U.S. Supreme Court Decisions Expand Employees' Ability to Bring Retaliation Claims

Charles M. Louderback
Leila S. Narvid
Payne & Fears LLP

Employers must establish proper procedures to respond to employees' complaints of discrimination and to make sure that any subsequent employment decision are based on legitimate business reasons.

According to the Equal Employment Opportunity Commission (EEOC) statistics, retaliation claims brought under employment discrimination statutes have risen considerably over the past several years. In fiscal year 2007, the number of retaliation claims filed with the EEOC rose 18% and represented over 32% of all charges received by the agency. Retaliation claims saw the greatest increase of all charges filed, and for the first time, retaliation was the second most popular charge filed with the EEOC. Race discrimination holds the top spot. (See Exhibit 1.)

Two recent U.S. Supreme Court opinions, which confirm that two federal statutes expressly prohibiting discrimination also implicitly prohibit retaliation for opposing discriminatory conduct, suggest that employers can expect an even greater number of retaliation lawsuits. In light of the increased risk of liability for retaliation, it is more important than ever for employers to establish proper procedures to respond to employees' complaints of discrimination and to make sure that any subsequent employment decisions are based on legitimate business reasons.

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EXHIBIT 1
EMPLOYMENT LAWSUITS FILED IN 2006 AND 2007

Basis of Charge	2007	2006	Percentage Increase/Historical Comparison
Race	30,510	27,238	Up 12% (highest increase since 1994)
Retaliation	26,663	22,555	Up 18% (record high level)
Sex/gender	28,826	23,247	Up 7% (highest level since 2002)
Age	19,103	16,548	Up 15%
Disability	17,734	15,575	Up 14% (highest level since 1998)
National origin	9,369	8,327	Up 12%
Religion	2,880	2,541	Up 13% (record high level)
Total charges	82,792	75,768	Up 9% (largest annual increase since 1993)

CBOCS West v. Humphries[1]

Hendrick Humphries was an assistant manager of a Cracker Barrel restaurant. Humphries complained that a White assistant manager had been motivated by racial discrimination in dismissing a Black employee. Humphries claimed that he then lost his own job in retaliation for his complaint.

In a 7-to-2 decision, the Supreme Court ruled that the Civil Rights Act of 1866, codified at 42 U.S.C. Section 1981 (Section 1981), prohibits retaliation against an individual who complains of discrimination against others when contracting rights are at stake. The Court's ruling has significant consequences for employers, including a longer period of time in which aggrieved employees may file suit, exposure to uncapped damages, as well as providing federal remedies for a greater number of employees who, until this decision, may not have been covered by federal antiretaliation statutes.

Humphries, who is African American, worked as an assistant manager at the Cracker Barrel in Bradley, Illinois. In August and October 2001, Humphries complained to his district manager about his general manager's disciplinary reports, racially offensive remarks, and the decision to terminate another African American employee.

The district manager did not take any action, and instead, later terminated Humphries' employment based on a report from another employee that Humphries left the store safe open overnight. Humphries filed suit against CBOCS West, Inc. (Cracker Barrel's owner) in the U.S. District Court for the Northern District of Illinois,[2] alleging violations of both Title VII and Section 1981. The court dismissed the Title VII claim for procedural defects. The court granted summary adjudication on the retaliation cause of action on the ground that Section 1981 did not support a separate retaliation claim.

The Seventh Circuit reversed and remanded the case for trial,[3] holding that the statutory language prohibiting discriminatory "termination of contracts" encompasses a retaliatory discharge of an employee. CBOCS West petitioned the U.S. Supreme Court for *certiorari* to decide whether Section 1981 covered employee retaliation claims.

Section 1981 Claims

Enacted in 1866, shortly after the Civil War, Section 1981 provides that "any person within the jurisdiction of the United States" has equal rights to "make and enforce contracts, regardless of their skin color." Before the Court's ruling in *Patterson v. McLean Credit Union*[4] courts routinely held that Section 1981 encompassed race-based retaliation claims.

