

L a b o r & E m p l o y m e n t
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S U P R E M E C O U R T E X P A N D S
E M P L O Y E E ' S R I G H T T O S U E
F O R R A C E R E T A L I A T I O N

In a remarkable decision that makes it easier for employees to bring retaliation claims involving race against their employers, the U.S. Supreme Court ruled in *CBOCS West Inc. v. Humphries*, No. 06-1431, ___ U.S. ___ (2008), that employees can sue employers for retaliation under Section 1981 of the Civil Rights Act of 1866. This post-Civil War statute, which has been available for many years as a basis for claims of race discrimination in employment, has not been used by employees with great frequency. In light of *Humphries*, that is about to change.

Background

Hedrick Humphries is an African-American who worked as an assistant manager at a Cracker Barrel restaurant. He complained to management about race discrimination against an African-American co-worker. Humphries was later discharged, the employer claimed, based on a report from another employee alleging he left a safe open overnight. Humphries filed suit alleging race discrimination and retaliation

under Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866. His Title VII claim was dismissed for procedural defects, leaving only his Section 1981 claim for race discrimination and retaliation. The issue before the Supreme Court was whether a retaliation claim may be brought under Section 1981. The plain language of Section 1981 does not give an individual a right to bring a private action for retaliation.

Supreme Court Decision

The Supreme Court ruled that Section 1981 granted employees an implied right to sue for retaliation based on race. The Court relied heavily on its decision in *Sullivan v. Little Hunting Park Inc.*, where an implied right to bring a retaliation claim was found under Section 1982 – another part of the same civil rights statute – as well as on its subsequent holdings suggesting that Section 1981 and Section 1982 should be interpreted consistently because of their common derivation from the Civil Rights Act of 1866.

(continued on page 2)

(continued from page 1)

The Significance of the Decision

The *Humphries* decision will encourage employees to bring race discrimination and retaliation claims under Section 1981 along with a traditional Title VII claim because Section 1981 has fewer hurdles than do claims brought solely under Title VII. Section 1981 provides employees with a longer period to file claims as its limitations period¹ is far longer than the 180/360 days within which a charge must be filed under Title VII. In addition, Section 1981 claims allow employees to circumvent the Equal Employment Opportunity Commission's administrative process prior to filing a retaliation suit. Also, Section 1981 is appealing to plaintiff's lawyers because it does not have any caps on the compensatory and punitive damages recoverable by an employee. Finally, even small business employers (i.e. fewer than 15 employees), will be affected by this decision because unlike Title VII and most state anti-discrimination statutes, Section 1981 does not have a minimum employee threshold necessary to trigger coverage and liability; it covers *all* employers.

¹Section 1981 borrows the statute of limitations most appropriate to the claim – generally the limitations period for breach of contract claims – from the state in which the discrimination or retaliation is alleged to have occurred.

The relative ease of bringing a claim under Section 1981 and the more generous potential recoveries are almost certain to prompt the plaintiff's bar to use this statute as a regular basis for claims of race discrimination and related retaliation. ◆

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