

Client Alert

A report
for clients
and friends
of the Firm June 2008

U.S. Supreme Court Expands Coverage for Employees Asserting Retaliation Claims Against Employers

The Employment Law Counseling and Training Practice Group at Proskauer Rose LLP highlights for your attention two recent Supreme Court decisions which expand employees' rights to assert retaliation claims against employers. We think the *Humphries* decision especially important because it affords protected employees an end-run around Title VII's procedural requirements and permits suit for retaliation under Section 1981 up to four years later.

On May 27, 2008, the United States Supreme Court sided with employees in two separate cases, upholding their rights to bring retaliation claims under federal statutes, 42 U.S.C. §1981 ("Section 1981") and the Age Discrimination in Employment Act of 1967 ("ADEA"). In *CBOCS West, Inc. v. Humphries*, ("*Humphries*"), the Court, in a 7-2 ruling, affirmed a decision of the U.S. Court of Appeals for the Seventh Circuit that an employee could maintain his suit for race retaliation under Section 1981, even though such a claim is not expressly protected by the statute. In the other case, *Gomez-Perez v. Potter, Postmaster General* ("*Potter*"), the Court, in a 6-3 decision, reversed a First Circuit decision prohibiting a federal employee from going forward with her claim of age retaliation under the ADEA. As many of the federal circuit courts of appeals had already recognized an implied retaliation cause of action under these statutes, the decisions are not all that surprising. However, because of the publicity surrounding these Supreme Court decisions, plaintiffs' practitioners have now been awakened to, or reminded of the teeth lurking in Section 1981 claims.

This Client Alert focuses on the *Humphries* decision because of its broader impact on private sector businesses. Now that it has been determined that retaliation claims are subsumed within Section 1981's protections, employees who miss Title VII's filing deadlines, or who seek an escape from damages caps, can pursue their retaliation claims by taking advantage of Section 1981's 4-year limitations period, absence of administrative filing requirements, and uncapped damages. The bottom line is that employers will see a jump in Section 1981 claims.

I. *Humphries*

Section 1981 was originally enacted in 1866 pursuant to the Thirteenth Amendment. The statute provides, in pertinent part "[a]ll persons... shall have the same right... to make and enforce contracts... as is enjoyed by white citizens...". Amended by the Civil Rights Act of 1991, the term "make and enforce contracts" has been defined to include "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship". Congress, however, failed to include "retaliation" when it amended the statute to broaden its protections, although accompanying House and Senate committee reports indicated broad agreement that "retaliation" was encompassed within Section 1981's prohibitions.

Plaintiff, Hedrick Humphries, filed suit alleging that his employer, CBOCS West, Inc., the owner of Cracker Barrel restaurants, fired him because of his race and in retaliation for complaining to management about alleged discriminatory treatment of a fellow black employee. Humphries sued under both Title VII and Section 1981. A federal district court dismissed the Title VII claims for procedural defects, and granted summary judgment to CBOCS West on the Section 1981 claims. Humphries appealed, and the Seventh Circuit affirmed summary judgment on Humphries' Section 1981 direct racial bias claim *but* reinstated his retaliation claim, rejecting the company's argument that Section 1981 did not extend to retaliation claims.

The Supreme Court was asked to decide whether a race retaliation claim was cognizable under Section 1981.

In an opinion written by Justice Stephen G. Breyer (Thomas, J. and Scalia, J., joined in dissent), the majority, while agreeing that the statutory language of Section 1981 did not expressly encompass retaliation claims, stated that prior Supreme Court decisions had implied a right to sue for retaliation under Section 1982 (*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)) and Title IX of the Education Amendments of 1972 (*Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005)). Since the Court has long interpreted Sections 1981 and 1982 alike because they were enacted together, have common language, and serve similar purposes (*Runyon v. McCrary*, 427 U.S. 160 (1973)), the Court concluded that considerations of *stare decisis* strongly supported its adherence to precedent in finding an implied right of action in Section 1981 for retaliation claims. Moreover, the majority noted, since Section 1981 was amended, federal appeals courts had reached a broad consensus that retaliation was subsumed within its protections (citing decisions of the Second, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits).

In *Sullivan*, the Court considered whether a claim of retaliation could be brought under Section 1982 and determined that a civil rights law prohibiting race discrimination in property sales also prohibited retaliation against an owner who was denied the right to transfer his property interest based on race. In *Jackson*, the Court interpreted Title IX of the Education Amendments of 1972 to provide a cause of action in retaliation based on sex discrimination, even though not expressly mentioned in the text of the law. As the *Jackson* Court put it, “In *Sullivan* we interpreted a general prohibition on racial discrimination [in Section 1982] to cover retaliation against those who advocate the rights of groups protected by the prohibition... Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination.”

On the basis of these precedents, and the legislative history underlying the 1991 amendments to Section 1981, the Court majority upheld an implied right of action for retaliation under Section 1981.

