

# California Supreme Court Adopts Employee-Friendly Standard for Retaliation Claims Brought Under California Labor Code § 1102.5.

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Which is the applicable evidentiary standard for whistleblower retaliation claims brought under section 1102.5 of California’s Labor Code: The familiar *McDonnell Douglas* framework or the more employee-friendly framework set forth in section 1102.6 of the Labor Code? Courts have left this question open for nearly two decades, but the California Supreme Court finally [settled](#) the issue in *Lawson v. PPG Architectural Finishes, Inc.*—a case certified from the [United States Court of Appeals for the Ninth Circuit](#).

## The Dispute

The plaintiff in *Lawson* sued his former employer for retaliation under section 1102.5. The district court applied the *McDonnell Douglas* framework, but the plaintiff argued that the burden-shifting framework set forth in section 1102.6 of California’s Labor Code ought to apply. The Ninth Circuit recognized that there were “key differences between the two standards” that could prove material. Specifically, the Ninth Circuit noted that: (1) section 1102.6 sets forth a true burden-shifting evidentiary standard unlike *McDonnell Douglas*, (2) section 1102.6 puts a “much heavier” burden on the employer if the employee can make his threshold showing of retaliation, and (3) application of the more relaxed *McDonnell Douglas* standard “would subvert the California legislature’s decision to afford” retaliation plaintiffs “heightened protection.”

In light of the mountains of conflicting case law in both state and federal courts, the Ninth Circuit refused to decide the issue and certified the question to the California Supreme Court, asking it to settle this important question of California law.

## The Two Tests Compared

Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of

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retaliation. Once a prima facie case is established, the employer must articulate a legitimate reason for taking the challenged adverse employment action. If the employer can do so, the plaintiff bears the burden to demonstrate that the defendant's stated legitimate reasons are a pretext for retaliation.

In comparison, under the section 1102.6 framework, a plaintiff must demonstrate by a preponderance of the evidence that an activity proscribed by section 1102.5 was a contributing factor in the alleged adverse employment action. Once the plaintiff has done so, the evidentiary burden of proof shifts to the defendant to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons if the plaintiff had not engaged in activities protected by section 1102.5.

## The California Supreme Court's Resolution

In an opinion authored by Justice Leondra Kruger, the California Supreme Court concluded "that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." The court determined that the plain language of the statute made this clear. However, beyond that, the court stated, "[i]t would make little sense to require section 1102.5 retaliation plaintiffs to satisfy *McDonnell Douglas* for the sake of proving that retaliation was a contributing factor in an adverse action." That's because "the three-part McDonnell Douglas test was not written for the evaluation of claims involving multiple reasons for the challenged action" which can often be the case with retaliation claims under section 1102.5.

Additionally, consistent with the Ninth Circuit's analysis, the court held that section 1102.6 reflected the California Legislature's purpose of encouraging "earlier and more frequent reporting of wrongdoing" and "expanding employee protection against retaliation." To the extent that employers are concerned "about more cases going to trial" in light of section 1102.6's lower evidentiary bar, the court stated that their "remedy lies with the Legislature that selected this standard, not with this court."

## Key Takeaways

By bringing long-needed clarity to the question of which evidentiary standard applies to section 1102.5 retaliation claims, California has adopted a decidedly more pro-employee standard than that set forth in *McDonnell Douglas*. Namely, the test is more plaintiff-friendly because it removes the requirement that a plaintiff prove that his or her employer's stated reason for an adverse action is a pretext for retaliation it imposes section 1102.6's "clear and convincing evidence" standard on employers. Because of these changes, section 1102.5 retaliation claims will be more likely to survive summary judgment.

Employers in the Golden State should familiarize themselves with the *Lawson* decision and consult with legal counsel to ensure their managers, supervisors, and other decision-makers are adequately trained to engage in thorough recordkeeping practices that ensure legitimate non-retaliatory reasons for employee discipline can be clearly explained and substantiated. And of course, employers everywhere can take this opinion as a reminder to ensure that disciplinary policies and recordkeeping practice are in order.

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