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Retaliation: The Implied Right To Sue

By Avery L. Goodrich, Jr., Esq.

Last month, the Supreme Court issued two decisions, finding in each that a broadly-worded anti-discrimination statute encompasses claims of retaliation, even though the provision does not explicitly authorize such a claim.

In *Gomez-Perez v. Potter, Postmaster General*, a 45-year-old female postal worker asked for a transfer to a postal station to be closer to her ill mother. The transfer was approved; however, when she requested a transfer back to her old station, the transfer was denied. Ms. Gomez filed a union grievance and an age discrimination complaint. Ms. Gomez later alleged that after she filed her complaint, she was subjected to "groundless complaints" of sexual harassment against others and that her work hours were drastically reduced. In her complaint filed in District Court, Ms. Gomez charged, among other things, that the Postal Service had violated §633a(a) of the federal-sector provision of the Age Discrimination in Employment Act of 1967 ("ADEA"), by retaliating against her for filing her complaint.

In the second decision, *CBOCS West, Inc. v. Humphries*, an

African-American manager at a Cracker Barrel Restaurant complained to other managers regarding what he believed to be the discriminatory termination of a co-worker. Mr. Humphries thereafter was discharged. Mr. Humphries filed a federal lawsuit, charging CBOCS West Inc., the owner of Cracker Barrel, with violating Title VII and 42 U.S.C. Section 1981 ("§1981").

Discrimination to be Broadly Interpreted to Encompass Retaliation

Both §633a(a) and §1981 contain broad language prohibiting discrimination in general. The federal-sector provision of the ADEA, §633a(a), states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." Meanwhile, §1981, which traces its origin to the post-Civil War Civil Rights Act of 1866, provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens." However, neither provision includes the word "retaliation."

The Court based its decision in *Gomez* in part on a decision it released in between the original enactment of the ADEA and the later enactment of the federal-sector employee provision. When Congress first enacted the ADEA in 1967, it only applied to private-sector employees. Seven years later, as part of the Fair Labor Standards Amendments of 1974, Congress extended the ADEA to public-sector employees.

This time, rather than employing the list of proscribed acts, as §623(a) had done, Congress adopted the broader language noted above.

During the interim, the Supreme Court decided *Sullivan v. Little Hunting Park, Inc.,* (1969), a case interpreting the post-Civil War anti-discrimination statute 42 U.S.C. §1982 ("§1982"), a companion statute to §1981. Section 1982 employs language identical to that of §1981, guaranteeing all citizens the same rights as enjoyed by white citizens. The *Sullivan* court held that the plain meaning of the statute included retaliation. The *Gomez* Court noted that Congress in 1974 was presumably familiar with the 1969 *Sullivan* decision and had every reason to expect that the broad ban included in §633a(a) would also be interpreted to include retaliation.

The *Gomez* majority also noted its 2005 decision of *Jackson v. Birmingham Bd. Of Ed.*, which dealt with a teacher bringing a claim pursuant to Title IX for alleged retaliation after complaining about sex discrimination in a high school athletic program. Title IX's language was broad, like that of §633a(a), and stated that "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." The *Gomez* court noted that Title IX did not use the word "retaliation," but was interpreted to include it, because of Congress' presumed familiarity with the *Sullivan* decision.

The minority in *Gomez*, besides noting the absence of "retaliation" in the statute, despite its presence in the private-sector provision of the same statute, also noted that good reason existed for Congress to exclude retaliation from the public-sector provision -- federal employees had already been given the right to file retaliation claims through the Civil Service Commission ("CSC"). The *Gomez* minority argued that when the public-sector provision of the ADEA was enacted, Congress intentionally excluded retaliation because it believed that the CSC would expand its coverage to add age. However, the majority rejected this argument as speculative.

CBOCS West may have been an easier case for the Supreme Court to decide, as §§1981 and 1982 contain nearly identical language and they share a common origin and purpose. Precedents regarding both provisions have long construed them identically. Indeed, as the *CBOCS West* Court noted, §1982 differs from §1981 only in that one provision guarantees the right to make and enforce contracts and the other, the right to inherit, purchase, lease, sell, hold and convey property. The Supreme Court did not find any justification to interpret what it called §1982's "sister statute" differently.

The decisions, surprising to many given the popular belief of a pro-business and pro-employer bent on the Supreme Court, expand the rights of federal employees over the age of 40 and private-sector employees bringing §1981 claims. These decisions may be indicative that the Court will interpret other employment discrimination statutes more broadly.

What Should Employers Do In Light of *CBOCS West, Inc*. and *Gomez-Perez*

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Retaliation complaints filed annually with the EEOC have doubled over the last 15 years, from 11,000 to 22,000, perhaps because it is often easier for employees to show that they were retaliated against than that they were victims of discrimination. Retaliation complaints are the fastest growing type of discrimination case. Employers should act carefully and prudently when an employee makes a claim of unlawful discrimination, because a claim of retaliation is likely to follow. Employers should routinely take these initial steps:

1. Maintain sufficient documentation that supports any materially adverse change in the terms of employment taken against an employee;

2. Refrain from discharging an employee in close proximity to the time the employee files a discrimination charge, unless the cause for termination is reasonably undisputable;

3. Refrain from making derogatory comments about a current or former employee who has filed a discrimination complaint, or who has expressed opposition to discrimination within your company; and

4. Treat the employee as you would all other employees under your supervision. Provide the employee with no special treatment or special consideration during the pending charge of discrimination.