

BREAKING NEWS

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A former general counsel of a major regional airline, Rudy's unique perspective keeps his interests aligned with clients seeking counseling on employee relations or faced with employee litigation. He has represented large and small employees in defense of claims brought under the ADA, Title VII, ADEA and common law employment torts. He also provides counsel and training to clients on avoiding discrimination and harassment claims. Rudy speaks regularly on employment law topics.

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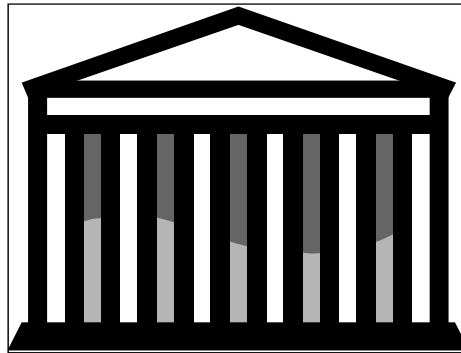
Elizabeth's practice includes defending clients facing Title VII discrimination claims as well as litigation regarding alleged theft of trade secrets and the enforceability of restrictive covenants. She works closely with her clients to craft appropriate solutions that align with their business objectives. Elizabeth also has written several papers on employment-related torts in Texas.

HIGH COURT CLEARS WAY FOR MORE RETALIATION SUITS

On May 27, 2008, the United States Supreme Court issued two decisions that expanded the availability of claims of retaliation in the work place. In

CBOCS West Inc. v. Humphries, No.

06-1431, — U.S. —, 2008 U.S. LEXIS 4516, the Supreme Court held that 42 U.S.C. § 1981, the statutory civil rights legislation that prohibits discrimination based on race in the making and enforcement of contracts, encompasses claims for retaliation.



The U. S. Supreme Court issued two recent rulings on workplace retaliation, holding that such claims are available under § 1981 and to federal workers alleging age discrimination.

Similarly, in *Gomez-Perez v. Potter*, No. 06-1321, — U.S. —, 2008 U.S. LEXIS 4518, the Court held that the section of the Age Discrimination in Employment Act protecting federal workers also allows for retaliation claims.

Though Title VII specifically provides a claim for retaliation, the 1991 Amendments to the Civil Rights statute did not change the language in either § 1981 or the federal sector portion of the ADEA. The Court nonetheless held that such claims are supported by Supreme Court precedent and by drawing analogies from the text of other federal statutes. Employers should take care to avoid any practice that might be perceived as retaliatory in nature, as it is clear that federal courts will now be more receptive of such claims.

What Employers Can Do to Prevent Retaliation Lawsuits:

- Implement and enforce a clear anti-retaliation policy
- Document misconduct
- Conduct exit interviews
- Conduct yearly training sessions to make managers aware of the policy and to clear up any questions
- Maintain an open line of communication with lower level management about what to do when a worker complains
- Hang posters summarizing the company's complaint procedures and anti-retaliation policies

***CBOCS West Inc. v. Humphries*, No. 06-1431, — U.S.—, 2008 U.S. LEXIS 4516 (May 27, 2008).**

In *Humphries*, the Court held that although the language of 42 U.S.C. § 1981 does not explicitly mention “retaliation,” principles of *stare decisis* and the legislative intent of the 1991 Amendments to the Civil Rights Act required a broad interpretation of the statute and permit claims for retaliation under Section 1981. Plaintiff Hedrick G. Humphries was the former assistant manager of a Cracker Barrel restau-

rant (defendant CBOCS West, Inc., owns Cracker Barrel). Humphries complained to managers that a fellow assistant manager had dismissed a black employee for race-based reasons. Cracker Barrel later terminated Humphries’s employment. Along with other claims, Humphries asserted a claim for retaliation under 42 U.S.C. § 1981, the statute that prohibits discrimination based on race in connec-

tion with the making and enforcement of contracts. The District Court granted summary judgment in favor of Cracker Barrel on the retaliation claim. The Seventh Circuit Court of Appeals reversed, and Cracker Barrel sought review by the Supreme Court. Justice Breyer delivered the Court’s opinion, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito.

The word “retaliation” is not present in the statute, but does it encompass a “complaint against a person who has complained of another person’s contract-related ‘right’? We conclude that it does.

—Justice Breyer
in *Humphries*

By granting certiorari, did the Supreme Court give employers a false sense of security?

The Court noted disagreement in the lower courts that retaliation claims are within the scope of the statute. The recent trend of the Supreme Court, however, was to shut the door on claims that the Court determined had exceeded the plain language of a statute to infer a basis for suit. In

fact, in *Ledbetter v. Goodyear Tire & Rubber Co.*, — U.S. —, 127 S. Ct. 2162 (2007), the Court, based on the specific language of the statute at issue, rejected an employee’s allegation of continuing violation in the context of a pay disparity claim because she failed to timely file a

charge of discrimination after the first discrete act of alleged discrimination. The Court’s decision in *Ledbetter* led many to predict that the Court would take the opportunity in *Humphries* to curtail or prevent retaliation claims in general. The pundits were proved wrong in this case.

Court: Section 1981’s “broad” language implicitly encompasses a claim for retaliation.

