

SUPREME COURT CONFIRMS: SECTION 1981 INCLUDES RETALIATION CLAIMS

Insights
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May 27, 2008 - The Supreme Court delivered its decision in *CBOCS West, Inc. v. Humphries* holding that Section 1981 of the Civil Rights Act of 1866 unequivocally includes claims of retaliation by those pursuing race and color claims under the statute. The Court's ruling has significant consequences for employers, including a longer period of time in which aggrieved employees may file suit, exposure to uncapped damages, as well as providing federal remedies for a greater number of employees who, until this decision, may not have been covered by federal anti-retaliation statutes.

Background

Enacted shortly after the Civil War, Section 1981 provides that "any person within the jurisdiction of the United States" has equal rights to "make and enforce contracts, regardless of their skin color." Historically, courts have permitted both race and color claims under Section 1981. Section 1981 protects individuals from discriminatory treatment both at the time when contracts are formed, and in post-formation conduct. Because the relationship between an employer and its employees is considered "contractual," (even in employment-at-will states) Section 1981 applies to many aspects of the employment relationship.

The plain language of Section 1981 does not make it clear that claims for retaliation come under the purview of Section 1981 because retaliation claims are based on an *action* taken by the employee "such as complaining about discriminatory treatment" rather than on the employee's race or color. In fact, as noted by the employer in this case, allowing retaliation claims under Section 1981 flies in the face of Congress' intent. Section 1981 was amended in 1991, and Congress excluded an anti-retaliation provision, indicating that retaliation was never meant to be a recognizable claim.

On the other hand, the employee in this case, and proponents of expanding Section 1981, contend that Section 1981 prohibits any conduct, including retaliation, that impairs an individual's right to "make and enforce contracts." A substantial number of courts, including the U.S. Court of Appeals for the 7th Circuit, have explicitly held that Section 1981 includes protection against unlawful retaliation.

Facts of the Case

Hedrick Humphries, who is African-American, worked as an assistant manager at the Cracker Barrel in Bradley, Illinois. In August and October, 2001, Humphries complained to his district manager about his general manager's disciplinary reports, racially offensive remarks, and the decision to terminate another black employee. Humphries believed that the general manager's disciplinary reports and the employee's termination were baseless and racially motivated. The district manager did not take any action and, instead, later terminated Humphries' employment based on a report from another employee that Humphries left the store safe open overnight.

Humphries originally filed suit alleging violations of both Title VII of the Civil Rights Act of 1964, and Section 1981 of the Civil Rights Act of 1866. Humphries' Title VII claim was dismissed for procedural defects, leaving only Humphries' Section 1981 claim before the court. The federal district court granted summary judgment in favor of Cracker Barrel on Humphries' Section 1981 claim holding that he was unable to establish a *prima facie* case. Humphries appealed the decision and in January 2007, the U.S. Court of Appeals for the 7th Circuit reversed the district court's grant of summary judgment as to Humphries' retaliation claim.

The 7th Circuit reasoned that section 1981 included claims of retaliation because the "plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the 'termination of contracts,' and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract." In doing so, the 7th Circuit sided with several other Circuit Courts of Appeals, including the 5th, 2nd, 8th and 11th Circuits, all of which have held that Section 1981 applies to claims of retaliation.

The Court's Ruling

Examining the relevant interpretive history and citing its prior decisions concerning companion statutes, the Supreme Court held that Section 1981 encompasses retaliation claims and noted that its view "is indeed well embedded in the law." The Supreme Court relied heavily on case law interpreting Section 1982 (a sister statute establishing equal rights concerning real and personal property), and noted that it had long construed these two sections alike because they had "common language, origin, and purposes."

Additionally, the Court cited its decisions prior to the enactment of Title VII, which explicitly allowed retaliation claims under Section 1981 “a claim thought by some to be abrogated by Title VII” and noted that there was no need for Congress to include an anti-retaliation provision when it amended Section 1981. Not surprisingly, the Court also cited a number of Federal Courts of Appeals decisions holding that Section 1981 encompasses retaliation claims. Finally, the Court pointed out that it has previously accepted “overlap” between several civil rights statutes and noted that any “necessary overlap” between Section 1981 and Title VII was clearly intended by congress.

In sum, the Court reasoned that “[p]rinciples of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same.” *Stare decisis* is the rule that previously decided cases are controlling.

The Significance of the Decision

Although several Circuits had previously allowed retaliation claims under Section 1981, until this decision, there still remained an argument that Section 1981 did not extend to such action. But with this ruling, the Supreme Court has literally opened the floodgates. Among other things, this decision will provide plaintiffs with substantially more time to file their Section 1981 retaliation claims than is permitted to file retaliation claims under Title VII.

Additionally, those plaintiffs filing under Section 1981 may now circumvent the Equal Employment Opportunity Commission’s administrative process prior to filing a retaliation suit. This decision also provides greater protection to employees of small employers (i.e., fewer than 15 employees), because employees working for employers with fewer than 15 employees, who are not covered by Title VII, may now file suit under Section 1981.

Perhaps most importantly, unlike retaliation claims under Title VII, retaliation claims filed under Section 1981 are not subject to a cap on their damages. The potential for an unlimited award of damages could be staggering, and possibly devastating, especially to small businesses.

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