

EMPLOYMENT LAW

A L E R T

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U.S. Supreme Court Expands Employees' Opportunity to File and Recover Damages for Race Retaliation Claims

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Retaliation claims already are on the rise. With a new Supreme Court ruling, that trend is certain to continue and may even increase. Previously, almost all federal retaliation claims had to go through an administrative process before a suit could be filed. That is no longer true for race retaliation claims, according to the Supreme Court's recent pronouncement. What's more, these "new" retaliation claims will not be subject to a cap on damages and will have a longer statute of limitations than has traditionally been applied.

In *CBOCS West, Inc. v. Humphries*, published on May 27, 2008, the United States Supreme Court held, in a 7-2 decision, that employees who claim that they have suffered retaliation for complaining of race discrimination may bring such claims under 42 U.S.C. § 1981 in addition to Title VII of the Civil Rights Act of 1964. A § 1981 claim, however, unlike a Title VII claim, does not have to go through an administrative process first, and thus employers will likely see that some plaintiffs will go straight to court, in claiming § 1981 retaliation, with no previous administrative process at all.

In *Humphries*, the plaintiff, an African-American man, claimed that he was discharged because of his race and because he had complained about race discrimination against another employee. He brought these claims under both Title VII and 42 U.S.C. § 1981 (Section 1981). The Court of Appeals upheld the trial court's dismissal of the employee's Title VII claims and his claim of race-based discharge under Section 1981. The only issue before the Supreme Court was whether Section 1981 provided the plaintiff an additional cause of action for his claim of retaliatory discharge.

Section 1981 is a Reconstruction-era statute passed to protect the rights of black citizens after the Civil War. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." This provision has long been interpreted to apply to private employment contracts. However, in *Patterson v. McLean Credit Union* (1989), the Supreme Court severely limited the scope of Section 1981 employment claims as it held that Section 1981 did not provide a claim to an

employee who alleged race-based harassment or denial of a promotion because the statutory language did not apply to “conduct by the employer after the contract relation has been established.” Congress subsequently passed the Civil Rights Act of 1991, in part, for the purpose of overturning the *Patterson* decision. The 1991 Act expands the definition of Section 1981 to prohibit discrimination in “the making, performance, and termination of contracts, and the enjoyment of all benefits privileges, terms, and conditions of the contractual relationship.” Although the purpose of the Act was to return the law to its “pre-*Patterson*” status quo, in which several courts had upheld retaliation claims under Section 1981, the Act did not expressly provide a cause of action for retaliation.

The employer in *Humphries* argued that Congress’s failure to expressly address retaliation when it passed the Civil Rights Act of 1991 indicated that it did not intend to provide a retaliation cause of action under Section 1981. Thus, the employer contended that no cause of action for retaliation should be implied under Section 1981 where none is expressly provided in the statutory text, and that allowing such claims would create unnecessary and harmful overlap with the administrative requirements and remedies under Title VII, which already provides a cause of action for retaliation for complaining of race discrimination.

The Supreme Court rejected the employer’s argument and held that the plaintiff could proceed under Section 1981 for claims of retaliatory discharge based on complaints of race discrimination. First, the Supreme Court cited its prior decision in *Sullivan v. Little Hunting Park, Inc.*, (1969), in which it found a retaliation claim available under 42 U.S.C. § 1982, a companion statutory provision to Section 1981 that prohibits race discrimination related to the enforcement of property rights and which contains parallel language to Section 1981 with no express language regarding termination. Second, the Court noted that Congress had intentionally expanded the scope of Section 1981 to include a cause of action for “post-contract-formation conduct” in passing the Civil Rights Act of 1991. Although the 1991 Act did not expressly address retaliation, appellate decisions before *Patterson* had held that such a cause of action was available, and the Act was intended to restore the availability of remedies for “post-formation” employer conduct that had been foreclosed in *Patterson*. Third, the Court noted that since the passage of the Civil Rights Act of 1991, appellate courts had again uniformly interpreted Section 1981 to encompass retaliation claims. Finally, the Court relied on its recent holding in *Jackson v. Birmingham Bd. of Ed.* (2005), in which it interpreted Title IX, the federal law prohibiting gender discrimination in education programs receiving federal assistance, as similarly implying a cause of action for retaliation where none was expressly provided in the statutory text. Interestingly, the Court acknowledged the argument that the current Court has adopted a “newer approach” to statutory construction that “emphasizes text.” Without acknowledging that it has, indeed, adopted such a “newer approach,” the Court stated that the principle of *stare decisis* demanded its holding in the *Humphries* case given the prior Court rulings in *Sullivan* and *Jackson*, regardless of the current approach by the Court to statutory construction.

The result of the Court’s holding is that employees who allege retaliation resulting from complaints of race discrimination may bring such claims under Section 1981 without regard to the administrative requirements or damages limitations in Title VII. Unlike Title VII, which caps damages at \$300,000, Section 1981 does not cap awards for damages. Further, the statute of limitations under Section 1981 is four years, and an employee alleging retaliation under Section

1981 need not first file a charge with the EEOC within the Title VII limitations period. As a result, we expect to see an increase in the number of Section 1981 claims against employers. However, Section 1981 relates only to race discrimination and, arguably, national origin or “color” discrimination, based on a prior Supreme Court holding that Section 1981 prohibits discrimination on the basis of “ancestry or ethnic characteristics.” Employees who allege retaliation resulting from complaints of discrimination based on other factors such as gender, age, religion, or disability must still bring such claims under Title VII or state law.

If you have questions about this Alert, please call one of our labor attorneys listed below.

Bass, Berry & Sims Labor and Employment Attorneys

Karen L.C. Ellis
(615) 742-6226
kellis@bassberry.com

Robert W. Horton
(615) 742-7708
rhorton@bassberry.com

Michael S. Moschel
(615) 742-6297
mmoschel@bassberry.com

Leslie G. Sanders
(615) 742-7711
lsanders@bassberry.com

Davidson French
(615) 742-6240
dfrench@bassberry.com

Alonda W. McCutcheon
(615) 742-7717
amccutcheon@bassberry.com

William N. Ozier
(615) 742-6232
bozier@bassberry.com

Annie M. Warnock
(615) 742-6517
awarnock@bassberry.com

Tim K. Garrett
(615) 742-6270
tgarrett@bassberry.com

Carolyn V. Moore
(615) 742-7944
cmoore@bassberry.com

Justin A. Page
(615) 742-7786
jpage@bassberry.com

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