Employment Edge 85th Edition - Retaliation: How The New U.S. Supreme Court Decision in CBOCS West Inc. v. Humphries Impacts Employers

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The number of retaliation claims filed against employers has grown rapidly in the last few years, and a recent decision by the United States Supreme Court is likely to further increase that growth. On May 27, 2008, the U.S. Supreme Court held in CBOCS West Inc. v. Humphries, No. 06-1431, that employees may bring retaliation claims under 42 U.S.C. § 1981. Section 1981, which was enacted just after the Civil War, prohibits racial discrimination regarding the right to "make and enforce contracts." Section 1981 broadly applies to all contracts, including employment contracts. Generally, Minnesota employees who feel that they have been subject to race discrimination have three potential legal theories upon which to base their claims: Title VII, the Minnesota Human Rights Act ("MHRA"), and Section 1981. Similar to Title VII and the MHRA, Section 1981 protects employees against employment-based discrimination, but unlike Title VII and the MHRA, the text of Section 1981 does not specifically prohibit retaliation against employees who complain about race discrimination. Following the Court's decision in Humphries, it is now clear that Section 1981 also prohibits retaliation against employees who complain about race discrimination.

So how does the Supreme Court's decision impact Minnesota employers? The decision is significant for a number of reasons. First, Section 1981 provides a longer statute of limitations than Title VII or the MHRA. Under Title VII, plaintiffs only have 180 to 300 days in which to file an action, and under the MHRA, employees have one year to file an action. The limitations period for violations of Section 1981, on the other hand, is four years, meaning that an employee could bring a claim for retaliation up to four years after an incident of alleged retaliation occurs. In addition, under Section 1981, employees do not have to satisfy any administrative remedies before filing a suit and there is no cap on damages as there is under Title VII and the MHRA. Simply put, the Court's ruling in Humphries makes it easier and potentially more profitable for plaintiffs who have complained of race discrimination to assert retaliation claims.

That being said, the same thoughtful preventative measures that help employers to avoid Title VII and MHRA retaliation claims will also help to prevent Section 1981 claims. Taking the following steps may reduce the risk of retaliation claims by putting employees on notice that they are prohibited from retaliating against others in the workplace. In addition, these steps should help encourage employees to report

retaliation concerns early so that the employer can address those concerns before a lawsuit is commenced.

- **Adopt and Communicate Anti-Retaliation Policies.** Employers should adopt and communicate clear written policies stating that the organization will not tolerate unlawful retaliation and establishing a procedure for employees to report any concerns of retaliation.
- **Know what Types of Activities May Give Rise to a Retaliation Claim.** Two years ago in Burlington Northern Santa Fe Railroad v. White, the Supreme Court held that a retaliatory adverse action under Title VII is an action that is "materially adverse" insofar as it might have deterred a reasonable employee from reporting discrimination.
- **Conduct Training.** Employers should train supervisors on how to spot protected activity and how to respond to employee complaints to ensure that complaints are forwarded to the appropriate people for prompt investigation and response. Supervisors should be made aware of the types of protected activities that create non-retaliation obligations so that they know when an employee has engaged in protected activity that could give rise to a retaliation claim. Finally, supervisors should be trained on the type of conduct that could give rise to a retaliation claim so that they know not to engage or to let others engage in conduct that could put the company at risk.
- **Encourage And Be Welcoming of Complaints.** Employees should be encouraged to report concerns or complaints so that they can be addressed early. In addition, an employer who welcomes complaints and acts appropriately in response is less likely to appear capable of retaliation.
- **Investigate and Respond to All Complaints Promptly.** In many instances, the law requires employers to investigate promptly and respond appropriately to employee complaints of misconduct or alleged legal violations. An employer should treat all complaints seriously and professionally, even complaints that do not appear to rise to the level of stating a legal violation. A good faith complaint, even if it proves to be meritless, still gives the employee protected status that makes retaliation unlawful.
- **Be Consistent in the Treatment of Employees.** Employers can reduce the risk of a retaliation claim by ensuring that an employee who has engaged in protected activity is treated the same as employees who have not engaged in protected activity.
- **Give Accurate Performance Appraisals.** Employers should train managers to provide timely, accurate, and straightforward performance appraisals. If legitimate performance issues exist, performance appraisals should accurately set forth those issues in a professional manner so that the employee can attempt to improve and the employer can safely rely on the performance review in defending a retaliation or other employment law claim. Managers should be encouraged to keep notes of conversations with an employee regarding the employee's performance. These notes and performance appraisals can be used to demonstrate that a performance issue existed before an employee reported discrimination or other unlawful conduct.
- **Dot Your "I's" and Cross Your "T's" Before Taking Any Negative Action.** An employer should be cautious about taking negative action against an employee who has engaged in protected activity. Before taking any adverse action, the employer should be confident that the action is well-justified, appears to be fair, and is based entirely on legitimate reasons unrelated to the employee's protected activity. In addition, adverse actions that closely follow an employee's protected complaint or activity are more likely to look retaliatory, and employers should carefully consider the timing of any proposed adverse action against a protected employee.

- **Consider A Higher Review of Personnel Decisions.** In some situations, it may be appropriate to create a system of "checks and balance" by having personnel decisions regarding a protected employee reviewed by a higher level supervisor, a Human Resources person, or a lawyer for the company.
- **Don't Report Protected Activity To Other Employers.** Employers should not tell other employers, including prospective employers, about protected activity. If a report of past protected activity made by one employer to another results in failure to hire or any other adverse employment action, both involved employers could be charged with retaliation.

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