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What The CBOCS Decision Means For Employers

Law360, New York (September 29, 2008) -- Unlike numerous other anti-discrimination laws, Section 1981 of the Civil Rights Act of 1866 does not expressly forbid retaliation against employees who complain about discrimination. In CBOCS West Inc. v. Humphries, the Supreme Court nevertheless held on May 27 that Section 1981, which on its face guarantees racial equality in the right to make a contract, also prohibits retaliation by employers. What does CBOCS mean for employers? While it creates the potential for greater liability than Title VII of the Civil Rights Act of 1964, it is not the sea change that many predicted.

The CBOCS Decision

The plaintiff in CBOCS, Herbert Humphries, is a black former employee of a Cracker Barrel restaurant. He sued his former employer under both Title VII and Section 1981, alleging that he was fired in retaliation for complaining about discrimination against other black employees.

The district court dismissed his Title VII claim because of procedural defects and ruled that Section 1981 does not encompass retaliation claims, a conclusion that the Seventh Circuit rejected on appeal.

The Supreme Court, in an opinion by Justice Stephen Breyer, held that Section 1981 authorizes retaliation claims. The court relied heavily on precedents interpreting similar statutes.

In a 1969 case called Sullivan v. Little Hunting Park Inc., the court construed the nearly identical language of a companion statute, Section 1982 (which prohibits discrimination in connection with property ownership), as also prohibiting retaliation. Because Sections 1981 and 1982 share common origins, language and purposes, the court held that they should be interpreted consistently.

Justice Clarence Thomas dissented, joined by Justice Antonin Scalia. He argued that the language of Section 1981 prohibits only discrimination, which differs analytically

from retaliation — the former an injury based on racial status, the latter the result of an individual's conduct.

Implications For Employers: A Growing Number Of Retaliation Claims

Retaliation claims are a rapidly growing category of lawsuits against employers.

It may often be easier for employees to prove — or at least reach a jury on the question — whether they were the victims of retaliation than whether they were discriminated against in the first place. From 1997 to 2007, retaliation claims filed with the Equal Employment Opportunity Commission increased by nearly 50 percent.

CBOCS is the latest in a series of Supreme Court decisions during that time that have taken an expansive view of protections from retaliation under the civil rights laws.

The court's 1997 decision in Robinson v. Shell Oil Co. held that Title VII, which by its terms applies to employees, also protects a former employee who claims that his past employer gave him a negative reference in retaliation for alleging that his firing was discriminatory.

In 2005, in Jackson v. Birmingham Board of Education, the court held that Title IX of the Education Amendments of 1972 — which prohibits sex discrimination in schools that receive federal funds, and which, like sections 1981 and 1982, does not refer to retaliation — authorizes claims of retaliation for complaints about gender discrimination.

In 2006, in Burlington Northern & Santa Fe Railway Co. v. White, the court reached two significant holdings under Title VII: first, that retaliation is not limited to "adverse employment actions," as many courts had held, but rather includes retaliatory conduct by employers even outside the workplace; and second, that Title VII prohibits any retaliatory conduct that "well might have dissuaded a reasonable worker" from complaining of discrimination, a generous reading of Title VII more favorable to employees than several lower courts had adopted or the government had urged.

In Gomez-Perez v. Potter, decided on the same day as CBOCS, the court held that the Age Discrimination in Employment Act protects federal employees from retaliation, even though the statute does not expressly prohibit such retaliation by the government, as it does private employers.

And the court will hear another retaliation case in its next term. Crawford v. Metropolitan Government of Nashville asks whether Title VII protects an employee from retaliation for statements made during an employer's internal investigation of suspected harassment.

Not only does CBOCS continue the court's trend of broadly construing anti-retaliation protections for employees, but it also exposes employers to potentially greater liability with fewer procedural protections than Title VII.

First, Section 1981 is often invoked in employment cases, but it prohibits racial discrimination — and, following CBOCS, retaliation — in connection with all contracts. CBOCS therefore has implications well beyond employment disputes.

Second, unlike Title VII, Section 1981 does not require plaintiffs to file a charge with the EEOC before suing in court. That lack of a charge-filing requirement denies employers the early notice of a dispute that the EEOC provides, as well as the opportunity to resolve the dispute during the EEOC's administrative process before formal litigation.

Third, while different statutes of limitations apply to Section 1981 claims (a four-year federal limitations period for some Section 1981 claims, state-law limitations periods for others), an individual will nearly always be able to bring a Section 1981 claim after a corresponding Title VII lawsuit would be time-barred. This is because Title VII has stringent limitations periods of 180 or 300 days, depending on the state.

Fourth, whereas Title VII applies only to employers with 15 or more employees, Section 1981 applies to retaliation claims against employers of any size.

Fifth, unlike Title VII, Section 1981 allows individual supervisors to be held personally liable for retaliation.

Finally, Section 1981 allows damages greater than the $300,000 cap imposed by Title VII. This distinction between the two statutes may be short-lived, since Congress is considering repealing Title VII's cap on damages.

How Should Employers Respond?

Though CBOCS potentially exposes employers to additional liability, it does not fundamentally change the landscape of anti-retaliation law.

Even before CBOCS, every court of appeals that considered the question held that Section 1981 creates a cause of action for retaliation.

It is no surprise that employers should keep records long enough to defend themselves against claims under Section 1981 — preferably at least four years. And all employers should already know not to retaliate against employees who complain of discrimination, whether on the basis of race or otherwise.

Generally, retaliation comes in two forms.

The first involves a claim that an employer took some adverse action against an individual because the individual opposed an unlawful practice such as race discrimination in employment. The second occurs when an employer takes action against a person who participated in a government investigation, such as by filing a charge of discrimination with the EEOC or in litigation when an individual serves as a party or witness in a discrimination lawsuit.

But, there are other types of retaliation claims. For example, threats against an individual who announces an intention to file a discrimination claim can violate anti-retaliation protections.

There is no bright-line rule that limits the potential retaliation claims against which employers may have to defend. So, what is an employer to do?

First, employers should recognize that they should not discourage anyone from reporting allegations of allegedly unlawful discrimination, either directly to them or to the government.

Second, employers should understand that retaliation claims often arise because an ongoing workplace relationship has gone bad. For example, when an individual alleges racial harassment by a supervisor, the employer may want to consider separating the individual and the supervisor in the workplace, even if the employer views the allegations as unfounded.

Third, when an employee complains about discrimination, the employer should promptly investigate the allegations and later follow up with the employee.

An investigation may entail notifying managers and others who work with the employee about the allegations. But, employers should beware: an adverse action may not be retaliation if the person who took the action did not know about the underlying accusation. Thus, in the course of an investigation, an employer should decide who needs to know about the allegations, and who does not.

In short, each case is different, and the particular facts and circumstances will shape the prudent employer's approach.

In this respect, CBOCS changed nothing.

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