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US Supreme Court Reads Retaliation Claims Into Two Antidiscrimination Statutes

Last week, in separate decisions issued on the same day, the United States Supreme Court recognized retaliation claims in two different antidiscrimination statutes that do not mention retaliation. Specifically, the Court read retaliation claims into a post-Civil War statute, 42 U.S.C. §1981, that prohibits race discrimination and also into the Age Discrimination in Employment Act (ADEA) as it pertains to federal employers. At a time when retaliation claims have consistently been on the rise, these decisions further increase the threat of litigation over alleged retaliation.

***CBOCS West, Inc. v. Humphries*: §1981 Retaliation Claims**

In *CBOCS West, Inc. v. Humphries*, the plaintiff brought claims under both Title VII and §1981, alleging that his employment had been terminated because of his race and also in retaliation for having complained of race discrimination toward another employee. Unlike Title VII, which explicitly prohibits both race discrimination in employment and retaliation, §1981 prohibits race discrimination but does not mention retaliation.

The Supreme Court affirmed that §1981 indeed encompasses retaliation claims. The Court examined "the pertinent interpretive history," including the "broad consensus" among circuit courts that §1981 encompasses retaliation claims, and concluded that "the view that §1981 encompasses retaliation claims is indeed well embedded in the law."

As a result of this decision, employees who allege retaliation after complaining of race discrimination may

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now bring retaliation claims under §1981 instead of Title VII. Doing so allows employees to bypass Title VII safeguards, such as damage caps, a 15-employee threshold, and administrative and procedural requirements including time limits that are much shorter than the four-year time limit for bringing suit under §1981. *Humphries* itself serves as an example because the plaintiff's Title VII claims failed for procedural reasons but the plaintiff nonetheless was able to pursue his §1981 retaliation claim. Accordingly, employers now have greater exposure to potential litigation over alleged retaliation and also to higher damages than under Title VII.

Gómez-Pérez v. Potter: ADEA Retaliation Claims Against Federal Employers

In *Gómez-Pérez v. Potter*, the plaintiff, who worked for the United States Postal Service, alleged retaliatory treatment after having filed an age discrimination complaint with her employer. Resolving a split among circuit courts, the Supreme Court concluded, in a 6-3 opinion, that the ADEA allows retaliation claims against federal employers even though the federal employment portion of the ADEA prohibits "discrimination based on age" without mentioning retaliation. In reaching this decision, the Court examined two prior decisions interpreting similar language in other antidiscrimination statutes and, finding the language and context of the statutes to be similar, followed these decisions.

The specific holding in *Gómez-Pérez* affects only federal employment. (Retaliation claims against private employers were not at issue here and, indeed, are expressly allowed under the ADEA.) This case may be of additional significance, however, in the future interpretation of other employment statutes because of its broad interpretation of a prohibition against discrimination as likewise prohibiting retaliation even in the absence of language covering retaliation.

Bottom Line

Retaliation cases continue to be on the rise, being litigated both with increased frequency and in new forms. The decisions in *Humphries* and *Gómez-Pérez* suggest that this trend will persist. Employers should therefore continue to take steps, including supervisor training and appropriate record retention, to minimize the now increased threat of retaliation claims.

For further information regarding these recent Supreme Court decisions or the best practices for avoiding retaliation claims, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

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