



## Labor & Employment ADVISORY ■

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### California Supreme Court Upholds Worker-Friendly Evidentiary Standard for Whistleblower Retaliation Suits

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On January 27, 2022, the California Supreme Court issued an opinion in a case of critical interest to employers defending claims of whistleblower retaliation. In *Wallen Lawson v. PPG Architectural Finishes Inc.*, No. S266001, the court voted unanimously to apply a more lenient evidentiary standard prescribed under state law when evaluating a claim of whistleblower retaliation under Labor Code Section 1102.5 instead of the burden-shifting test applied in federal discrimination cases.

Before the case reached the California Supreme Court, the U.S. District Court for the Central District of California held for PPG after determining that the *McDonnell Douglas* test applied to the litigation. Under that approach, the plaintiff must establish a prima facie case of unlawful discrimination or retaliation and PPG need only show a legitimate, nondiscriminatory reason for firing the plaintiff in order to prevail. On appeal to the Ninth Circuit, the plaintiff claimed the court should have instead applied the framework set out in Labor Code Section 1102.6, under which his burden was merely to show that his whistleblower activity was “a contributing factor” in his dismissal, not that PPG’s stated reason was pretextual.

The California Supreme Court acknowledged the confusion surrounding the applicable evidentiary standard and clarified that Section 1102.6, and not *McDonnell Douglas*, supplies the relevant framework for litigating and adjudicating Section 1102.5 whistleblower claims. Pursuant to Section 1102.6, the burden is on the plaintiff to establish, by a preponderance of evidence, that retaliation for an employee’s protected activities was a contributing factor to an adverse employment action. Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that the alleged adverse employment action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected whistleblowing activities.

The court held that “it would make little sense” to require Section 1102.5 retaliation plaintiffs to satisfy *McDonnell Douglas* to prove that retaliation was a contributing factor in an adverse action, particularly when the third step of *McDonnell Douglas* requires plaintiffs to prove that an employer’s legitimate reason

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for taking an adverse action is pretext for retaliation. The court emphasized that placing this unnecessary burden on plaintiffs would be inconsistent with the state legislature's purpose of "encourag[ing] earlier and more frequent reporting of wrongdoing by employees and corporate managers" by "expanding employee protection against retaliation."

The California Supreme Court's decision makes it more difficult for employers to dispose of whistleblower retaliation claims. Employers should review their antiretaliation policies, which should include multiple avenues for reporting, for example, opportunities outside the chain of command and a hotline. When a complaint is made, employers should respond promptly and be transparent about how investigations are conducted and about confidentiality and antiretaliation protections. Finally, supervisors and employees should receive training on what constitutes retaliation and the legal protections available and management held accountable for implementing antiretaliation policies.

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