Published on *The National Law Review* https://natlawreview.com

CA Supreme Court Clarifies Standard for Employee Whistleblower Retaliation Claims

Article By:

Ryan Bykerk

Samuel S. Hyde

On Jan. 27, 2022, the California Supreme Court issued its opinion in *Lawson v. PPG Architectural Finishes, Inc.*, No. S266001, 2022 WL 244731 (Cal. Jan. 27, 2022), clarifying the legal standard for whistleblower retaliation claims under California Labor Code section 1102.5 ("Section 1102.5"). Importantly, the Court's ruling shifts the evidentiary burdens for these claims, making it more important than ever that employers document the reasons for termination, particularly when employee complaints are involved.

Section 1102.5 whistleblowing claims and the *McDonnell Douglas* test

The California Legislature enacted section 1102.5 in 1984 to protect whistleblowing employees from retaliation. At the time, however, the Legislature provided no guidance for how to prove such claims in court. To fill that gap, California courts borrowed the familiar federal burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This test places the initial burden on the plaintiff to establish a prima facie case of retaliation by a preponderance of the evidence. If the plaintiff carries that burden, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action. If the defendant carries its burden, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the employer's stated reason was pretextual.

Section 1102.6

California courts applied the *McDonnell Douglas* test to Section 1102.5 claims for nearly two decades. Then, in 2003, the Legislature amended the Labor Code's whistleblower protections in response to the Enron, WorldCom and other high-profile corporate scandals. Among the new legislation was new Labor Code section 1102.6 (Section 1102.6), which provides:

In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would

have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.

Some California courts began applying this new standard to Section 1102.5 claims. Others continued applying the old *McDonnell Douglas* standard despite the new code section.

Lawson **corrects the split among California Courts of Appeal**

Enter *Lawson.* Plaintiff Wallen Lawson was a manager for PPG Architectural Finishes, Inc. (PPG), a paint and coatings manufacturer. After several negative performance evaluations from his direct supervisor related to his customer rapport and sales metrics, Lawson was placed on a performance improvement plan. But around the same time, he filed anonymous complaints with PPG's ethics hotline alleging that his supervisor was instructing him to deliberately provide customers with the wrong shade of paint in a scheme to move slow-selling product. He also told his supervisor he would not participate in the scheme. PPG investigated and instructed Lawson's supervisor to discontinue the practice, but the supervisor remained with PPG. Several months later, Lawson's supervisor and PPG determined that Lawson had failed to meet the goals in his performance improvement plan, and terminated Lawson.

Lawson sued in federal district court, claiming that he was terminated for blowing the whistle on his supervisor's fraudulent sales tactics. PPG moved for summary judgment, and the trial court, applying the *McDonnell Douglas* standard, granted the motion. The district court found that Lawson carried his burden to make out a prima facie case based on his complaints regarding the paint tinting scheme, but that the employer articulated a legitimate, nonretaliatory reason for firing him—specifically, his continued poor performance and failure to demonstrate progress under the performance improvement plan—that Lawson failed to rebut.

Lawson appealed to the Ninth Circuit Court of Appeals, which noted the split in California case law regarding the correct test to apply and certified the issue to the California Supreme Court. The California Supreme Court, held that the framework codified at section 1102.6 supplanted the *McDonnell Douglas* test for whistleblower retaliation claims.

The California Supreme Court's ruling appears correct as a matter of straightforward statutory interpretation—there is no need to borrow a burden-shifting framework from federal case law when Section 1102.6 provides one. But for employers, it significantly shifts the analysis. Under the *McDonnell Douglas* standard, an employer could rebut a claim of whistleblower retaliation by simply producing "some evidence" of a legitimate, non-discriminatory reason for the adverse action. Now, once an employee has proven its case by a preponderance of the evidence, the burden of persuasion shifts to the employer to prove by *clear and convincing evidence*—in other words, proof "so clear as to leave no substantial doubt"—that the adverse action would have occurred even if the protected activity had not occurred.

California employers already know that terminations carry risk. With a more demanding standard for employers to rebut charges of whistleblower retaliation, it is more important than ever for employers to carefully build a record to support terminations.

National Law Review, Volume XII, Number 34

Source URL:https://natlawreview.com/article/ca-supreme-court-clarifies-standard-employee-whistleblower-retaliation-claims