In 1989, however, the U.S. Supreme Court held that Section 1981 did not protect against "conduct by the employer after the contract relation has been established," thereby excluding protection in the employment context from any posthire conduct, including retaliation.

Concerned about the consequences of *Patterson*'s narrow reading of Section 1981, Congress amended Section 1981 in 1991 by adding a subsection (b), which made it clear that

Authors' Note: For reprints and proofs contact Leila Narvid, Payne & Fears LLP, One Embarcadero Center, Suite 2300, San Francisco, CA 94111; phone: (415) 398-7860, fax: (415) 398-7863; email: ln@paynefears.com.

Section 1981 prohibits not only discrimination in the formation of contracts, but also in all aspects of contractual relationships between parties.

Section 1981(b) states

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationships.

In the employment context, Section 1981 applies to the formation of the employment relationship and all aspects of that relationship, or its termination. Section 1981 also applies even if an employee is at-will and there is no formal written contract and no specific terms of employment.

Section 1981 is often viewed as the statute of choice by employees seeking to file race discrimination complaints under federal law. First, Section 1981 covers all employers, whereas Title VII of the Civil Rights Act of 1964 (Title VII;)[5] another federal statute prohibiting race discrimination by private sector employers) covers only those employers with at least 15 employees. Second, Title VII claims are subject to a 180-day or 300-day statute of limitations, depending on the state in which the allegedly discriminatory acts occurred.

The statute of limitations for Title VII claims is not only shorter than those governing most civil actions, such as those for torts and breach of contract, but also significantly shorter than those governing many other antidiscrimination laws. In contrast, Section 1981 claims are subject to a longer statute of limitations. In New York, for example, Section 1981 claims are subject to a 3-year statute of limitations. Third, although Title VII claims may not be filed in federal court until the plaintiff exhausts his or her administrative remedies by filing a charge with the EEOC or equivalent state or local agency and receives a Notice of Right to Sue from the EEOC, Section 1981 claims may be filed in federal court without any prior administrative proceedings.

Finally, unlike Title VII claims, there is no cap on the amount of compensatory or punitive damages a successful plaintiff can recover for claims filed under Section 1981. Title VII limits the combined recovery for pain and suffering, emotional distress, inconvenience, mental anguish, other nonpecuniary losses and punitive damages to between $50,000 and $300,000, depending on the number of employees.

Supreme Court Ruling

Looking at its decisions prior to the enactment of Title VII and the historical context surrounding the enactment of Section 1981, the Supreme Court held that the broad terms of Section 1981 encompass a claim for retaliation. Although the text of Section 1981 does not include the word "retaliate," the Court noted that Reconstruction-era statutes were phrased more in the manner of a broad constitutional norm.

As the Court stated in the context of Section 1981's companion provision, 42 U.S.C. Section 1982 (establishing equal rights concerning real and personal property), which is likewise derived from Section 1 of the Civil Rights Act of 1866

> [A] narrow construction of the language of Section 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by Section 1 of the Civil Rights Act of 1866 . . . from which Section 1982 was derived.[6]

Writing for the Court, Justice Breyer explained that the Court's decision was guided in large part by *stare decisis,* a doctrine that commands adherence to the Court's precedent. The Supreme Court relied heavily on *Sullivan* and other cases interpreting Section 1982 and noted that it had long construed these two sections alike because they had "common language, origin, and purposes."

For example, in *Sullivan,*[7] the Court held that a White homeowner could bring a claim under Section 1982 when a community nonprofit corporation refused to approve his proposed assignment of a membership interest in the corporation's recreation facilities to an African American and expelled him from the corporation when he protested its action.

