Employment Law Matters

July 2008

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Supreme Court Makes It Easier for Workers to Sue Their Employers for Retaliation

Retaliation Claims —The Fastest Growing Type of Discrimination Claim — Will Now Likely Grow Faster

The U.S. Supreme Court recently held that workers may sue their employers under Title 42 of the United States Code, Section 1981, for "retaliation" associated with employment discrimination claims. (*CBOCS West, Inc. v. Humphries*, ___ U.S. ___, [No. 06-1431] [May 29, 2008]). This is in addition to any retaliation claims employees were permitted to file under Title VII of the Civil Rights Act of 1964 or under the New York State Human Rights law. Given that Section 1981 does not place caps on monetary damages that employees can recover and has a longer statute of limitations than both Title VII and the Human Rights law, employers can expect what had been the fastest growing type of employment discrimination claim will grow even faster.

The *CBOCS* case involved a former assistant manager of a Cracker Barrel restaurant (Hedrick Humphries) who sued CBOCS West, Inc. (the owner of Cracker Barrel restaurants) alleging that it terminated him because of his race and for complaining that it had dismissed another assistant manager for racially motivated reasons in violation of Section 1981. Section 1981 provides, in pertinent part, that: "[a]ll persons . . . have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." While the law does not mention retaliation directly, the U.S. Supreme Court held that Section 1981 also encompasses retaliation claims. The Court relied on its prior decisions which found retaliation actions were implied under a related civil rights statute and under Title IX of the Education Amendments of 1972. The Court also concluded from its review of the legislative history of Section 1981 that Congress intended the statute to allow actions for retaliation.

Prior to this decision, it was generally accepted that employees had up to 300 days following an employer's alleged retaliatory act to file a claim under Title VII and up to three years to file a claim under the Human Rights law. Unlike these other two laws, Section 1981 has a limitations period of four years. In other words, if an employee fails to file a claim under Title VII or State Law within three years, rather than being prohibited from filing a retaliation claim at all, the employee now has an additional year (under Section 1981) in which to file.

Employers should also take note of the fact that there is no limit on monetary damages an employee can collect for a violation of Section 1981. Under Title VII, the maximum total amount of compensatory **and** punitive damages that may be awarded to an employee are dependent upon the number of workers his/her employer has, as shown below:

Number of Employees	Damages Cap
15-100 employees	$50,000
101-200 employees	$100,000
201-500 employees	$200,000
500+ employees	$300,000

New York's Human Rights Law does not permit any punitive damages but does allow employees to collect compensatory damages for mental anguish in addition to any lost pay, benefits or other similar expenses. Section 1981 permits both compensatory and punitive damages without any statutory cap. As one might expect, this makes Section 1981 suits much more attractive to potential plaintiffs.

The *CBOCS* decision becomes

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Supreme Court Makes It Easier for Workers to Sue (cont'd)

even more problematic for employers in light of another recent Supreme Court decision which expanded the definition of retaliation. (*Burlington Northern Santa Fe Railway, Co. v. White*, 548 U.S. 53 [2006]). In *Burlington Northern*, employee Shelia White was reassigned to a more physically demanding job after she complained to management about sexual harassment by her immediate supervisor. Ms. White filed a retaliation complaint with EEOC.

Burlington Northern argued that Ms. White had suffered no significant employment change. Ms. White countered that Title VII bars employers from taking any sort of retaliatory action regardless of its significance, including shifting the employee's job responsibilities.

The Supreme Court agreed with Ms. White. Specifically, the Court found that the anti-discrimination provision of Title VII differs in important ways from the language in the anti-retaliation provision. While the anti-discrimination provision is limited to employer conduct that affects employees' "compensation, terms, conditions, or privileges of employment," the anti-retaliation provision does not share these limitations. The purpose of the anti-retaliation provision is to protect employees from any type of employer action intended to dissuade the employee from asserting his or her right to be free from discrimination.

Given the foregoing, discharged employees likely will bring more discrimination actions under Section 1981 as a result of the *CBOCS* and *Burlington Northern* decisions. According to the U.S. Equal Employment Opportunity Commission's (EEOC) statistics, retaliation claims have grown from approximately one-fifth of all claims filed with that agency in 1997 to nearly one-third of all claims last year. During this same time period, the frequency of all other claims of discrimination (e.g., race, religion, gender, age, disability, etc.) have remained flat and even decreased. The number of retaliation claims is now second only to race discrimination claims filed annually with the EEOC. While it may sound illogical, it is possible that the number of claims for retaliation may soon exceed the number of claims for underlying discriminatory actions.

In the wake of these rulings, we suggest considering the following:

- Employers should be careful not to engage in any actions that could be construed as retaliatory against employees who have brought an employment discrimination complaint either to the employer directly or to the EEOC (or other agency). Before taking any adverse action against an employee who has made such a complaint, they should consult with their attorneys

- Employers should draft and implement an effective anti-retaliation policy.

- Employers need to train their supervisors and employees to ensure compliance with the anti-retaliation policy.

