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The high court gets it right

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On May 27, the U.S. Supreme Court took the right approach to retaliation in the workplace by recognizing that the employment discrimination statutes should be read broadly to encompass retaliation claims. The court correctly found that retaliation against an employee for complaining about discrimination is itself discriminatory conduct. Yet the court's expansive reading of retaliation claims contrasts sharply with its cramped approach to other types of discrimination claims, which results in a false and unsupportable distinction between retaliation claims and other discrimination claims. The recent *CBOCS* and *Gómez-Pérez* decisions appear to be a belated recognition by the Supreme Court that retaliation is just another form of discrimination. Perhaps this realization will lead the court to abandon the artificial distinction it has drawn in the past between retaliation and discrimination.

CBOCS West Inc. v. Humphries and *Gómez-Pérez v. Potter* were argued on successive days in February, and decided on May 27. In *CBOCS*, the court held by a 7-2 margin that an employee could bring a retaliation claim under Section 1981, the race discrimination statute, and in *Gómez-Pérez*, the court held by a 6-3 margin that a Postal Service employee could bring a retaliation claim under the federal-sector age discrimination statute. Critically, the court squarely rejected the employers' argument that the absence of the magic word "retaliation" in those statutes precluded a retaliation claim. These decisions were foreshadowed in several interesting respects.

First, while Justice Samuel A. Alito Jr. was on the 3d U.S. Circuit Court of Appeals, he issued a decision on the same day that he was confirmed to the Supreme Court (Jan. 31, 2006), which found it reversible error to grant summary judgment on a postal worker's retaliation and discrimination claims. In *Jensen v. Potter*, 435 F.3d 444 (3d Cir. 2006), Alito correctly recognized that harassment could support a retaliation claim, since harassment is an adverse employment action. He made the interesting observation that "in reality, however, when a woman who complains about sexual harassment is thereafter subjected to harassment based on that complaint . . . [this] give[s] rise to a reasonable inference that the harassment would not have occurred if the person making the complaint were a man."

Government's clashing positions

Second, the solicitor general submitted an amicus brief on behalf of the plaintiff-employee in *CBOCS*, arguing that Section 1981 should encompass retaliation claims, yet submitted a merits brief on behalf of its client, the defendant-employer in *Gómez-Pérez*, arguing the opposite for the federal-sector age discrimination statute. This discrepancy was highlighted by Alito during the oral argument in *Gómez-Pérez*, when he asked, "would it be unkind to say that the government's position seems to be that a general ban on discrimination includes a ban on retaliation except when the government is being sued? . . . Tomorrow the government is going to argue [in *CBOCS*] that the prohibition of discrimination in Section 1981 includes retaliation. And yet here you're arguing . . . exactly the opposite position."

It was not that surprising to see Alito writing the majority opinion in *Gómez-Pérez*, joined by five other justices, given his interest in retaliation claims. Justice Clarence Thomas dissented in both cases, joined by Justice Antonin Scalia, asserting that there was no private cause of action for retaliation claims under either statute. Roberts split the difference, joining Justice Stephen G. Breyer's majority in *CBOCS*, but separately dissenting in *Gómez-Pérez* on the ground that retaliation claims should only be inferred in statutes that have "broad antidiscrimination provisions," but not "any time Congress proscribes 'discrimination based on X.'" This cramped view is consistent with the Supreme Court's unduly restricted view of other types of discrimination claims, such as disability claims (where very few disabled employees can succeed), or pay discrimination claims, as in the controversial 2007 *Ledbetter v. Goodyear Tire* decision, which was criticized in Congress and elsewhere for requiring an employee to file a discrimination claim as soon as she received her first discriminatory pay check, even if she did not know with any certainty that she was paid less than her male colleagues until years later.

Perhaps *CBOCS* and *Gómez-Pérez* signal that the Supreme Court sees the connection between retaliation and discrimination — employees must be protected from both in the workplace, and there is no principled basis to draw a distinction between the two forms of illegal workplace abuse. It may be that the court views the "cover-up as being worse than the crime," but that is not a rational basis for giving retaliation claims a broad scope, while creating procedural and substantive hurdles for other types of discrimination claims. As Alito clearly recognized on his last day on the 3d Circuit, retaliation is simply another form of discrimination. The court needs to rethink this artificial distinction, and recognize that all forms of discrimination are illegal, not just retaliation.

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