An Official Publication of the New Hampshire Bar Association

NEW HAMPSHIRE BAR NEWS

As seen in the BAR NEWS - August 15, 2008

The Supreme Court Revs Up Employee Retaliation Rights

By: Nancy Richards-Stower and Debra Weiss Ford

Editor's note: This is the fifth NH Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both New Hampshire Fellows of the College of Labor and Employment Lawyers. The topic is the two retaliation decisions issued by the United States Supreme Court on May 27, 2008.

First, Gomez-Perez v. Potter *reversed the First Circuit Court of Appeals by holding that Section 633(a) of the ADEA (federal Age Discrimination in Employment Act), prohibits retaliation against a federal employee who complains of age discrimination. Second, in* CBOCS West, Inc. v. Humphries*, the Court held that an employee can state a claim for retaliation under 42 U.S.C. Section 1981. (See the attorneys' earlier debate: "Retaliation Under Title VII: Two Viewpoints"* NH Bar News, 8/11/06.*)*

Debra: Another couple of employee victories at the US Supreme Court! Gloating again, Nance?

Nancy: Yes, Deb. It's a special joy to have the First Circuit reversed in a 6-3 employment law decision written by Justice Alito, for when it comes to employment civil rights statutes, the First Circuit is not known for its expansive interpretation. *"Summary Judgment for the Employer (again)"* is the mantra all too often heard by employees in Concord and Boston.

Debra: Nance, we'll do the "summary judgment debate" another time; O.K.?

Nancy: O.K., but how about in my lifetime? I'm 57 years old, and you and I started debating summary judgment back when I was 30-something (and far less jaded on the subject).

Debra: Speaking of age, let's discuss *Gomez-Perez* first. Federal employees, like private employees, are protected from age discrimination under the ADEA, but with a different administrative procedure. The language does not specify that federal employees were given the same statutory right to be free from retaliation as private employees. Gomez-Perez addressed a split in the circuits.

Nancy: Yes, and not surprising since *Burlington Northern v, White*, 548 U.S. 53 (2006), made it clear that the only serious way to encourage citizens to enforce the civil rights employment statutes was to protect those brave enough to invoke them. What is clarified in *Gomez-Perez*, (in a rare footnote) is that *Burlington Northern*'s distinction for broader coverage for the specific retaliation language of Title VII compared to its language for "discrimination" was that Congress wanted Title VII's anti-retaliation coverage to also protect against punishing conduct outside the workplace. Unfortunately, that footnote will now be argued in federal ADEA cases to limit retaliation to only workplace occurrences. It is poetic justice, however, that Gomez-Perez championed the employment rights of a Puerto Rican postal clerk.

Debra: Poetic justice? You will have to explain what you mean by that comment.

Nancy: I only admit that poetic justice and Supreme Court justice merged. Here the employee sought a transfer back to her original post after having transferred away to care for her sick mother. When the transfer back was denied, she followed the (very confusing) federal EEO protocols and filed a timely age discrimination complaint. Then came the retaliation: groundless complaints, graffiti, false allegations of sexual harassment against her, and, the old standby taunt, *"Go back to where you belong."* The constitutional argument raised by the United States was that the U.S. never waived sovereign immunity for retaliation claims for federal sector employees. The First Circuit informed the U.S. that a general ADEA waiver was statutorily recognized, but adopted the government's second argument against coverage: that "retaliation" wasn't "discrimination."

Debra: Yes, the language at issue was simple:

[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any *discrimination* based on age.

The Supreme Court found that retaliation was

covered by the "discrimination" language based on an earlier race discrimination decision brought under 42 U.S.C. Section 1982, which prohibits race discrimination in property rights (*Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229 (1969)). Sullivan held that a homeowners' association's expulsion of a white member who leased his property to an African-American family and assigned his share in the association, was retaliation for conduct protected by a federal anti-discrimination statute, giving the plaintiff a private right of action even though the statute banned "discrimination," but was silent on "retaliation."

Nancy: *Sullivan* was the same case used by the Supreme Court in 2005, in *Jackson v. Birmingham Bd. of Ed.*, 544 U. S. 167 (2005), to find a cause of action for retaliation under Title IX, when a teacher complained of punishment following his complaints of gender discrimination at his school. Like the federal sector ADEA, Title IX does not specifically mention "retaliation." The *Jackson* court logically found that retaliation was a form of discrimination and that was that. Indeed, as the court pointed out in *Gomez-Perez*, the U.S. had argued for retaliation coverage in *Jackson* and was not now arguing for reversal. So a great (rhetorical) question is, why, then, three years later, is the United States Department of Justice arguing to the U.S. Supreme Court that there was no "retaliation" coverage because the statute read only "discrimination." Wait! That's a rhetorical question (see House Judiciary Committee's *Hearing on Oversight of the Department of Justice*, May 10, 2007 [involving the politicization of the U.S. Department of Justice under Attorney General Gonzales])!

Debra: I wondered how you'd weave in the Gonzales controversy. However, I agree that it doesn't help management employment counsel when the Department of Justice argues against its own earlier precedent-setting arguments either. But, to be fair, one of the arguments made by the government in *Gomez-Perez* was that the ADEA *does* have a specific retaliation provision in the *private* employer section, so the lack of it in the public employer section was presumptive proof of non-coverage.

