Another option for retaliation claims: U.S. Supreme Court holds that 42 U.S.C. § 1981 applies

Although the case law involving Section 1981 can be complicated and murky, you should think seriously about bringing a Section 1981 cause of action

Barry Wolf

On May 27, 2008, the U.S. Supreme Court rendered a decision permitting plaintiffs to bring retaliation claims under 42 U.S.C. § 1981 (Section 1981) (*CBOCS West, Inc. v. Humphries* (2008) WL 2167860). Although bringing such a claim permits a defendant to remove the case to federal court under 28 U.S.C. § 1441(a), Section 1981 is potentially useful in cases where an employee asserting retaliation claims related to race discrimination is unable to proceed under the California Fair Employment and Housing Act (FEHA).

The case

Plaintiff Hedrick Humphries, an African American, was fired from his position as an assistant manager of a Cracker Barrel restaurant. Humphries sued the restaurant's owner (CBOCS West, Inc.), claiming that he was dismissed because of racial bias and because he had complained to managers that a fellow assistant manager had dismissed another African American employee for race-based reasons. Humphries brought his discrimination and retaliation claims under both Title VII of the Civil Rights Act of 1964 (Title VII) and Section 1981. (*CBOCS West, Inc.*, *supra*, at p. 3.) The latter statute forbids discrimination on the basis of race in the making and enforcement of contracts. (*Johnson v. Railway Exp. Agency, Inc.* (1975) 421 U.S. 454, 459 [95 S.Ct. 1716, 1720].)

Humphries' Title VII claims were dismissed because he failed to pay the necessary filing fees on a timely basis. (*CBOCS West, Inc.*, *supra*, at p. 3.) CBOCS West, Inc. was granted summary judgment on Humphries' Section 1981 claims for discrimination and retaliation. The Court of Appeals affirmed the judgment except in regard to Humphries' Section 1981 retaliation claim. The Supreme Court granted certiorari to review whether Section 1981 encompassed "retaliation against a person who has complained about a violation of another person's contract-related 'right.'" (*Ibid.*) The Court concluded that retaliation claims can be brought under section 1981 even though the statute does not explicitly refer to retaliation. (*Ibid.*)

Implications of the Court's holding

Why does the Court's construing Section 1981 as prohibiting retaliation help race discrimination plaintiffs, who can sue for retaliation under the FEHA? Section 1981's usefulness stems from the fact that it differs from the FEHA (and Title VII) in four important respects.

First, as *CBOCS West, Inc.* illustrates, Title VII (like the FEHA) requires an employee to engage in an administrative process before she can file suit. This process too often amounts to a series of hurdles that employees have difficulty negotiating, particularly if they have not yet obtained counsel. In contrast, there are no administrative prerequisites to filing suit under section 1981. (*Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 181 [109 S.Ct. 2363, 2375], *superseded by statute on other grounds as stated in Jones v. R.R. Donnelley & Sons Co.* (2004) 541 U.S. 369, 372-73 [124 S.Ct. 1836, 1839-40].)

Second, there is no requirement that an employer have a minimum number of employees in order to be amenable to suit under section 1981. (*Rivers v. Roadway Exp., Inc.* (1994) 511 U.S. 298, 304, n.3 [114 S.Ct. 1510, 1515, n.3].)

Third, at least some courts have held that individuals who exercise control over a plaintiff's employment can be held liable under section 1981. (*See, e.g.*, *Foley v. University of Houston System* (5th Cir. 2003) 355 F.3d 333, 337-338 [plaintiffs could proceed against individual defendants because there were triable issues of fact regarding whether they had exercised control in the employment decisions at issue, which would have rendered them "'essentially the same' as [the employer] purposes of the retaliatory conduct alleged . . . ."].) In contrast, supervisors cannot be held liable under the FEHA for retaliatory conduct, except perhaps when

a supervisor who is liable for harassment has retaliated against someone who opposes or reports that same harassment. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1160, 1168, n.4.)

Fourth, private sector employees suing under Section 1981 for retaliation (as well as other acts) occurring after employment began benefit from a four-year statute of limitations. (*Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. at pp. 382-83 [124 S.Ct. at pp. 1845-46].) In that action, the Court had to decide whether plaintiffs' hostile work environment, wrongful discharge, and refusal to transfer claims were governed by state statutes of limitations or by 28 U.S.C. § 1658, a "catchall four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990." (*Id.* at pp. 371-72 [124 S.Ct. at p. 1839].) The Court held the four-year statute applicable because plaintiffs' claims could not have been brought under section 1981 until Congress amended that statute in 1991 to overrule *Patterson v. McLean Credit Union*, which had held "that the statutory right 'to make and enforce contracts' did not protect against harassing conduct that occurred after the formation of the contract." (*Id.* at pp. 372-73, 383 [124 S.Ct. at pp. 1840, 1845-46].)

Whether the four-year statute of limitations governing Section 1981 applies to employees of state and local governments is not as clear. (Federal employees, of course, can only sue for discrimination under Section 717 of the Civil Rights Act of 1964. (*Brown v. Gen. Servs. Admin.* (1976) 425 U.S. 820, 835 [96 S.Ct. 1961, 1969].) The Supreme Court held prior to 1991 that state and local employee claims for violations of Section 1981 must be brought under 42 U.S.C. §1983. (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 735 [109 S.Ct. 2702, 2723].) Courts disagree regarding whether the 1991 amendments to Section 1981 permitted state and local employees to sue under that statute without invoking 42 U.S.C. section 1983. (*See, e.g., Pittman v. Oregon, Employment Dept.* (9th Cir. 2007) 509 F.3d 1065, 1069.) However, there appears to be at least a possibility that even if state and local employees must sue under Section 1983, the four-year catchall limitations period might apply to claims (such as retaliation after the start of employment) that were not cognizable under Section 1981 before that statute's amendment in 1991. (*See City of Rancho Palos Verdes, Cal. v. Abrams* (2005) 544 U.S. 113, 124, n.5 [125 S.Ct. 1453, 1460, n.5] [stating that when a claim brought under Section 1983 rested upon violation of a federal statute revised after 1990, the catchall limitations period "would seem to apply"].)

Although the case law involving Section 1981 can be complicated and murky (as the paragraph immediately above illustrates), you should think seriously about bringing a Section 1981 cause of action if your client cannot sue for retaliation pertaining to racial discrimination under the FEHA, especially since attorney fees are potentially available in actions brought under Section 1981. (42 U.S.C. §1988(b).)


Wolf

Barry M. Wolf is an appellate specialist certified by the State Bar of California Board of Legal Specialization. He practices civil appellate law, with an emphasis on employment litigation, and is a member of the California Employment Lawyers Association (CELA). His office is in Los Angeles and you can contact him at wolf.law@verizon.net.