- Employers should encourage those who have lodged any kind of employment discrimination complaint to report any perceived instances of retaliation immediately so that they may be dealt with appropriately.

Should you need assistance or further information, please feel free to contact our office at 315-437-7600.

Federal Contractors and Subcontractors Must Now Use E-Verify

On June 9, 2008, President Bush issued an amendment to Executive Order 12989 which requires all federal contractors and subcontractors, as a condition of each future federal contract, to use an electronic system to verify workers' immigration status. In response to this amendment, the Department of Homeland Security designated "E-Verify" as the system of choice. E-Verify (formerly the "Basic Pilot/ Employment Eligibility Verification Program") is an online system operated jointly by the Department of Homeland Security and the Social Security Administration (SSA). Federal contractors and subcontractors will now be required to check the work eligibility status of new hires online by comparing information from an employee's I-9 form against SSA and Department of Homeland Security databases.

These federal agencies are also proposing new regulations to implement this change in EO 12989. In summary, the proposed rule--

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Federal Contractors Must Now Use E-Verify (cont'd)

- Requires inclusion of a clause in in prime and sub–contracts over $3,000 for services or for construction, obligating the contractor or subcontractor to enroll in the E-Verify program within 30 days of contract award, begin verifying the employment eligibility of all new employees of the contractor or subcontractor that are hired after enrollment in E-Verify, and continue to use the E-Verify program for the life of the contract.

- Requires contractors and subcontractors to use E-Verify to confirm the employment eligibility of all existing employees who are directly engaged in the performance of work under the covered contract.

- Applies to solicitations issued and contracts awarded after the effective date of the final rule. Under the final rule, Departments and agencies will amend existing indefinite-delivery/indefinite-quantity contracts to include the E-Verify clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial.

- In exceptional circumstances, allows a head of the contracting activity to waive the requirement to include the clause. This authority is not delegable.

The public comment period for these new rules ends August 12, 2008. The rules are expected to be finalized shortly thereafter.

Contractors and subcontractors can enroll in the E-Verify program by completing the necessary online registration form found at www.vis-dhs.com/EmployerRegistration/StartPage.aspx

If you have any questions regarding this amended Executive Order and whether it applies to your company, please feel free to contact us.

Employers With Affirmative Action Plans Must Update Them to Track Any "Internet Applicants"

The Office of Federal Contract Compliance Programs (OFCCP), the federal agency responsible for enforcing all federal rules pertaining to Affirmative Action Plans (AAPs), has issued regulations regarding how federal contractors and subcontractors keep track of Internet Applicants. Employers required to have AAPs must keep track of gender and minority status of all applicants for employment on what are referred to as "Applicant Flow Logs." With the advent of Internet job sites (like monster.com, for example), employers will often receive thousands of applications from all over the world. The new rules specify which applicants must be included in the contractor's Applicant Flow Log in order to comply with the OFCCP's requirement. Specifically, an "Internet Applicant" must be included in an Applicant Flow log if:

- The job seeker submits an "expression of interest" in employment through the Internet or other electronic means;

- The contractor "considers" the job seeker for employment in a particular position; and

- The job seeker's expression of interest indicates the individual possesses the "basic qualifications" for the position.

"Acceptable Expressions of Interest" include e-mail, fax, job boards, electronic scanning, etc. The new Internet Applicant definition includes all expressions of interest, regardless of the means in which they are made, if the contractor "considers" expressions of interest made electronically in the recruiting or selection process for the particular position. In other words, if the contractor only accepted hard copy applications for a position, the applicant would not be included in the Flow Log.

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"Internet Applicants" (cont'd)

"Considering" means "assessing the substantive information provided in the expression of interest with respect to any qualifications." This means opening up and reviewing, looking, ranking, etc. the expressions of interest. An employer is not required to consider expressions of interest that either are not submitted in accordance with the contractor's standard procedures for applying for a job or that are not submitted with respect to a particular position. The new definition also allows employers to draw the line at too many applicants. If there are a large number of expressions of interest, the employer has not "considered the individual for employment in a particular position" if it uses data management techniques that do not depend on an assessment of qualifications, (such as random sampling or absolute numerical limits to reduce the number of expressions of interest to be considered).

The job seeker "Basic Qualifications" must meet each of the following three conditions:

- The qualifications must be non-comparative features of a job seeker (e.g., two-year experience requirement would be acceptable; a requirement that the individual be one of the top five individuals in terms of experience would not be acceptable).
- The qualifications must be objective in that they do not depend on the contractor's subjective judgment (e.g., a four-year degree is acceptable; a four-year degree from a "good school" would not).
- The qualifications must be relevant to the performance of the particular position (e.g., requirement of accounting degree may not be acceptable for a human resources position).

Steps which contractors should consider taking to comply with these new regulations are as follows:

- Audit applicant tracking procedures
- Ensure basic qualifications are established correctly
- Compare race/gender makeup of applicant flow to availability statistics
- Ensure document retention
- Train human resource and recruiting staff

Please contact us with any questions or if you need assistance in updating your AAP.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057