Justice Breyer rejected Cracker Barrel’s argument that a plain reading of the text of Section 1981 foreclosed a claim for retaliation. In response to CBOCS’s assertion that Humphries’s termination would have happened regardless of his race, the Court acknowledged that the statute’s language did not

expressly refer to a claim of an individual (black or white) who suffers retaliation because he tried to help another person suffering direct racial discrimination, but ruled that this fact alone could not “carry the day.” Reviewing previous holdings on retaliation claims in the context of Title IX and 42 U.S.C. § 1982, the Court

held that retaliation claims are in fact *not* precluded by Section 1981. Rejecting the argument that the Court’s current emphasis on textual language should prevent such a holding, Justice Breyer wrote: “Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same.”

***Gomez-Perez v. Potter, No. 06-1321,
—U.S.—, 2008 U.S. LEXIS 4518
(May 27, 2008).***

The case of *Gomez-Perez v. Potter* concerned the right of a federal employee to maintain a claim of retaliation under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 633a. Justice Alito wrote for the Court, joined by Justices Breyer, Stevens, Kennedy, Souter, and Ginsburg. Just as in *Humphries*, the word “retaliation” is found nowhere in the ADEA statute. Regardless, the Court held that the statute encompasses such a claim.

Plaintiff Myrna Gomez-Perez, a 45-year-old window distribution clerk for the U.S. Postal Service, requested a transfer from her full-time position at the post office in Dorado, Puerto Rico to the post office in Moca, Puerto Rico to be closer to her ill mother. Following approval of the transfer, Gomez-Perez

began to work in the Moca post office in a part-time position. Later that month, she requested a transfer back to her old job. The Postal Service denied Gomez-Perez’s transfer application, as her former supervisor had converted the Dorado position to part-time and filled it with another employee.

After an unsuccessful union grievance, Gomez-Perez filed a charge of discrimination with the EEOC. She alleged that after filing her charge, she was subjected to various forms of retaliation. For example, Gomez-Perez alleged that her supervisor made groundless complaints against her at a meeting, her name was written on anti-sexual harassment posters, and she was falsely accused of sexual harassment. Gomez-Perez filed suit in the U.S. District Court of Puerto Rico, claiming among other things that her employer violated the federal sector provision of the

ADEA by retaliating against her for filing an EEOC charge. The trial court dismissed the claim on summary judgment. On appeal, the First Circuit of Appeals affirmed the lower court’s ruling. This created a split in the circuits as to whether the federal sector provision of the ADEA encompassed a claim for retaliation.

As in the *Humphries* case, the Court was guided by reasoning in earlier Supreme Court precedent that broadly interpreted civil rights legislation to allow retaliation claims. The Court also relied on *Jackson v. Birmingham Board of Education*, 544 US 167 (2005), which broadly interpreted Title IX to include remedies for retaliation. Applying the rationale of these decisions, the Court held that retaliation claims are likewise permitted by the federal sector provision of the ADEA.

“Retaliation is discrimination ‘on the basis of [sex, age, race etc.]’ because it is an intentional response to the nature of the complaint, an allegation of...discrimination”

*-Justice Alito
in Gomez-Perez*

The Dissents: “Retaliation” is not in the text of the statutes.

Justice Thomas dissented in *Humphries* that a claim for retaliation is not a claim for discrimination in and of itself based on race. Rather, “when an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race*; rather, it is the result of his *conduct*.” Justice Thomas ar-

gued that it makes no sense to subject an employer to a race discrimination case under Section 1981 when the employer treats all employees—black and white—the same.

Chief Justice Roberts argued in *Gomez* that federal sector workers were not covered by the portions of the ADEA

that apply to private-sector workers because an elaborate civil service system already exists for federal employees. Obviously, Congress was familiar with this system and recognized that federal workers did not need the broader protections of the ADEA extended to private workers, who had no such administrative protections.

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The Bottom Line: What Do *Humphries* and *Gomez* Mean for Employers?

Considering that Section 1981 presents fewer obstacles to potential plaintiffs than Title VII, the Court's holding in *Humphries* might make Section 1981 the preferred statutory basis for employees who claim to have experienced an adverse employment action based on retaliation. First, Section 1981 has a four-year statute of limitations. Second, Section 1981 does not require that a plaintiff exhaust administrative remedies before filing suit. Third, there are no damage caps for claims brought under Section 1981. Finally, it is often easier for an em-

ployee to prove a retaliation claim than that they were victims of discrimination based on race.

The number of retaliation claims has doubled in the last fifteen years as it is. It is now likely that employers will see more retaliation claims brought under Section 1981 than ever before. Texas employers already face the prospect of retaliation claims brought under Title VII, a host of other state and federal statutory limitations on the right to discharge an employee, as well as the Texas common law prohibition

against discharging an employee for failure to perform an illegal act (*Sabine Pilot Serv. v. Hauck*, 687 S.W.2d 733 (Tex. 1985)). The Supreme Court's late-May decisions simply add to the list of claims available to employees who allege wrongful termination. As always, employers must be careful to document employee misconduct and to follow progressive discipline and employee-complaint policies to best defend against any such claims in the event that it becomes necessary to terminate an employee.

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