



SUPREME COURT ISSUES TWO PRO-PLAINTIFF EMPLOYMENT RETALIATION RULINGS



Ronald Daves.....

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Those commentators and politicians that say the Supreme Court is pro-employer or pro-defendant, should take a look at two recent rulings of the Supreme Court. *CBOCS West v. Humphries*, ___U.S. ___; *Gomez-Perez v. Potter*, ___U.S. ___, both issued May 27 of this year. The Court in each case found that plaintiffs were protected against retaliation in their employment, even though the law they sought to invoke only contains an express federal civil right to be free from discrimination, and there was no express mention of retaliation in these laws. The Bush Administration had backed the position of the plaintiffs in both cases. Apparently all but two of the nine Supreme Court Justices now accept that an employee's protection from retaliation for making a discrimination claim is included in an express right in federal civil rights laws to be free from discrimination, even if the statute does not mention retaliation.

In one of the cases, the 7-2 majority opinion ruled that Section 1981 of the Civil Rights Act of 1866, which bars race discrimination in the making and enforcing of contracts, includes retaliation claims. In the *Gomez-Perez* ruling, a 6-3 majority opinion written by Justice Alito, ruled that the federal age discrimination law also prohibits retaliation against federal employees who complain of age discrimination. Many experts had expected the employers to win these cases, but Justices Alito, Roberts, and Kennedy surprised many in siding with the plaintiffs in one or both cases.

There are a number of implications from these rulings. First, the cases are a further indication of how dangerous retaliation cases are for employers, as judges and juries in this day and time appear more sympathetic to retaliation claims, than to discrimination claims. Further, many employers, and particularly their first-line supervisors, are ignorant of how strict the retaliation laws are, and thus are more prone to inappropriate conduct of a retaliatory nature. Further, as a result of these cases and other developments, plaintiffs are going to increasingly turn to Section 1981 to bring discrimination or retaliation claims, rather than rely strictly on Title VII of the Civil Rights Act of 1964. Section 1981 was passed by Congress back in 1866, and basically allows persons to have the same rights to make and enforce contract as "white persons." Significantly, it allows a longer statute of limitations to bring such cases, up to four years, compared to the 300-day filing requirement under Title VII. Further, while Title VII has a \$300,000 "cap" for claims of compensatory and punitive damages, there are no statutory "caps" for punitive and compensatory damages under Section 1981. Further, Section 1981 covers all employers, while Title VII applies only to employers with 15 or more employees.

There are a couple of disadvantages to Section 1981 for plaintiffs, the principal limitation being that it only applies to race and national origin claims. Further, Section 1981 lacks the administrative process for resolving discrimination and retaliation claims as exists through the EEOC under Title VII.

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RELIANCE UPON CLINICS FOR HEALTHCARE NEEDS



T. Joseph Lynch.....

"The idea is to treat routine medical conditions on a walk-in basis at fees below what doctors' offices charge."

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in years past. The idea is to treat routine medical conditions on a walk-in basis at fees below what doctors' offices charge. Even the Mayo Clinic is opening such clinics in Minnesota and Wisconsin, where their fees will range from \$49.00 to \$59.00.

Even employers are opening their own clinics. Employers opening such clinics have enormous recruiting advantages, as workers can receive fast medical attention without having to leave work to visit doctors. Such facilities also encourage wellness and prevention programs. Fees to employees are often either free or below normal rates, and in many cases employers can save money as well.

It is not necessary for an employer to start from scratch in developing such a clinic, as there are clinic operators providing services to employers across the country on an efficient basis. Clinics can be provided on a full-time basis, or simply have a nurse come in a few days a week.

Another alternative to on-site clinics is for employers to promote the use of retail clinics. Cooperative relationships with such clinics can be established lowering co-payments for employees and their dependents as well as possibly leading to less expensive insurance costs for employers.

As presidential candidates and political parties argue healthcare issues, a quiet trend is expanding in the country that may dramatically affect healthcare needs in the future – the growth of clinics in retail facilities, and in employer establishments. This writer often prefers such healthcare clinics, which offer immediate walk-in attention, without advance reservations or trips to the emergency room. Prices are typically much lower than other healthcare facilities, and normal insurance and Medicare reimbursements typically apply.

Retail clinics are spreading in many locations in the country, including malls. Large retailers are considering establishing such clinics within their facilities, much as pharmacies were established in such facilities

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PLAINTIFFS' LAWYERS SOMETIMES TAKE "HIT"



Mary Dee Allen
 "In such situations, a court usually has inherent or statutory authority to provide an award of attorney's fees to the innocent party, against the other party, and even the other party's attorneys. "

Employers have never been fond of plaintiffs' lawyers, and even the public has major suspicions about them. Nevertheless, plaintiffs' lawyers provide substantial funding and maintain significant influence over political developments. A recent example of a plaintiff's lawyer attaining national influence, is former Senator John Edwards of North Carolina.

Nevertheless, sometimes plaintiffs' lawyers have legal problems themselves.

