HUNTON& WILLIAMS

CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws. Hunton & Williams LLP provides legal services to corporations, financial institutions, governments and individuals, as well as to a broad array of other entities. Since our establishment more than a century ago, Hunton & Williams has grown to more than 1,000 attorneys serving clients in 100 countries from 18 offices around the world. While our practice has a strong industry focus on energy, financial services and life sciences, the depth and breadth of our experience extends to more than 100 separate practice areas, including bankruptcy and creditors' rights, commercial litigation, corporate transactions and securities law, intellectual property, international and government relations, regulatory law, products liability, and privacy and information management.

Supreme Court Upholds Employee Retaliation Actions Where Statutes Are Silent

On May 27, 2008, the U.S. Supreme Court issued two opinions confirming that two statutes expressly prohibiting discrimination also implicitly prohibit retaliation for opposing discrimination.

In *CBOCS West Inc. v. Humphries*, a former assistant manager of a Cracker Barrel restaurant in Illinois brought an action under 42 U.S.C. § 1981 ("Section 1981"), alleging that he was fired for complaining about a Caucasian manager's treatment of African American employees, including himself. The District Court dismissed his lawsuit because Section 1981 prohibits race discrimination but does not expressly prohibit retaliation. On appeal, the Seventh Circuit reversed and remanded the case for trial.

CBOCS West petitioned the Supreme Court for certiorari to decide whether Section 1981 covered employee retaliation claims. In its 7-2 decision holding that such claims are actionable, the Court relied not on the plain language of the statute but instead on decisions in previous cases.

In its second decision, *Gomez-Perez v. Potter*, the Court held that federal employees, like employees in the private sector, are protected from retaliation under the Age Discrimination in Employment Act ("ADEA"). In that case, an employee of the U.S. Postal Service claimed that she was subjected to retaliation for complaining about age discrimination.

In its 6-3 opinion, the Court overturned a First Circuit decision rejecting the claim because the statute did not expressly prohibit retaliation against federal employees. The Court held that the absence of an express right of action for public employees does not mean that one does not exist. As in the *CBOCS West* case, the Court based its decision on previous judicial decisions and not on the statutory language.

What this means for employers

With the Supreme Court's recognition of retaliation claims under Section 1981, employers can expect a rise in such claims. Unlike claims under the broader Title VII of the Civil Rights Act (which also prohibits race discrimination and retaliation), employees do not have to file a complaint with the EEOC before filing a lawsuit under Section 1981. Further, while an employee must bring a Title VII claim within 180 or 300 days of the alleged discriminatory act, depending on the state, there is a four-year statute of limitations governing Section 1981 actions. Moreover, unlike under Title VII, there is no cap on the amount of damages a plaintiff can be awarded under Section 1981.

Viewed together, the two decisions demonstrate that the Court is not constrained by statutory language and instead that it is willing to read into the statutes causes of action that Congress did not expressly create.

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