Legal Alert: Supreme Court Finds that Federal Employees Can Bring Age-Based Retaliation Claims

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The U.S. Supreme Court recently held, in a 6-3 decision, that the federal provision of the Age Discrimination in Employment Act (ADEA) prohibits retaliation, even though the language of the statute does not specifically address retaliation. *See Gomez-Perez v. Potter* (U.S. May 28, 2008). The federal-sector provision of the ADEA provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." The key question for the Court in this case was whether the statutory phrase "discrimination based on age" includes retaliation based on the filing of an age discrimination complaint. The Court held that it does.

Gomez-Perez, a postal worker in Puerto Rico, claimed she was subjected to retaliation after filing an EEOC charge alleging age discrimination. The First Circuit held that the ADEA does not prohibit retaliation against federal employees. The Supreme Court granted *certiorari* to resolve a split among the federal appeals courts regarding whether such a claim is available to federal employees.

In determining that retaliation claims are available to federal employees, the Court relied, in part, on prior decisions finding that retaliation claims are available under 42 U.S.C. Section 1982, which prohibits discrimination based on race in the sale or rental of property, and under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in any education program or activity receiving federal financial assistance.

In the Title IX decision, *Jackson v. Birmingham Bd. of Education,* the Court held that retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination. The Court in *Jackson* held that this interpretation flowed naturally from its earlier interpretation of 42 U.S.C. Section 1982, *Sullivan v. Little Hunting Park.* "Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,' just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race."

Following the reasoning in these decisions, the Court in *Gomez-Perez* interpreted the ADEA's federal sector provision's prohibition on discrimination based on age as also prohibiting retaliation. The Court found that the statutory language at issue in this case "is not materially different from the language at issue in *Jackson* ('discrimination' 'on the basis of sex') and is the

functional equivalent of the language at issue in *Sullivan*." The Court also noted that the context in which the statutory language appears in all three cases is the same – they all involve remedial provisions aimed at prohibiting discrimination.

Employers' Bottom Line:

The Court's tendency toward expanding the scope of retaliation claims in both public and private sector employment illustrates the importance of ensuring that all employment decisions are based on documented, legitimate nondiscriminatory business reasons.

If you have any questions regarding this decision or other labor or employment related decisions, please contact the Ford & Harrison attorney with whom you usually work.