Nancy: Yes, but the "Supremes" noted that such a presumption exists when both statutory provisions were enacted simultaneously. Here, the original ADEA was enacted for private employees in 1967; the federal sector provisions were added in 1974, so, "presumption busted!" To summarize (with bows to Dana Carvey) *"Postal clerk wins. Retaliation covered. First Circuit: wrongo! Stress level at post offices everywhere: down."* Now, what about *Humphries*?

Debra: Clearly *you* fear no retaliation, Nancy…. Anyway, *CBOCS West, Inc. v. Humphries* poses a similar statutory interpretation question about retaliation for private employees under 42 U.S.C. Section 1981, which reads:

[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

Both *Sullivan* and *Jackson, supra* were relied on as precedent in this decision.

Nancy: I loved re-reading the history of how Congress reversed *Patterson v McLean Credit Union*, 491 U.S. 164 (1989), in the Civil Rights Act of 1991 (a/k/a "Deal with the Devil" to some principled civil rights advocates). You remember CRA '91: passed after the Anita Hill hearings: employees got *Patterson* reversed as well as the right to jury trials and permission to sue for compensatory and punitive damages–but the damages were capped at ridiculous amounts, and, of course, Justice Thomas was confirmed.

Debra: It wasn't quite a *quid pro quo*, Nance.

Nancy: Deb, remember, quid pro quo is determined from the perspective of the victim, and after President Bush (Sr.'s) veto of the Civil Rights Act of 1990, and the override failed by one single vote, the plaintiffs' bar felt victimized. (Did I mention that Senator McCain voted to uphold the veto?)

Debra: I'm not touching that last comment. Anyway, *Patterson* held that 42 U.S.C. Section 1981 pertained only to the *formation* of employment and other contracts, but once the contracts were formed, subsequent discrimination wasn't covered. The Civil Rights Act of 1991 (a compromise following the veto of the Civil Rights Act of 1990) reversed that so that post-hiring discrimination was covered. Since retaliation would usually follow the formation of the employment contract, whether it be employment at-will or for a term, after the CRA '91, the only question was whether the *discrimination* prohibited included *retaliation* for having complained about discrimination. As the Supreme Court noted, *"Federal Courts of Appeals have uniformly interpreted §1981 as encompassing retaliation actions,"* so CBOCS made a very odd decision in appealing and urging the court to overrule prece-

dent – without any strong argument for so doing.

Nancy: Well, CBOCS' lawyers probably read the paper and saw that one precedent after another was getting the old heave-ho by this court (affirmative action before Humphries and gun control afterwards), so why the heck not try? Deb, this was a very scary argument to us civil rights advocates, and with good reason. You'll note that even with all that precedent, the final decision was not unanimous: it was 7-2; Justices Thomas and Scalia dissented. Justice Thomas' dissent said flat-out, *"Retaliation is not discrimination based on race… [but] the result of… conduct," citing Burlington N. & S. F. R. Co. v. White*, at 63. He says if an employer fires anyone who complains about race discrimination, be they black or white, it can't be race discrimination.

Debra: Well, he does have a point.

Nancy: Arghhh! No, he does not! All race discrimination is illegal–black or white– and complaining about it is protected–black or white–so of course it is about race: the race of the complainant (or the co-worker for whom she speaks up).

Debra: Justice Thomas' criticism of the court's rationale was for finding that the status vs. conduct distinction is different, because in this case, the varying scope of protection for discrimination and retaliation was not at issue, as they were in Burlington's Title VII statutory analysis, where there was a specific statutory prohibition against retaliation.

You must admit, Nance, that as Justice Thomas says:

Burlington underscores the fact that status-based discrimination and conduct-based retaliation are distinct harms that call for tailored legislative treatment.

Nancy: Admission denied! As the *Humphries* decision explains, before *Patterson*, Section 1981 retaliation claims were accepted by the federal courts (and note, it was in 1975, in *Johnson v. Railway Express Agency,* 421 U.S. 454, the Supreme Court made clear that Section 1981 applied to private contracts, and not just the racist governmental restrictions which prompted its original passage after the Civil War). Then *Patterson* came down in 1989, ruling that no post-hiring conduct was protected by Section 1981 (and thus wiped out retaliation for post-hiring race discrimination complaints). Since *Patterson's* reversal by CRA '91, appellate decisions nationwide again acknowledged retaliation, supporting the notion that Congress meant for the *pre-Patterson* cases to inform the post-CRA '91 cases. Section 1981's language was enacted 98 years before that of Title VII. Section 1981 has always been interpreted similarly to Section 1982 because of their similar language; and as noted above in the first part of this debate, it was back in 1969 that the Supreme Court held that Section 1982 covered retaliation in *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229 (1969).

Debra: Well, Congress should have made it clear when they reversed *Patterson* in CRA '91 that retaliation was specifically covered.

Nancy: I heard back in law school that "The Law does not require useless acts."

Debra: Yes, but providing guidance to employers and employees would be useful.

Nancy: And providing trials to employees complaining about discrimination would be useful, too, but those summary judgment decisions….

Debra: Maybe next debate, Nance.