In recent years, due to the clogging of courts with sometimes frivolous litigation, claims are often made by one of the parties to litigation of "abusive" litigation or "frivolous" claims or defenses offered by the other side. In such situations, a court usually has inherent or statutory authority to provide an award of attorney's fees to the innocent party, against the other party, and even the other party's attorneys. This remedy can be a powerful deterrent to abuses.

Numerous rules also limit what a party or attorney can do in or prior to litigation. For example, numerous ethical and even legal rules prohibit the solicitation of clients by plaintiffs' attorneys, including any payment or inducement to those clients to allow the representation. There are also strict rules against plaintiffs' attorneys interviewing employer supervisors or others who have the authority to bind the employer, as such tactics are viewed as inappropriate "end around" the defendant's legal representation. In recent years, a failure to produce requested documents, answer appropriate interrogatories or the spoilage (destruction or loss) of pertinent records, also has increasingly serious consequences.

Massive "class actions" have particularly drawn a lot of attention, and recently there have been criminal

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ADS PREFERRING OLDER WORKERS NOW ALLOWED BY EEOC



Mark Travis.....
 "The revised regulations stated that help-wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older workers, e.g., 'young college student.'"

In 2004, the U.S. Supreme Court ruled that the federal age discrimination law only prohibits discrimination based on relatively older age, not discrimination based on age generally. General Dynamics Land System. Last year, the EEOC published a final rule amending its ADEA regulations to conform to the Supreme Court ruling. The revised regulations stated that help-wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older workers, e.g., "young college student."

However, employers may post help-wanted notices or advertisements expressing a preference for older individuals through terms like "over age 60," "retirees," or "as a pension supplement." Employers desiring to use such advertisements should carefully check the law of their particular state, however, as a few states prohibit discrimination on the basis of any age, and thus would prohibit discrimination in favor of an older worker over a younger worker.

The regulation indicates that help-wanted notices or advertisements that ask applicants to disclose their age do not violate the federal age law, but they may deter older workers from applying or otherwise indicate discrimination. The EEOC will therefore closely scrutinize employment notices or advertisements including such requests to assure that they were made for a lawful purpose.

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PLAINTIFFS' LAWYERS SOMETIMES TAKE "HIT" continued from page 3

prosecutions of class action attorneys who have made millions of dollars off their cases, developing through indictments in New York, Mississippi, Kentucky, and other areas. The situation is so serious in Kentucky that its Supreme Court set up a committee to investigate whether the state's courts have "adequate safeguards against unethical conduct" in the areas of mass torts and class actions. Two prominent securities class action lawyers in New York, in the firm formerly known as Millburg Weiss, pled guilty to federal criminal charges that they made secret payments to plaintiffs. Some of the biggest issues have arisen in litigation involving pharmaceutical companies, tobacco companies, securities litigation, and others. One wonders whether some of the massive class or collective actions filed under the wage-hour and related laws will also see such issues arise. The types of issues that can arise are complicated because they may involve not only legal issues, but also ethical and professional standards that attorneys are required or suggested to follow. There are a lot of "gray areas" as to whether the violation of professional or even ethical standards can be used against a party or their attorneys. The issue is particularly sensitive in massive class action cases, where sometimes millions and even billions of dollars are at stake.

OSHA PRIMER FOR EMPLOYERS



William Seale.....

"The best defense to an OSHA investigation begins before the OSHA compliance officers come around."
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Since mid-2007, OSHA has had a site-specific targeting plan, in which it reviews industry and illness data to determine who to review or inspect. Employers can examine their own likelihood of being selected as an OSHA target by reviewing their days away, restricted, and transferred rate, and days away from work injury and illness rate. These can be determined from the OSHA Form 300 log and Form 300A summary. During 2007, OSHA stated that its program will "initially cover work sites on the primary list that reported 11 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time employees." OSHA also stated that "the primary list will also include sites based on the days away from work injury and illness rate of 9.0 or higher."

Employers might also be interested in knowing OSHA's trends in citations and violations for their particular industry. This can be done by going to OSHA's web site and reviewing the appropriate industry code, examining the most-fined violations of that industry code. It may also be of interest to compare an employer's own incident rates with those of a competitor. One can find the history of inspections of competitors

on OSHA's web site at <http://www.OSHA.gov/oshstats/index.html>. This database also contains a list of citations by regulation number, and it is important to also look at the general duty clause citations.

Further, OSHA inspectors, like other government agencies, will often respond to news stories about an organization. Employers should also be aware of OSHA's special emphasis program for targeting certain high-hazard industries.

The best defense to an OSHA investigation begins before the OSHA compliance officers come around. There are a number of things an employer can do to assure that it is ready for an OSHA inspection.

1. Be sure that you have the proper OSHA written programs in place.
2. Make certain that you have established a safety program that has effective rules that are effectively communicated to the employees, and that are effectively enforced.
3. You need to conduct OSHA self-audits and you may wish to make use of various resources available to you, such as the Voluntary Protection Program from OSHA, or the consultative services from OSHA, professional safety engineers and/or legal advice.
4. You should establish written procedures that carefully spell out the procedures that you are going to take when the OSHA compliance officer does arrive to conduct an investigation.