While not explicitly using the term "retaliation," the Court recognized that retaliatory acts were at the heart of plaintiff's claims and allowed him to proceed on that basis:

> If [plaintiff's expulsion from the corporation] . . . can be imposed, then [plaintiff] is punished for trying to vindicate the rights of minorities protected by [Section] 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property.[8]

The Court noted that Section 1981 should not be curtailed because of overlap with Title VII. Congress specifically intended to create partially overlapping schemes of liability under Section 1981 and Title VII. Precisely the same kind of Title VII/Section 1981 "overlap" and potential circumvention exists with respect to employment-related direct discrimination, yet Congress explicitly and intentionally created that overlap. *Alexander v. Gardner-Denver Co.*[9] The recognition by Congress in 1971 (when it reexamined and broadly extended Title VII) that Title VII and Section 1981 are independent, but overlapping remedies is particularly important because by that time the federal courts had already construed Section 1981 to provide a remedy against retaliation in the employment context independent of Title VII.

A strongly worded dissent written by Justice Clarence Thomas, joined by Justice Antonin Scalia, concluded that Section 1981 does not state that it prohibits retaliation, and when Congress revised the law, it did not include a provision barring retaliation. Thus, the Court should not imply a claim for retaliation into a statute that exclusively prohibits discrimination.

According to Justice Thomas

> Retaliation is not discrimination based on race. When an individual is subject to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his race; rather, it is the result of his conduct.[10]

The Humphries opinion confirms that Section 1981 implicitly prohibits retaliation for opposing discrimination. According to the *Humphries* Court, case precedent and the legislative history of Sections 1981 and 1982 lead to the conclusion that retaliation for complaints about race discrimination is a form of intentional discrimination, and that it impairs the rights secured by Section 1981 to enjoy all the benefits of the contractual relationship irrespective of race.

Gomez-Perez v. Potter[11]

In *Gomez-Perez v. Potter* the U.S. Supreme Court overturned an appeals court ruling that older federal workers have significantly less protection from workplace bias than older workers in the private sector or than workers who encounter race or sex discrimination. The crux of the case was whether workers can complain of retaliation, as a form of illegal age discrimination, when their employer is the federal government.

Myrna Gomez-Perez, a 45-year-old clerk for the U.S. Postal Service (USPS) in Puerto Rico, complained that she had been denied transfer to a different office because of age discrimination. Her lawsuit alleged that as a result of her complaint, she became the target of retaliatory actions by her supervisors.

She appealed a summary judgment ruling against her in the U.S. District Court for Puerto Rico, which did not reach the question of whether the Age Discrimination in Employment Act (ADEA)[12] private cause of action for federal employees alleging age discrimination implicitly includes a retaliation cause of action. On appeal, the First Circuit Court of Appeals affirmed, noting that the parallel ADEA provision governing private employers expressly provides for retaliation claims. The First Circuit reasoned that Congress would have said so explicitly had it intended for a similar cause of action against federal employers.

ADEA and Retaliation

The ADEA was enacted in 1967 to protect individuals age 40 and older from age discrimination in the private workplace. With the passage of the amendments in 1974, the ADEA became applicable to federal government workers. Section 623 of the ADEA[13] prohibits private employers from discriminating based on age.

This section also prohibits private employers from retaliating against any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the ADEA. Federal employees are protected under Section 633a of the ADEA.[14] Although Section 633a prohibits the federal government from making personnel decisions based on age, it does not specifically address retaliation against federal employees who have charged their employer of ADEA violations.

