied to Section 1102.5 Retaliation Claims**

In *Lawson*, a paint merchandiser employee claimed that his employer had fired him because he blew the whistle on his supervisor's fraudulent paint mis-tinting practices, in violation of Labor Code section 1102.5. PPG moved for summary judgment.

Labor Code section 1102.5 provides whistleblower protections to employees who disclose wrongdoing to authorities. As relevant here, section 1102.5 prohibits an employer from retaliating against an employee for sharing information the employee has reasonable cause to believe violates a local, state, or federal rule or regulation with a government agency, with a person with authority over the employee, or with another employee who has authority to investigate or correct the violation.

The district court granted summary judgment in favor of PPG on the retaliation claim because it found that the employee could not satisfy the third step of the *McDonnell Douglas* test that PPG's termination reason was pretextual. The district court applied the three-part *McDonnell Douglas* burden-shifting framework: (1) the employee establishes a prima facie case of retaliation; (2) the burden of production shifts to the employer to articulate a legitimate reason for its decision; and (3) the burden shifts back to the employee to show that that the employer's reason is pretextual.

On appeal to the United States Court of Appeals for the Ninth Circuit, the employee argued that the district court should have instead applied the framework set out in Labor Code section 1102.6: (1) the employee demonstrates "by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action; and (2) the burden of proof shifts to the employer to demonstrate "by clear and convincing evidence" that it would have taken the same action "for legitimate, independent reasons" even if the employee had not engaged in the protected action. The employee argued that his burden was to merely show that his whistleblowing activity was a "contributing factor" in his dismissal under section 1102.6, not to show that PPG's stated reason was pretextual under *McDonnell Douglas*.

The Ninth Circuit certified the question to the California Supreme Court because it observed "widespread confusion" and inconsistent practice among California courts as to which evidentiary standard applied. Although the California legislature enacted section 1102.6 in 2003 in response to a

series of high-profile corporate scandals involving Enron and others, some courts continued to apply the *McDonnell Douglas* test to retaliation claims.

The unanimous decision, penned by Justice Leondra Kruger, held that Labor Code section 1102.6, not *McDonnell Douglas*, governs section 1102.5 retaliation claims. The court rooted its reasoning in the statutory text of section 1102.6, which describes the applicable standards and burdens of proof for both parties in a section 1102.5 retaliation claim.

The California Supreme Court rejected PPG's argument that whistleblower employees should be required to satisfy the *McDonnell Douglas* test and prove that the employer's proffered legitimate reasons were pretextual in order to prove that retaliation was a contributing factor under section 1102.6. To the contrary, the court found that placing this unnecessary burden on employees would be inconsistent with the legislature's evident purpose in enacting section 1102.6 of "encourag[ing] earlier and more frequent reporting of wrongdoing by employees."

Takeaways for Employers

Employers should be aware that it will likely be more difficult for employers to win Labor Code section 1102.5 whistleblower retaliation claims on summary judgment. While arguably the standard under section 1102.6 has applied since its enactment in 2003, some courts have followed the more employer-friendly *McDonnell Douglas* standard. The *Lawson* opinion removes any ambiguity as to which standard applies to whistleblower retaliation cases, favoring the employee-friendly test articulated in the Labor Code.

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