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In this issue

Supreme Court Breathes New Life into Retaliation Claims

BY LESLEY A. PATE AND DONNA M. GLOVER

The United States Supreme Court recently held that 42 U.S.C. § 1981 (Section 1981 or the Act) prohibits employers from retaliating against employees who complain of racial discrimination. See CBOCS West v. Humphries, — U.S. —, Slip Op. No. 046-1431, 2008 WL 2167860 (May 27, 2008).

The decision breathes new life into retaliation claims because Section 1981, which applies to all employers regardless of size, does not have many of the bars to filing suit imposed by other federal anti-retaliation statutes, such as Title VII of the Civil Rights Act of 1964.

Overview of the Humphries Decision

In Humphries, an associate manager at a restaurant complained about racially derogatory remarks made by his manager. He later complained that he believed a co-worker was inappropriately disciplined because of her race. Soon after his complaints, Humphries was terminated for allegedly leaving a safe open overnight.

Humphries then filed suit claiming, *inter alia*, that he had been terminated in retaliation for opposing the alleged racial discrimination against his co-worker. At issue before the Court was whether Section 1981 – which broadly prohibits racial discrimination – encompasses retaliation claims.

The Court found, by a vote of 7-2, that the Act does prohibit retaliation even though the plain text of the statute does not refer to retaliation. In so finding, the Court relied primarily upon the principle of *stare decisis*, the Court's policy of standing behind past decisions.

Specifically, the Court explained that it has long recognized that 42 U.S.C. § 1982 prohibits retaliation, and then reasoned that both that statute and Section 1981 should be interpreted alike because the statutes were enacted together, have common language, and share the same purpose. The Court also referred to a recent decision in which the Court held that Title IX of the Education Amendments of 1972 includes an anti-retaliation remedy despite Title IX's failure to use the word "retaliation."

What the Decision Means for Employers

As noted above, the Humphries decision exposes employers to a heightened risk of retaliation claims. For instance, in contrast to Title VII, Section 1981 has a longer statute of limitations, does not require employees to comply with equal employment opportunity (EEO) administrative procedures, and does not have a damages cap.

Venable attorneys regularly counsel employers regarding compliance with Section 1981 and the other federal anti-discrimination and anti-retaliation statutes. Employers with questions regarding this recent decision or its practical impact should contact a labor and employment attorney at Venable.

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President Bush Signs Law Banning Genetic Information Discrimination in Health Insurance and Employment

BY LUISA M. LOPEZ AND MOLLY T. GEISSENHAINER

On May 21, 2008, President George W. Bush signed into law the Genetic Information Nondiscrimination Act of 2008 (GINA). GINA prohibits discrimination on the basis of genetic information with respect to health insurance and employment. GINA's employment law provisions become effective November 21, 2009.

The result of a ten-year congressional struggle, GINA is designed to prohibit the misuse of genetic information readily available due to recent scientific advancements in genetics research. "Genetic information" includes genetic tests that determine variations in an employee or applicant's DNA, genetic tests of the employee's family members, and a family history of the manifestation of a particular disease or disorder.

GINA prohibits employers, labor unions, and employment agencies from requesting or using genetic information as a basis for employment decisions, such as hiring, promotions, assignments, or termination. Employers are also prohibited from limiting, segregating, or classifying

employees on the basis of genetic information in any way that would deprive employees of employment opportunities or adversely affect employee status.

In addition to restrictions on the use of genetic information, GINA also generally prohibits employers from requesting, requiring, or purchasing genetic information. Exceptions to this general rule include inadvertent requests by employers for genetic information; requests for such information for the purposes of complying with the Family and Medical Leave Act or other state family and medical leave laws; requests for genetic information to be used to monitor the biological effects of toxic substances in the workplace; the purchase of commercially and publicly available documents from sources such as newspapers, magazines, periodicals, and books; and employers' performance of DNA analysis for law enforcement purposes as a forensic laboratory.

The law also permits requests for information from employers offering health and genetic services, including such services offered as part of a health and wellness program. With these requests, however, an employee must authorize a request for genetic information in writing, the results are available only to the employee and a licensed health-care professional or board-certified genetic counselor, and the employer may only receive aggregate data that does not disclose the identity of individual employees. Thus, employers who maintain a wellness program should review the content of the health risk assessment forms required of employee-participants to ensure that such forms meet GINA requirements.

The rights and remedies under GINA mirror those available under Title VII of the 1964 Civil Rights Act. Aggrieved persons may seek compensatory and punitive damages, as well as attorneys' fees. In addition, GINA provides that no person shall retaliate against an individual for opposing an act or practice made unlawful by GINA. Therefore, employers should review their employee handbooks and policies prior to the November 2009 effective date.

The law requires the Departments of Labor, Health and Human Services, and Treasury to issue final regulations and other guidance interpreting GINA over the next 12 to 18 months. Venable expects to issue a follow-up e-lert on these regulations when they are released for public comment. In the interim, Venable is available to assist clients who have questions regarding compliance with GINA.

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