

California Supreme Court Holds That McDonnell Douglas Standard Should Not Be Used When Evaluating Whistleblower Retaliation Claims

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In *Lawson v. PPG Architectural Finishes, Inc.*, __ P.3d __, 2022 WL 244731 (Cal., Jan. 27, 2022), the California Supreme Court clarified that whistleblower retaliation claims brought under Labor Code section 1102.5 should not be evaluated under the *McDonnell Douglas* test, but instead the standard enumerated in Labor Code section 1102.6. Under the section 1102.6 standard, a plaintiff must show that protected activity was a contributing factor in a prohibited action against the employee by a preponderance of the evidence. The employer must then demonstrate with clear and convincing evidence that the action would have occurred for legitimate, independent reasons, even if the employee had not engaged in protected action.

Courts Applied One of Two Standards When Evaluating Whistleblower Retaliation Claims

In *Lawson*, a paint manufacturer employee brought a claim under Labor Code section 1102.5 alleging that his employer discharged him after reporting that paints were purposefully “mistinted” so the manufacturer could avoid having to buy back unpopular colors from retail stores.

Labor Code section 1102.5 prohibits employers from “preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee” who could investigate the non-compliance if the employee reasonably believes “a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation” exists. In contrast, the Fair Employment and Housing Act (“FEHA”) prohibits retaliation based on an employee’s protected activity, which includes resisting or objecting to discrimination or harassment. *Lawson* clarifies the standard for whistleblower retaliation claims only.

The district court found that the paint manufacturer set forth a legitimate, nondiscriminatory reason for Lawson’s termination, namely failing to meet sales targets, and that Lawson failed to produce sufficient evidence that the termination was pretextual. On appeal to the Ninth Circuit, Lawson argued that the district court should have applied the standard set out in section 1102.6 for evaluating whistleblower retaliation claims and not the *McDonnell Douglas* standard. The California Supreme

Court granted review to clarify the correct standard.

The United States Supreme Court established a framework for evaluating discrimination claims based on circumstantial evidence in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). California courts have adopted the federal *McDonnell Douglas* test and applied it to evaluate both FEHA and whistleblower retaliation claims under section 1102.5. Under this standard, a plaintiff must first establish a *prima facie* case by showing she or he engaged in protected activity, was subjected to an adverse employment action and a causal link between the two exists. Then, the employer must provide a legitimate, nonretaliatory reason for the adverse employment action. If the employer is able to do so, the plaintiff must show the legitimate, nonretaliatory reason was pretext for impermissible retaliation.

However, in 2003, the state legislature introduced the section 1102.6 standard in reaction to several high-profile corporate scandals and coverups. While some courts evaluated whistleblower retaliation claims under this new standard, others continued to use the traditional *McDonnell Douglas* framework. However, the *Lawson* court established that section 1102.5 claims should be evaluated using the more stringent 1102.6 standard.

Section 1102.6 Adjusts Evaluation of Whistleblower Retaliation Claims

Under the section 1102.6 standard, a plaintiff has to show her or his protected activity was a contributing factor, even if other legitimate factors also contributed to the adverse action. Unlike the *McDonnell Douglas* test, Section 1102.6’s standard does not require that the plaintiff prove that the nonretaliatory reason was pretextual. Rather, a plaintiff must show that “the employer had at least one retaliatory reason that was a contributing factor in the action.”

Further, Section 1102.6 clarifies the evidentiary standard for both parties. Employers must meet a higher “clear and convincing” evidence state, but the plaintiff’s burden is the lower “preponderance of evidence standard. The chart below highlights the differences:

	<i>McDonnell Douglas</i> Standard	Section 1102.6 Standard
Plaintiff	Causal link between protected activity and adverse employment action	Preponderance of evidence shows protected activity was a contributing factor
Defendant	Legitimate, nondiscriminatory reason for the adverse employment action	Clear and convincing evidence shows adverse employment action would have occurred for legitimate, independent reasons regardless of protected activity
Plaintiff	Show legitimate, nondiscriminatory reason was pretext for retaliation	Not applicable

The Court rejected arguments that the *McDonnell Douglas* standard would apply in a whistleblower retaliation claim in conjunction with the section 1102.6 standard. The paint manufacturer argued that a plaintiff would have to meet the *McDonnell Douglas* standard to prove that a retaliatory motive was a “contributing factor.” However, the Court indicated that the *McDonnell Douglas* standard is only *one* method of proving employer intent and it is not “well suited to litigation under the section 1102.6 framework.” For example, the Court stated that plaintiffs do not have to show pretext when showing that retaliation was a “contributing factor,” which the *McDonnell Douglas* framework would require. The Court also rejected an argument that the *McDonnell Douglas* standard should apply only at the summary judgment stage, because it would force plaintiffs to show that retaliation was the *only* factor for an adverse action, simply to get to trial to show retaliation was a factor.

Key Takeaways

Employers should be aware that in a whistleblower retaliation case, courts will look at *all* the factors that led to an adverse employment action, to determine if retaliation was a contributing factor. Further, *Lawson* clarifies the standard for whistleblower retaliation claims only, and FEHA retaliation claims are still properly evaluated under the *McDonnell Douglas* standard.

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