LABOR AND EMPLOYMENT LAW UPDATE

GHOSTS OF 1866: SUPREME COURT CONFIRMS BREADTH OF ANTI-RETALIATION LAWS YET AGAIN!

On June 22, 2006, the Supreme Court in *Burlington Northern & Santa Fe Rwy. Co. v. White* held that the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 ("Title VII") extend to conduct away from work and to conduct which does not have an economic impact on an employee. In the wake of the decision, the title of this firm's July 2006 Labor and Employment Law Update inquired: "Are the Floodgates Open for Retaliation Claims?"

The apparent answer to this question was swift and decisive. Complaints of retaliation filed with the Equal Employment Opportunity Commission increased to 26,663 in 2007. This was a jump of 18% from the previous year.

Any hopes by employers for relief from the flood of retaliation claims were dashed on May 27, 2008 when the Supreme Court in *CBOCS West, Inc. v. Humphries* again confirmed the breadth of federal law prohibiting workplace retaliation. This time the Court's focus was a Reconstruction Era statute enacted in 1866. Far from being an innocuous ruling regarding an obscure 19th century law, *Humphries* upheld the availability of an option clearly more attractive than Title VII for a significant class of potential retaliation claimants.

CIVIL RIGHTS ACT OF 1866: The Act states that all persons ". . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white persons . . ." The law was amended in 1991 to extend its reach to the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

RACE/COLOR DISCRIMINATION: Despite its seemingly narrow language, the Supreme Court has said that the 1866 statute "proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race."

ETHNIC DISCRIMINATION: The Supreme Court has said that the 1866 statute may outlaw discrimination based on "ancestry or ethnic characteristics." Amongst the groups which have been found to be protected are Arabs, Jews, Hispanics, Native Americans and Asians.

DISCRIMINATION NOT ADDRESSED: The 1866 statute does not cover discrimination based upon sex, religion, national origin, age or disability.

EMPLOYMENT DISCRIMINATION: The Supreme Court has said that employment relationships are amongst the "contracts" governed by the statute.

RETALIATION: In a 7-2 decision, the Supreme Court in *Humphries* found that the 1866 statute also prohibits retaliation against: (1) a person who complains of race or ethnic discrimination directed toward himself or herself and (2) a person (of any race) who complains of race or ethnic discrimination directed toward others.

EXAMPLE: A white human relations supervisor who reasonably believes that Hispanic employees are being subjected to ethnic slurs complains to upper management and is promptly terminated. The supervisor, though neither Hispanic nor a victim of race discrimination, may have a claim under the 1866 statute.

Humphries bars retaliation only for complaints of discrimination prohibited by the 1866 statute.

WHY DOES THE DECISION MATTER? To be sure, employment discrimination based upon race, color and retaliation is already prohibited by Title VII. Five fundamental differences between Title VII and the 1866 statute, however, underscore the significance of the *Humphries* opinion:

NO FREE PASS FOR SMALL EMPLOYERS**:** Title VII is applicable only to employers with 15 or more employees. The 1866 statute applies to all employers regardless of size.

NO FREE PASS FOR INDEPENDENT CONTRACTORS: Unlike Title VII, which bars discrimination only against employees and applicants for employment, the 1866 statute makes it unlawful to discriminate in all contracts.

NO REQUIREMENT THAT ADMINISTRATIVE REMEDIES BE EXHAUSTED: Before filing suit, a Title VII claimant must first file a timely charge with the Equal Employment Opportunity Commission or, where applicable, a state or local agency. A Title VII claimant must receive a right-to-sue notice from such an agency before filing suit. There are no such requirements under the 1866 statute.

NO CAP ON DAMAGES: Title VII places caps on the compensatory and punitive damages which can be awarded to a claimant. These caps vary according to the size of the employer and can never exceed $300,000. There are no such caps under the 1866 statute.

NO PROTECTION AGAINST PERSONAL LIABILITY: Title VII is applicable by its express terms only to employers and does not subject individual supervisors to personal liability for discrimination. The 1866 statute provides no such protection for individual supervisors.

IMPACT: *Humphries* will likely have an impact on future retaliation claims tied to race or ethnic discrimination in at least three respects:

NUMBER OF CLAIMS: Certainly, the decision opens the door for persons, such as independent contractors and employees of small employers, who otherwise could not sue for retaliation.

STRATEGY: For the reasons set forth above, more retaliation claimants will likely either (1) forego Title VII as a remedy altogether or (2) group a claim under the 1866 statute with one under Title VII. Individual supervisors may be named in suits more often as leverage for favorable testimony.

SETTLEMENTS: With no cap on damages, the prospect of high jury awards may foster more settlements and higher settlement values.

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