



## Supreme Court "fills in the blank" to recognize retaliation claims for federal employees under ADEA; Gomez-Perez v. Potter, 2008

5-27-08: The [US Supreme Court](#) in [Gomez-Perez v. Potter](#), 128 S. Ct. 1931 (2008) ruled that the [Age Discrimination in Employment Act of 1967](#), 29 U.S.C. § 621 *et seq.*, prohibited retaliation against federal employees who had complained about age discrimination, even though the federal employee section of the [ADEA](#) did not expressly prohibit retaliation. This was a 6-3 decision. The majority opinion was written by Justice [Alito](#), in which Justices [Stevens](#), [Kennedy](#), [Souter](#), [Ginsburg](#), and [Breyer](#) joined. Justices [Roberts](#), [Scalia](#), and [Thomas](#) dissented, with dissenting opinions being written by Justices [Roberts](#) and [Thomas](#).



### The Gap in the Federal Employee Section of the ADEA

This was the problem under the [ADEA](#): The [ADEA](#)'s main section, in prohibiting discrimination against employees 40 and older, only deals with private industry employees and state government employees. I will call this section of the [ADEA](#), the "private and state employee sections".

To address age discrimination against federal government employees, the [ADEA](#) has a *separate* section, [29 U.S.C. § 633a](#), which contains a separate statement of the prohibitions against age discrimination. While the private and state employee sections of the [ADEA](#) contain expressly an anti-retaliation provision ([29 U.S.C. § 623\(d\)](#)), the federal employees section does not. The original [ADEA](#) was passed in 1967, but the federal employees were not covered until the statute was amended in 1974 to cover them.

So that gets us to [US Postal Service](#) employee Myrna Gomez-Perez in Puerto Rico, who asked for a transfer. The transfer was refused so she filed a complaint of [age discrimination](#) (she was 45). After she filed the [age discrimination](#) complaint, she claimed she was subjected to various forms of retaliation. So she eventually filed suit in the United States District Court for the District of Puerto Rico, claiming retaliation. Ms. Gomez-Perez's lawsuit was dismissed for a different reason (sovereign immunity), and she then appealed to the [US Court of Appeals for the First Circuit](#) ("First Circuit"). The First Circuit ruled in her favor on the sovereign immunity issue, but said her case was properly dismissed for a different reason--she was a federal employee and the [ADEA](#)'s federal

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employee section (29 U.S.C. § 633a) did not prohibit retaliation. Under the First Circuit's logic, nothing ADEA prohibited retaliation against federal employees.

## The US Supreme Court Fills the Gap

So Ms. Gomez-Perez appealed to the US Supreme Court, which ruled that the federal employee section of the ADEA prohibits "discrimination based on age" (29 U.S.C. § 633a(a)), and that implicitly prohibits retaliation that arises out of prior complaint of age discrimination. The controversy between the majority opinion and the dissenting judges was whether it was appropriate to read into the age discrimination prohibition a corresponding prohibition for retaliation related to an age discrimination complaint. The majority relied on prior decisions which had done precisely the same thing in the context of other anti-discrimination laws.

For example, in *Jackson v. Birmingham Board of Education*, 544 U. S. 167 (2005), Title IX of the Education Amendments of 1972 prohibited "discrimination" on "the basis of sex" in connection with any education program receiving federal aid. The controversy in that case was over retaliation after a complaint of sex discrimination, and that statute, like the federal employee sections of the ADEA, did not expressly prohibit retaliation against someone who complained about sex discrimination. The US Supreme Court there concluded that "retaliation" was covered by the sex discrimination prohibition. In essence, the US Supreme Court held that if you retaliate against someone who has complained about sex discrimination, then the retaliation is an act of sex discrimination.

So the US Supreme Court for Ms. Gomez-Perez applied the same logic for the ADEA: Since the ADEA prohibited age discrimination against federal employees, then it was an act of age discrimination to retaliate against someone who complained of age discrimination.

The real issue then, in a setting where a statute does not expressly prohibit age retaliation, is whether retaliation is a subset of age discrimination (and therefore covered by the prohibition against age discrimination); or whether the retaliation is conceptually and analytically different. The US Supreme Court, for Ms. Gomez-Perez, and in comparable discrimination settings, has found concluded that retaliation is a subset of the broader prohibition of discrimination.

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