Supreme Court Decision

In a 6-to-3 decision, the Supreme Court reversed the First Circuit, holding that the phrase "discrimination based on age" as stated in Section 633a includes claims based on retaliation for filing an age discrimination complaint. Justice Alito, writing for the majority, compared the ADEA language with similar language in both Section 1982 and Title IX of the Education

EXHIBIT 2
COMPARISON OF SECTION 1981 AND TITLE VII RETALIATION CLAIMS

§ 1981 Retaliation Claims	Title VII Retaliation Claims
Covers all employers	Covers only those employees with at least 15 employees
Subject to a longer statute of limitations, typically 4 years; no requirement to file with the EEOC or administrative agencies before filing action in court	Subject to a 180-day or 300-day statute of limitations (depending on whether the state has an EEOC work-sharing agency); may not be filed in court until plaintiff exhausts administrative remedies by filing a charge with the EEOC or equivalent state agency, and receives a Notice of Right to Sue
No cap on compensatory and punitive damages	Cap on compensatory and punitive damages: 15 to 100 employees, $50,000; 101 to 200 employees, $100,000; 201 to 500 employees, $200,000; 500+ employees, $300,000

Note: EEOC = Equal Employment Opportunity Commission.

Amendments of 1972, which the Court had previously found permits retaliation claims.

Where the lower courts noted a discrepancy in statutory language between the ADEA and other civil rights laws previously afforded a generous reading, the Court pointed out that the comparisons were inapt, and that proper comparisons favored Gomez-Perez. Where the lower courts sought to distinguish rulings treating the word "discrimination" as including "retaliation" on technical grounds (e.g., that some civil rights laws are invoked based on court-created rights to sue, unlike the ADEA's explicit "right of action") the Supreme Court wrote

> It would be perverse if the enactment of a provision explicitly creating a private right of action—a provision that, if anything, would tend to suggest that Congress perceived a need for a strong remedy—were taken as a justification for narrowing the scope of the underlying prohibition.[15]

As it did in *Humphries*, the Supreme Court relied largely on on its prior holdings in other discrimination actions in which it found that claims of retaliation could be brought even though the statute did not specifically prohibit retaliation.

The Court also rejected the USPS's argument that, because there is an express retaliation provision in Section 623 for private sector actions and no similar provision in Section 633a, retaliation claims were specifically excluded for federal employees. The Court noted that the two sections were enacted 7 years apart, and the federal provision was not modeled on the private-sector provision, but directly after Title VII's federal-sector discrimination ban, which prohibits in broad terms retaliation based on discrimination.

In short, after assessing both the text of the ADEA and policies underlying it, the Supreme Court ruled that all signs point to a conclusion that federal age antidiscrimination law prohibits both discrimination and retaliation against victims who complain about it. In delivering the Court's majority opinion, Justice Samuel A. Alito definitely stated that "retaliation for complaining about age discrimination is discrimination based on age."[16]

Practical Implications

Retaliation cases continue to be on the rise, being litigated both with increasing frequency and in new forms. *Humphries* and *Gomez-Perez* join a series of recent Supreme Court decisions favoring expended remedies for victims of retaliation. Two years ago, in *Burlington Northern & Santa Fe Railway v. White*,[17] the Supreme Court adopted an expansive definition of the forms of employer conduct that may constitute actionable retaliation. Under *Burlington*, employer action need only be such that "would dissuade a reasonable worker from making or supporting a charge of discrimination."[18]

The decisions in *Humphries* and *Gomez-Perez* suggest that the trend of decisions favoring expanded remedies for plaintiffs will persist, and that employers should expect more discrimination and retaliation cases, and that more of these will be brought under Section 1981, rather than Title VII.

(See Exhibit 2.) Section 1981 provides plaintiffs with an avenue for sidestepping the exhaustion and timing requirements of Title VII. Employers should be aware of the following practical implications

