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Two recent U.S. Supreme Court cases bring the ADEA and section 1981 in line with a host of federal and state antidiscrimination statutes that already prohibit retaliation as a form of discrimination.

U.S. Supreme Court Holds that Retaliation Is a Form of Discrimination

By Daniel J. Cravens and Peter C. Leung

Introduction

The United States Supreme Court recently issued opinions in *Gomez-Perez v. Potter*, No. 06-1321 (May 27, 2008) and *CBOCS West, Inc. v. Humphries*, No. 06-1431 (May 27, 2008), holding that the antidiscrimination provisions of the Age Discrimination in Employment Act of 1967 (ADEA) and 42 U.S.C. section 1981 also prohibit retaliation. These opinions signal the Court's intention to read protection against retaliation into similar "remedial provisions aimed at prohibiting discrimination."

ADEA Prohibits Retaliation by Federal Employers

The Court in *Gomez-Perez v. Potter* held that section 633a(a) of the ADEA, which prohibits federal-sector employers from engaging in "discrimination based on age," also prohibits retaliation for complaints about age discrimination.

The petitioner, a United States Postal Service worker in Puerto Rico, claimed that she suffered retaliation in violation of the ADEA after making an equal employment opportunity age discrimination complaint. The Postal Service moved for summary adjudication of the retaliation claim on the ground that the federal-sector antidiscrimination provision of the ADEA does not explicitly cover retaliation. The trial court denied this motion but the First Circuit reversed, creating a split among the Circuit Courts.

The Supreme Court reversed the circuit court's opinion holding that "the statutory phrase 'discrimination based on age' includes retaliation based on the filing

of an age discrimination complaint." In finding that section 633a(a) prohibits retaliation, the Court brings anti-retaliation protections for federal employees in line with 29 U.S.C. section 623a, the ADEA provision that explicitly protects private sector employees from retaliation as well as discrimination.

Section 1981 Prohibits Retaliation

In another retaliation case, the Court in *CBOCS West, Inc. v. Humphries* held that 42 U.S.C. section 1981 protects against both direct racial discrimination and retaliation based on complaints of discrimination.

The petitioner, a black male, alleged that his employer dismissed him because of his race and also in retaliation for complaints that he had made to other managers on behalf of another black employee. The trial 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, reasoning that the statutory language prohibiting discriminatory "termination of contracts" encompasses a retaliatory discharge of an employee.

The Supreme Court upheld the Seventh Circuit decision, holding that an employee may bring a claim for retaliation under section 1981. The Court reasoned that that the legislature intended to prohibit employers from retaliating against individuals for attempting to vindicate the rights of minorities protected by the statute itself.

The Court Affirms Its Commitment to Civil Rights Precedents

The Supreme Court relied heavily on its civil rights area opinion in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), to support its decision in both the *Gomez-Perez* and *CBOCS West* cases. In the 1969 case, Paul Sullivan, a white man, rented his home located in a mainly white community to a black man. The community organization that controlled the community pool refused to allow the black tenant to use the community pool and expelled Sullivan from the organization for renting to a minority. Sullivan sued for discrimination under 42 U.S.C. section 1982, a statute related to Section 1981.

The *Sullivan* majority found that the community organization's decision to expel Sullivan due to his advocacy of a black man violated section 1982. It reasoned that to decide otherwise would allow the organization to punish Sullivan for trying to vindicate the rights of minorities protected by section 1982 and would give impetus to the perpetuation of the very conduct that the statute sought to eliminate.

The Court also relied on *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), in which the Court held that Title IX of the Education Amendments of 1972 included protection against retaliation. In that case, Jackson, a public school teacher, was fired because of his advocacy on behalf of the girls basketball team. In affirming his right to relief for retaliation under Title IX, the Court held that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination.... We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discriminations' on the bases of sex," in violation of Title IX."

What Do These Decisions Mean for Employers?

These decisions bring the ADEA and section 1981 in line with a host of federal and state discrimination statutes that

already prohibit retaliation as a form of discrimination, including Section 1982, the ADEA as applied to private employers, the Americans with Disabilities Act, Rehabilitation Act, Title IX, and Title VII of the Civil Rights Act of 1964. The Court explicitly rejected the notion that a cause action for discrimination materially differs from a cause of action for retaliation.

Employers should note that the protection against retaliation extends to both victims of direct discrimination and to others who suffer retaliation because of their advocacy on behalf of such victims. These opinions will have little practical effect in California and other jurisdictions where state discrimination statutes already prohibit retaliation.

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