

## California Supreme Court Clarifies Burden of Proof in Whistleblower Retaliation Claims

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The California Supreme Court has clarified that state whistleblower retaliation claims should not be evaluated under the *McDonnell Douglas* test, but rather under the test adopted by the California legislature in 2003, thus clarifying decades of confusion among the courts.

California Labor Code Section 1002.5, which broadly prohibits retaliation against whistleblower employees, was first enacted in 1984. At that time the statute enumerated a variety of substantive protections against whistleblower retaliation, but it did not provide any provision setting forth the standard for proving retaliation.

Thus, trial courts began applying the three-part, burden-shifting framework laid out in *McDonnell Douglas* to evaluate these cases. The *McDonnell Douglas* framework is typically used when a case lacks direct evidence. Under the burden-shifting standard, a plaintiff is required to first establish a prima facie case by a preponderance of the evidence, then the burden shifts to the employer to rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employer's action. If the employer meets this burden, the plaintiff prevails only if they can show that the employer's response is merely a pretext for behavior actually motivated by discrimination or retaliation.

But in 2003, the California legislature amended the Labor Code to add a procedural provision in section 1102.6. That provision provides that once a plaintiff establishes that a whistleblower activity was a contributing factor in the alleged retaliation against the employee, the employer has 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."

After this new provision was enacted, some California courts began applying it as the applicable standard for whistleblower retaliation claims under Section 1102.5. But other trial courts continued to rely on the *McDonnell Douglas* test.

In its recent decision of *Wallen Lawson v. PPG Architectural Finishes, Inc.*, the California Supreme Court acknowledged the use of the two different standards by trial courts over the years created

widespread confusion. The California Supreme Court issued its recent decision after the Ninth Circuit asked it to resolve the standard that should be used to adjudicate retaliation claims under Section 1102.5, as part of a district court case brought by Wallen Lawson, a former employee of PPG Industries. Lawson claimed that the paint supplier fired him for complaining about an unethical directive from his manager. The district court granted PPG's motion for summary judgment on Lawson's retaliation and wrongful termination claims after deciding that *McDonnell Douglas* standard applied. When Lawson appealed, the Ninth Circuit sent the issue to the California Supreme Court. And when the Ninth Circuit asked the California Supreme Court to weigh-in on the proper standard to evaluation section 1102.5 claims, it noted that the legal question "has caused no small amount of confusion to both state and federal courts" for nearly two decades.

In a unanimous decision in Lawson's favor, the California Supreme Court ruled that a test written into the state's labor code Section 1102.6 in 2003 should be the benchmark courts use when determining whether retaliation claims brought under Section 1102.5 are viable.

The California Supreme Court noted that the *McDonnell Douglas* test is not well-suited for so-called mixed motive cases "involving multiple reasons for the challenged adverse action." Therefore, it does not work well with Section 1102.6, which allows plaintiffs to successfully prove unlawful retaliation even when other legitimate factors played a part in their employer's actions.

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