VEDDERPRICE®

May 29, 2008

Labor Law Bulletin

Supreme Court Extends Retaliation Claims to More Employees

In its 2006 *Burlington Northern* decision, the U.S. Supreme Court adopted a relatively easy standard for stating a retaliation claim under Title VII. On May 27, 2008, it issued two decisions which, in effect, enable more employees to bring retaliation claims. Although the decisions come as no surprise, they highlight the increasing risk that employers face for retaliation claims.

In the first of the two cases, the Court ruled that the claimant could state a retaliation claim under Section 1981. *CBOCS West, Inc. v. Humphries*, No. 06-1431. Like Title VII, Section 1981 prohibits employment discrimination based on race but it has a longer statute of limitations than Title VII and, unlike Title VII, has no administrative filing requirements and no cap on compensatory and punitive damages.

The case grew out of the firing of a black associate manager at a Cracker Barrel restaurant in Illinois, who claimed he was fired because of his race and because he had complained to fellow managers that another black employee had been terminated because of his race. There was no question that Section 1981 covered the claim that the associate manager was fired because of his race. The issue before the Supreme Court was whether Section 1981 also covered the claim that he was discharged in retaliation for complaining of race discrimination toward a co-worker.

In the Court's second decision, the issue was whether federal employees can bring retaliation claims based on adverse employment actions against them for engaging in protected activity under the Age Discrimination in Employment Act (ADEA). *Gomez-Perez v. Potter*, No. 06-1321. The ADEA specifically allows retaliation claims by private-sector employees but is silent as to federal workers. The case involved a postal worker in Puerto Rico who alleged she suffered a series of reprisals from her supervisors after filing a charge with the EEOC.

In both cases, the Supreme Court held that retaliation claims could be brought under the statute at issue. Although neither decision was unexpected, they will provide more employees with the ability to bring retaliation claims when these claims are already on the rise. The number of EEOC charges alleging retaliation has doubled since 1992 and showed the largest year-to-year increase (18 percent) of all EEOC filings in 2007. Retaliation claims now account for about 30 percent of all EEOC charges.

Because of the differences between Title VII and Section 1981, employers will face not only more claims but also greater exposure for claims alleging retaliation for opposing or complaining of race discrimination. Individuals who may not have filed a timely Title VII retaliation claim may still bring a Section 1981 retaliation claim. And, as noted above, Section 1981 provides a more robust remedy than Title VII because it does not limit the amount of compensatory and punitive damages recoverable. Section 1981 even covers small employers who may not meet the 15-employee threshold for Title VII coverage. Offering more time to file suit, higher damages and universal employer coverage, Section 1981 will be the remedy of choice for a claimant alleging he was subjected to adverse employment action for complaining about race discrimination.

Retaliation claims remain one of the most significant risks employers face, especially when dealing with incumbent employees who engage in protected activity. This week's Supreme Court decisions extend that risk to more employers. With proper policies and training, the risk can be mitigated and controlled. We encourage our clients to contact Bruce R. Alper (312-609-7890) or Christopher L. Nybo (312-609-7729) with questions about these decisions or retaliation issues generally.

UPCOMING Seminars and Webinars

Labor and Employment Practice Area

The 22nd National Institute on ERISA Basics—Chicago, Illinois

06/04/2008 – 06/06/2008

Thomas G. Hancuch and Charles B. Wolf will serve as faculty members at the 22nd National Institute on ERISA Basics, sponsored by the American Bar Association's Joint Committee on Employee Benefits. Mr. Wolf will speak on "ERISA Preemption" and "Multiemployer Plans," and Mr. Hancuch will speak on "Plan Termination and Bankruptcy."

17.3 CLE Credit Hours have been requested from Illinois, including 1.00 CLE Credit Hour of Ethics

The Palmer House Hilton

To register, see www.vedderprice.com or call David Croker at 312-609-7869.

VEDDERPRICE®

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500 FAX: 312-609-5005

1633 BROADWAY, 47th FLOOR
NEW YORK, NEW YORK 10019
212-407-7700 FAX: 212-407-7799

875 15th STREET NW, SUITE 725
WASHINGTON, D.C. 20005
202-312-3320 FAX: 202-312-3322

FIVE BECKER FARM ROAD
ROSELAND, NEW JERSEY 07068
973-597-1100 FAX: 973-597-9607

WWW.VEDDERPRICE.COM

About Vedder Price

Vedder Price P.C. is a national full-service law firm with over 260 attorneys in Chicago, New York, Washington, D.C. and New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional association and not-for-profit law.

Questions or comments concerning the bulletin or its contents may be directed to the firm's Labor Practice Leader, Bruce R. Alper (312-609-7890), or the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780), in Washington, D.C., Theresa M. Peyton (202-312-3360) or, in New Jersey, John E. Bradley (973-597-1100).