II. Potter

In *Potter*, the U.S. Supreme Court was asked to decide whether or not an age retaliation claim filed by a public employee was cognizable under Section 633(a) of the ADEA. In this case, plaintiff, Mynra Gomez-Perez filed suit alleging that her employer, the United States Postal Service (“USPS”), had violated the federal-sector provision of ADEA by subjecting her to various forms of retaliation, including reducing her working hours and harassment, after she had

filed an administrative ADEA complaint. A federal district court granted summary judgment to the USPS, concluding that the United States had not waived sovereign immunity. Gomez-Perez appealed, and the U.S. Court of Appeals for the First Circuit held that the USPS did waive sovereign immunity but affirmed summary judgment on the alternative ground that in prohibiting “discrimination based on age” against federal employees, Congress did not provide a remedy for retaliation. Gomez-Perez sought certiorari, and asked the Supreme Court to consider whether Section 633(a) of the ADEA encompassed retaliation claims by federal employees.

Justice Samuel A. Alito delivered the opinion of the Court (Roberts, C.J., Thomas, J. and Scalia, J., joined in dissent). In its majority reasoning, the Court used an analysis very similar to that used in deciding *Humphries* and prior rulings. The Court found that the ADEA language at issue, “discrimination based on age,” was not “materially different” from the language at issue in *Jackson* (race) and was the “functional equivalent” of the language at issue in *Sullivan* (sex) in which the Court, as discussed above, in both cases implied the existence of a prohibition on retaliation. Simply put, the *Potter* Court held “following the reasoning of *Sullivan* and *Jackson*, we interpret the ADEA federal-sector provision’s prohibition of ‘discrimination based on age’ as likewise proscribing retaliation.”

What do these decisions mean for employers?

In prior decisions, the U.S. Supreme Court has made clear that Section 1981’s prohibitions against race discrimination in private employment extended to Caucasians and all other races, and not just to African-Americans. Thus, the statute’s protections extend to many claims based on ancestry, ethnic characteristics, and/or color. Even “at-will” employment claims can be contested under Section 1981 on grounds of discrimination based on the aforementioned protected characteristics. However, claims of age, gender, or disability discrimination, generally, have been excluded from Section 1981’s protections.

The decision in *Humphries* should give employers, at the very least, a few moments of pause. According to recent statistics compiled by the EEOC, retaliation claims now represent over one-third of all charges filed with the Agency. Thus, in 2007, the Agency received more than 26,600 retaliation claims.

The decision in *Humphries* affords plaintiffs relief from EEOC’s administrative and procedural requirements, thereby permitting an end run around Title VII. Thus, Section 1981 complainants can file an action directly in court and take advantage of the longer limitations period – 4 years – and uncapped damages. This decision will allow plaintiffs claiming retaliation to by-pass the traditional EEOC charge system and prevent employers from resolving bias claims at an early stage of litigation.

In light of the above, employers should take a number of action steps. *First*, preserve employee records for at least 4 years (in some states, e.g., New York, employee records should be preserved at least 6 years). *Second*, employers can no longer take solace in the fact that a disciplined or discharged employee has not brought a claim within 300 days of the action taken. Hence, it is 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. So, if an employee did not get the promotion s/he wanted, check to be sure that there is documentation supporting the decision because you might have to defend against a retaliation claim up to 4 years from the time the adverse decision was made. In this regard, the *Humphries* decision will serve to remind the plaintiffs' bar that claims of race, ancestry, ethnicity, and color discrimination – as well as retaliation – can be brought up to 4 years *after* the last act has taken place. *Third*, this is an opportune time to remind supervisors and managers of their obligations under anti-discrimination and anti-retaliation policies and laws. So, training of managers and supervisors in documenting employee conduct and the objective business reasons underlying actions taken is a good idea. *Finally*, human resources professionals must be vigilant in reviewing all tangible and potentially adverse employment actions (e.g., failure to promote) with an eye on retaliation prevention.

The decision in *Potter* while a significant victory for federal employees, giving them the same protection against retaliation that has been afforded to workers in the private sector, has no impact in the private sector. As in *Humphries*, most courts prior to the First Circuit's decision had interpreted the ADEA to allow retaliation claims by federal employees.

In the event you have any questions concerning these decisions, please contact your Proskauer relationship attorney or one of the attorneys listed below.

**BOCA RATON • BOSTON • CHICAGO • LONDON
LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK
PARIS • SÃO PAULO • WASHINGTON, D.C.**

Client Alert

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the Firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

For more information about this practice area, contact:

New York:	Elise M. Bloom 212.969.3410 – ebloom@proskauer.com
	Fredric C. Leffler 212.969.3570 – fleffler@proskauer.com
Newark:	John P. Barry 973.274.6081 – jbarry@proskauer.com
	Lawrence R. Sandak 973.274.3256 – lsandak@proskauer.com
California:	Anthony J. Oncidi 310.284.5690 – aoncidi@proskauer.com
	Harold M. Brody 310.284.5625 – hbrody@proskauer.com
Boston:	Mark W. Batten 617.526.9850 – mbatten@proskauer.com
New Orleans:	Charles F. Seemann, III 504.310.4091 – cseemann@proskauer.com
Washington, D.C.:	Lawrence Z. Lorber 202.416.6891 – llorber@proskauer.com
Boca Raton:	Allan H. Weitzman 561.995.4760 – aweitzman@proskauer.com

We would like to acknowledge Labor & Employment Law Staff Attorney Daniel Hollman for his significant contributions to this Alert.

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

You can also visit our Website at www.proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2008 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.