

June 2008

EMPLOYER ALERT

SUPREME COURT PERMITS RACE RETALIATION CLAIMS UNDER SECTION 1981

On May 27, 2008, the U.S. Supreme Court ruled that employees may sue employers for race-based retaliation in employment under 42 U.S.C. Section 1981, a law which grants people of all races the same rights "to make and enforce contracts" ("Section 1981"). Although Section 1981 previously has been applied to claims of race-based termination of employment contracts and at-will employment, the Supreme Court had not ruled on whether it also applies to retaliation claims. Although the plain language of Section 1981 does not specifically prohibit retaliation, the Supreme Court ruled that the statute **does** afford employees such protection. See CBOCS West, Inc. v. Humphries, No. 06-1431 (May 27, 2008).

The Supreme Court's decision further expands the scope of existing employee protection against retaliation for making complaints of workplace discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") and particularly is significant to employers for the following reasons:

1. Section 1981 has a longer statute of limitations than does Title VII (4 years as opposed to 3 years);
2. Section 1981 does not subject individuals to the same administrative prerequisites as does Title VII (filing claim with the Equal Employment Opportunity Commission and receiving a right to sue letter) to filing a lawsuit in federal court;
3. Section 1981 does not have a cap on compensatory and punitive damages, whereas Title VII has a cap of \$300,000 (or less, depending on the number of employees) on such damages.

Claims of employer retaliation already were on the rise, due in large part to the Supreme Court's 2006 decision in Burlington N. & S. F. R. Co. v. White, No. 05 259 (June 22, 2006), in which it held that Title VII's anti-retaliation provision applies not only to adverse employment actions (e.g., terminations and demotions), but to **any** employer action that would have been materially adverse to a reasonable employee or applicant and "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Moreover, an employee may satisfy his/her burden of demonstrating employer retaliation based upon a causal connection (usually a closeness in time) between an alleged employee complaint and subsequent employer action -- even if the employee cannot demonstrate that the action(s) complained of actually constituted unlawful discrimination. Accordingly, employers are well advised to seriously consider employee allegations, claims, and/or complaints of discrimination and their responses thereto to avoid potential liability for retaliatory conduct.

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the Supreme Court ruled
that employees may sue
employers for race-based
retaliation under
42 U.S.C. Section 1981, a
statute that provides
employees with broader
protection and remedies
than does Title VII.**

(End of Alert. Please see next page for contact details.)

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We are available to provide counsel and guidance concerning these issues, as well as other management concerns not discussed in this Employer Alert. For additional information on the issues discussed here and other issues arising under federal and state labor and employment law, please contact the attorney named below.

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