- The decisions provide plaintiffs with substantially more time to file their Section 1981 retaliation claims than is permitted to file retaliation claims under Title VII. Safeguards such as timeframes for when a claim must be filed and presuit dispute resolution strategies, which are spelled out in Title VII, give employers an opportunity to address alleged facts of discrimination prior to a lawsuit being filed. These provisions are not found in Section 1981.
- Unlike Title VII, Section 1981 contains no limit on the amount of compensatory and punitive damages that a court may award to an employee who has been subjected to retaliation in the workplace. Uncapped damages will likely be an incentive for potential plaintiffs to pursue Section 1981 claims.
- Those plaintiffs filing under Section 1981 may now circumvent the EEOC's administrative process prior to filing a retaliation suit.
- Employees of small employers (i.e., fewer than 15 employees) have greater rights now, because employees working for small employers, who are not covered by Title VII, may now file suit under Section 1981.
- Although the *Gomez-Perez* decision obviously has the most impact on claims by federal employees, it is further evidence of the Court's willingness to expand the rights and potential claims of employees in the area of discrimination. With respect to federal employers, the Court's ruling allows employees, who previously were able only to bring ADEA retaliation claims to a federal Civil Service Commission, to bring those claims to federal court and to pursue the same remedies under the ADEA as are available to private sector employees, including money damages.

Preventing Retaliation Lawsuits

Considering the prospect of unlimited damages under *CBOCS* alongside the Supreme Court's current, broad interpretation of what actions may give rise to a retaliation claim, employers should review their antidiscrimination policies and make sure that they address complaints relating to bias in the workplace. Employers should also conduct periodic training sessions to ensure that all employees are aware of their obligation not to retaliate against an employee who has filed a discrimination or harassment complaint.

During an employer's investigation of an internal complaint of harassment or discrimination, the complainant, witnesses, the alleged harasser, and relevant decision makers should be specifically advised that any type of retaliation will not be tolerated, and the complainant and any witnesses should be encouraged to make the employer aware of any conduct that might be retaliatory.

In addition, if the employer's harassment or discrimination investigation results in disciplinary action against a supervisor or coworker of the complainant, the supervisor or coworker who has been disciplined should be warned that any retaliatory conduct will lead to additional disciplinary action. It is also important to maintain complete documentation surrounding events giving rise to employee discipline as well as to other potentially adverse employment actions that might give rise to retaliation claims.

Records should be maintained for at least 4 years, to cover the statute of limitations period for Section 1981 claims. Employers should also be aware that protection against retaliation extends to both victims of direct discrimination and to others who are retaliated against because of their advocacy on behalf of such victims.

Notes

1. CBOCS West, Inc. v. Humphries. 553 U.S. (2008).
2. Humphries v. CBOCS West, Inc., 392 F.Supp 2.d 1047 (N.D. Ill. 2005).
3. Humphries v. CBOCS West, Inc., 474 F.3d 387, 398 (7th Cir. 2007).
4. Patterson v. Mclean Credit Union, 491 U.S. 164 (1989).
5. Title VII contains a broad prohibition against workplace discrimination, and prohibits employer retaliation against employees for exercising the rights Title VII grants them.
6. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969).
7. Sullivan v. Little Hunting Park (1969), at 236-237.
8. Sullivan v. Little Hunting Park (1969), at 237.
9. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

10. CBOCS West, Inc. v. Humphries. (2008).
11. Gomez-Perez v. Potter, 553 U.S. (2008).
12. *Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 621 (1967).
13. ADEA, 29 U.S.C. § 623.
14. ADEA, 29 U.S.C. § 633.
15. Gomez-Perez v. Potter (2008), Section A.
16. Gomez-Perez v. Potter (2008), Section A.
17. Burlington Northern & Santa Fe Railway v. White, 548 U.S. 53 (2006).
18. Burlington Northern & Santa Fe Railway v. White (2006), Section I.

Charles M. Louderback is a partner in the San Francisco office of Payne & Fears, LLP. Louderback has extensive trial experience in the field of employment law and business litigation. He has successfully tried a myriad of employment matters, including causes of action for wrongful discharge; race, age, gender and religious discrimination; sexual harassment; overtime claims; public policy violations; retaliatory discharge; and claims for fraud.

Leila S. Narvid is an associate in the San Francisco office of Payne & Fears, LLP, where she focuses on the representation of employers in all aspects of labor and employment law, including discrimination, sexual harassment, wrongful termination, retaliation, disability and wage and hour violations.