SUPREME COURT AFFIRMS RIGHT TO SUE FOR RETALIATION UNDER §1981

Extends Life of Plaintiff's Claim and Potential for Damages

On May 27, 2008, in a 7-2 decision, the Supreme Court concluded that an African-American, former assistant manager for a Cracker Barrel restaurant may pursue a retaliation claim under the Civil Rights Act of 1866 (42 U.S.C. §1981). *CBOCS West, Inc. v. Humphries*, U.S., No. 06-1431, (5/27/08). The Supreme Court's decision is particularly notable given that §1981 does not expressly prohibit retaliation.

The plaintiff in *Humphries* claimed that he was dismissed because he complained to management that a fellow co-worker was discriminated against on the basis of race. Mr. Humphries alleged that his firing was a retaliatory action by management and that such action is prohibited under §1981, which provides that people of all races shall have the same rights to make and enforce contracts. In response, CBOCS West (the owner of Cracker Barrel) maintained that the claim should fail because retaliation is not mentioned in the statute nor was it the specific intent of Congress to include this right. The Supreme Court affirmed the Seventh Circuit's decision which interpreted §1981 to encompass retaliation claims.

In support of its decision, the Supreme Court first looked to prior rulings that similarly recognized the right to sue for retaliation. In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and in *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005), the Court held that both 42 U.S.C. §1982 of the Civil Rights Act of 1866 and 20 U.S.C. §1681 (Title IX of the Education Amendments of 1972), respectively, recognized an implied right to sue for retaliation. In those cases, the Court reasoned that permitting punishment against a person who tries to defend the rights of a minority would only give momentum to the continuation of racial restrictions. In a long line of related cases that followed, the Supreme Court has interpreted both §§1981 and 1982 in the same manner. Accordingly, the Court in *Humphries* found that these prior decisions provided sufficient basis to require a similar result with respect to a retaliation claim under §1981.

In earlier decisions, the Court narrowed the scope of §1981 to only cover discrimination that occurred prior to contract formation. However, the *Humphries* court noted that the passing of the Civil Rights Act of 1991 served to amend §1981 and, thus, solidify the intent of Congress to broaden the meaning of the statute to include claims arising during all points of the contractual relationship. Since 1991, the lower courts have relied on this amendment, as well as prior court opinions, congressional intent, and a broad reading of §1981, to hold that the statute encompasses retaliation actions. For these reasons, the Court held that Mr. Humphries may pursue a retaliation claim against CBOCS.

The Supreme Court's decision in *Humphries* now provides prospective plaintiffs with another arrow in the quiver of claims employers may be forced to defend against, particularly in a current economic climate marked by workforce reductions and related job actions. Unlike suing under Title VII, where a plaintiff must file a lawsuit within 90 days after the EEOC's (or equivalent state or local agency's) determination of an administrative charge, §1981 plaintiffs are given four years from the date of the alleged violation to bring suit. Additionally, whereas a plaintiff's damages are generally capped at $300,000 under Title VII, Congress has expressly exempted claims under §1981 from damage caps, thus significantly increasing an employer's potential liability.

If you would like to further discuss the issues presented by the *Humphries* decision, or to discuss other labor and employment matters facing your organization, please contact:

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