

California Supreme Court Decision Places Higher Burden on Employers in Whistleblowing Retaliation Claims

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On January 27, 2022, the California Supreme Court provided clarification in *Lawson v. PPG Architectural Finishes, Inc.* to lower courts reviewing whistleblower retaliation claims. In what it calls an “unsurprising” decision, the Supreme Court concluded that the framework prescribed by California Labor Code section 1102.6, rather than the *McDonnell Douglas* test, must be used in whistleblower claim evaluations.

The impact of this decision is that employees will have a lower burden to meet to demonstrate that their alleged whistleblower activities resulted in an adverse employment action, while employers will have to meet a higher burden requiring them to demonstrate by clear and convincing evidence that they did not retaliate based on the employee’s activities.

IN DEPTH

Labor Code section 1102.6 requires that an employee bringing claims under Labor Code section 1102.5 for whistleblowing activities¹ shows by a preponderance of the evidence that retaliation was a contributing factor in the employer’s adverse employment action. The burden then 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 activities protected under Labor Code section 1102.5.

By contrast, the *McDonnell Douglas* test required a plaintiff to establish a *prima facie* case by proving that they engaged in protected activity, that they were thereafter subjected to an adverse employment action and that there was a causal link between the two. Once the plaintiff established a *prima facie* case, the burden shifted to the employer to provide evidence of a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifted back to the employee to prove that the employer’s reason was pretextual.

The Supreme Court’s decision makes clear that for any whistleblower retaliation claims brought under Labor Code section 1102.5, courts must apply the procedural framework listed in Labor Code section 1102.6. There are two main differences between the two frameworks. *First*, Labor Code section 1102.6 eases the burden on the plaintiff by only requiring a showing that the whistleblowing activity was a *contributing factor* to the employer’s adverse employment action, even when an

employer might have other legitimate reasons for the adverse employment action.

Second, Labor Code section 1102.6 places a heavier burden on employers by requiring them to show by clear and convincing evidence that they would have taken the same action for independent reasons. While the burden of persuasion under *McDonnell Douglas* stays with the plaintiff (who must continue to show that the reasons set forth by the employer are pretextual), this is not the case under Labor Code section 1102.6.

Employers should keep in mind that this employee-friendly decision creates a higher burden on employers to show they did not act in a retaliatory manner for any employee whistleblower claims. If you have questions about the decision or how to navigate its implications, please do not hesitate to contact your regular [McDermott Employment team](#).

McDermott Will & Emery Law Clerk Priya Singh contributed to this article.

¹Under Labor Code section 1102.5, whistleblowing activities include but are not limited to: employees disclosing or providing information to a government agency, refusing to participate in activities what would violate state or federal statutes, and exercising their rights under their former employment.

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