

## July 2008 Labor and Employment Update

### United States Supreme Court Places Added Burden on Employers Contemplating Layoffs

On June 19, 2008, the United States Supreme Court held that employers defending against disparate impact claims brought under the Age Discrimination in Employment Act (ADEA) bear both the burden of production *and* the burden of persuasion when relying on "reasonable factors other than age" to justify layoff decisions. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008).

In *Meacham*, the federal government ordered its contractor, Knolls, to reduce its workforce. Knolls had its managers score their subordinates on "performance," "flexibility" and "critical skills." Those scores, along with points for years of service, were used to determine who was to be laid off. Of the 31 employees laid off, 30 were 40 years of age or older.

Twenty-eight of those employees sued Knolls, alleging that the layoff selection process had a discriminatory impact on older employees. The laid-off employees relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance, and that the scores for "flexibility" and "criticality" - scores over which managers had the most discretionary judgment - had the firmest statistical tie to the layoff decisions.

The jury found for the laid-off employees on their age discrimination claims. The United States Court of Appeals for the Second Circuit ultimately ruled in favor of Knolls, reasoning that the employees failed to satisfy their burden of persuasion on the reasonableness of the "factors other than age" defense asserted by Knolls (*i.e.*, the Second Circuit concluded that the burden was on the employees to show that Knolls' stated non-age factors were unreasonable).

The employees appealed the Second Circuit's decision to the United States Supreme Court, arguing that the Second Circuit improperly shifted the burden of persuasion to the laid-off employees and away from Knolls. The Supreme Court agreed with the employees, concluding that the burden is on Knolls to establish that its layoff decisions were based on "reasonable factors other than age."

Following *Meacham*, employers defending their layoff (and other employment)

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decisions must be able to both produce evidence supporting their "reasonable factors other than age" defense and convince the trier of fact of the merit of that defense. As a result of this decision, laid-off employees in particular may be more likely to bring age discrimination claims under the ADEA, and it will likely be more difficult and costlier for employers to defend against such claims.

Moreover, as acknowledged by the Supreme Court itself, the *Meacham* decision may well affect the way some employers make layoff decisions. Reductions in force may well have a disproportionate effect on older workers because age, perhaps more than any other classification protected by fair employment laws, often correlates with other decisional factors (e.g., technology-based skills, entitlement to heightened salary figures, entitlement to additional vacation time, etc.) that are of utmost importance to employers when contemplating layoffs. The effect of the *Meacham* decision may be to chill the use of such legitimate factors by employers. Any such limitation on an employer's flexibility could lessen its ability to react to changing economic and market factors in a quick and efficient manner which, of course, could lead to a decrease in competitiveness and result in additional job losses.

Should you have any questions about the implications of the *Meacham* decision upon any contemplated layoffs, or about the ADEA generally, please contact a member of [Reinhart's Labor and Employment Department](#).

## **United States Supreme Court Rules Retaliation Claims May Be Brought Under Section 1981**

The United States Supreme Court recently held that Section 1981 of the Civil Rights Act of 1866 (Section 1981) encompasses retaliation claims. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

Hedrick G. Humphries (Humphries), an African-American assistant manager of a restaurant, alleged the restaurant fired him (1) because of racial bias and (2) because he had complained about alleged race discrimination. Humphries sued under both Title VII of the Civil Rights Act of 1964 and Section 1981. Humphries' Title VII claim was dismissed due to his failure to timely pay filing fees; therefore, the Supreme Court considered solely whether Humphries could pursue a retaliation claim under Section 1981.

Section 1981 prohibits discrimination in the terms and conditions of contracts, including performance, enforcement and termination. Enacted just after the Civil



War, Section 1981 provides that: "[a]ll persons within...the United States shall have the same right...to make and enforce contracts... ." Because the plain language of the statute makes no mention of retaliation, the Court examined Section 1981's interpretative history.

The Court noted that, in a 1969 decision, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), it had concluded that Section 1982, which focuses on rights related to the ownership of property, included retaliation claims. In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Court similarly held that Section 1982 encompasses retaliation claims. Given that Sections 1981 and 1982 have long been interpreted alike given their similar language, origin and purpose, and given that federal appeals courts have consistently held that Section 1981 contains an implied right to sue for retaliation, the Court concluded that Section 1981 does, in fact, encompass retaliation claims.

Given the history of Section 1981, the Court's ruling in *CBOCS West, Inc.* was not particularly surprising. Yet, the express expansion of Section 1981 has significant implications for employers, particularly small businesses. Whereas Title VII applies only to employers of 15 or more employees, Section 1981 essentially applies to all employers. Further, compensatory and punitive damages recoverable under Title VII are subject to a cap of \$300,000 (for employers with over 500 employees), whereas damages recoverable under Section 1981 are not subject to any caps. Additionally, Title VII contains a number of administrative barriers that a plaintiff must navigate; Section 1981 does not. For example, under Title VII, a plaintiff must comply with the United States Equal Employment Opportunity Commission's administrative process and strict filing deadlines, whereas under Section 1981, a plaintiff need only file his/her complaint with a court within four years of the alleged retaliatory action. Therefore, the *CBOCS West, Inc.* decision will likely increase the number of retaliation claims filed against employers each year.

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