

# THE DAILY RECORDER

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## Several New “Retaliation” Decisions

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The courts have issued a significant number of retaliation decisions in the past several weeks. The U.S. Supreme Court held in two cases that employees are protected from adverse employment actions for complaining about civil rights violations, even when the underlying statutes did not contain anti-retaliation provisions. Two panels of the California Court of Appeal went in different directions regarding what constitutes “retaliation.”

### Supreme Court Decisions

In CBOCS West, Inc. v. Humphries, the high court interpreted 42 U.S.C. § 1981 to consider whether an employee may make a retaliation claim under what has been called the “original” employment discrimination law. Section 1981 is a part of the Civil Rights Act of 1866. Congress passed § 1981 after the Civil War in response to contract terms offered to freed slaves, such as lifetime contracts and exorbitant rent and food charges, which virtually preserved slavery. Section 1981 guarantees “[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.” Section 1981 applies to all types of contracts, including employment contracts.

Humphries was an assistant manager for CBOCS West, Inc., a national chain of country kitchen-style restaurants and gift stores. He claimed the company fired him after he complained to management that the termination of a black employee was racially motivated, and filed suit under § 1981.

In the employment context, retaliation claims often are made by employees who “blew the whistle” on allegedly

illegal activity. Unlike many employment statutes, § 1981 does not include an explicit anti-retaliation clause. However, in a 1969 decision, Sullivan v. Little Hunting Park, Inc., the Supreme Court found that a sister statute, 42 U.S.C. § 1982, includes protection from retaliation.

In Sullivan, a white resident rented his house to a black man. When the homeowners’ association prohibited him from using a private park available to residents, the owner complained to the association. In response, the association cancelled the owner’s membership. The owner then filed a lawsuit claiming his property rights were illegally limited in retaliation for “trying to vindicate the rights of minorities protected by Section 1982.” The Supreme Court ruled that the association’s action constituted unlawful retaliation and the owner could pursue his claim. The Court noted that owners attempting to sell their property might be the only parties in a position to challenge racially restrictive housing covenants.

In Humphries, the Court decided that § 1981 protects employees against retaliation for complaining about racial discrimination the same way § 1982 protects homeowners who complain about racial discrimination. The Supreme Court found further support for its conclusion in the fact that Congress expanded the coverage of § 1981 in 1991. The Supreme Court noted that Congress had not acted to limit the scope of the Sullivan case after some 22 years. Therefore, Congress must have intended the Civil Rights Act of 1866 to include protection from retaliation, even if it had not written an anti-retaliation clause.

This case was not the only time that the Supreme Court has inferred protection from retaliation in a law against discrimination. The Supreme Court decided Gomez-Perez v. Potter at the same time. Gomez-Perez is a postal worker from Puerto Rico who sued the Postmaster General for allegedly allowing retaliation when Gomez-Perez transferred to a different post office. Gomez-Perez requested to transfer back to her original post office, which was denied. She complained that the refusal to give her prior job back was discrimination because she was over the age of 40, in violation of the Age Discrimination in Employment Act (ADEA). Afterwards, she alleged that her supervisor retaliated by criticizing her, falsely accusing her of sexual harassment, and allowing her co-workers to mockingly write her name on anti-sexual harassment posters and tell her to “‘go back’ to where she ‘belonged.’”

The government challenged her lawsuit by pointing out that the ADEA contains separate rules for private-sector and federal-sector complaints. The federal rules do not include the same anti-retaliation provisions as the private sector rules. The government argued that Congress must have meant two different things when it wrote two different sections. Not so, said the Supreme Court. The two sections of the law were written at different times. Moreover, going back to Sullivan and mentioning another case applying Title IX’s ban of gender discrimination in education, the Court said that Congress must have known that a law against “discrimination” must also ban retaliation. Consequently, federal employees who have made claims under the ADEA may sue their agencies for retaliation if they believe they have

suffered adverse action as a result. In a footnote, the Court recognized that a similar argument can be made for federal employees who complain about race, color, sex, religion, and national origin discrimination under Title VII, even though that statute was not before the Court.

### California Courts

The state courts also issued retaliation decisions last month under California state law. In Arteaga v. Brink's Inc., the Court of Appeal held that an employee could not support his complaint of retaliation. Brink's is an armored car company that must trust its employees with firearms and substantial quantities of cash. Arteaga was a guard and messenger on an armored car responsible for loading ATM machines with thousands of dollars of currency and returning unused currency to Brink's. Over the course of almost a year, Brink's investigated "numerous shortages" of cash on routes serviced by Arteaga's armored car.

Arteaga was aware of the investigations because he was questioned about the shortages. He even wrote a letter to his supervisors complaining that the constant investigations were causing him "stress," and asking: "Either trust me or don't trust me. But stop going back and forth!" Around the same time, he reported a work-related injury to his arm, but was cleared to return to work by a physician. Several days later, Brink's let him go. He was not accused of theft, but was responsible for ATM shipments that totaled \$7,668 in shortages.

Arteaga sued, claiming that the termination was in retaliation for his claim that he had an on-the-job injury only a few days earlier, in violation of California Labor Code Section 132a. Arteaga argued that "temporal proximity" supported his claim of retaliation, meaning that because the termination came very close in time after the claim of disability, the Court could infer that the termination was retaliatory. The Court was not persuaded because Arteaga's performance was already questioned before he made the disability claim. Temporal proximity, that court explained, is persuasive when an employee has a long history of good performance and is only criticized after engaging in protected activity. Because of the money missing under Arteaga's watch, Brink's had a legitimate non-retaliatory reason to discharge him.

At almost the same time, another District Court of Appeal issued a very different decision. In Steele v. Youthful Offender Parole Board, the court allowed a "preemptive" retaliation claim when the termination happened before the protected activity. Steele was a "young woman with aspirations of a state career" who worked as an office assistant/receptionist for a state agency. Her performance was less than outstanding. She was also a frequent participant in radio station-sponsored bikini contests, a fact she apparently shared with her co-workers. One manager in her office came to one of her bikini contests (outside of work) and gave her an awkward kiss while he was there. She was "taken aback, but not offended." She told a co-worker, and it eventually got back to the higher-ups.

During the short time she worked for YOPB, Steele's performance was criticized and her managers changed her hours "to make [her] job less desirable" and encouraged her to resign before she was disciplined or fired. When she resigned, she was instructed to write a statement denying that the manager ever kissed her at the bikini contest. Eventually, she sued for constructive termination. The court found the employer's response to the bikini contest supported a theory that Steele was encouraged to leave the department in an effort to prevent her from making a sexual harassment complaint (even though she never made such a complaint and denied being sexually harassed). As in Arteaga, the fact that employee discipline happens prior to protected activity is evidence of no retaliation. Steele found that is not always positive proof of a non-retaliatory reason.

### Advice for Employers

Anti-retaliation policies are helpful. However, managers must be vigilant to ensure they are carried out. It may be that a complaint with little or no legal merit is converted into a viable retaliation claim because of retribution against the complaining party. It also is critical to inform employees that the employer not only does not tolerate retaliation, but also that employees who suspect retaliation have recourse to the employer's internal complaint procedures. Employers also must be sensitive to the fact that employees who engage in protected activity fear retribution when they do so; unfortunately, sometimes with good reason.

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