Retaliation Under Louisiana Law: Has the Supreme Court Revived This Dormant Cause of Action?

By Charlie W. Penrod
Despite Louisiana’s status as an at-will employment state, federal and state law contains many exceptions to that general rule. Employers are prohibited under both federal and Louisiana law from taking adverse employment actions based upon certain “protected” characteristics, such as race, gender, age or religion, among others. Concurrent with those rights under federal law is the basic right to be protected from retaliation from an employer for raising a complaint about any of these issues.

Under federal law, it is abundantly clear that retaliation, as well as straight discrimination claims, are barred under Title VII of the Civil Rights Act of 1964. However, Louisiana’s prohibition on retaliatory employment actions remains muddled and cloudy. Despite the fact that retaliation is a pernicious form of unfair employee treatment, Louisiana state and federal courts continue to hold that Louisiana law does not prohibit race and gender retaliation.

**Why Does This Even Matter?**

Shrewd legal analysts might ask why this even matters. Employment actions in Louisiana are governed by Title VII so that even if there is a loophole under Louisiana law, federal law should provide an adequate remedy. But the elimination of potential retaliation claims under state law presents two strategic disadvantages that plaintiff’s attorneys must confront. First, plaintiff’s attorneys do not have the ability to prevent defendants from removing retaliation claims to federal court. Plaintiffs cannot bring the petition in state court solely under state law because only federal law provides a remedy for employment retaliation.

Secondly, Title VII contains statutory caps on compensatory damages that do not appear in Louisiana law. A retaliation plaintiff’s potential recovery may be significantly limited by filing suit under Title VII. While this may not affect more minor claims, for other plaintiffs, this can be a significant matter.

**What Does Louisiana Law Say?**

The vast majority of state and federal courts that have weighed in on this issue have held that Louisiana does not prohibit employment retaliation for race and gender. In 1997, the Louisiana Legislature amended and redrafted Louisiana’s employment discrimination statutes by moving the relevant provisions from Title 51 to Title 23. As one court has stated, this process has “simply create[d] confusion.”

La. R.S. 23:331 specifically prohibits various forms of employment discrimination on the basis of race and gender but does not prohibit employment retaliation. Inexplicably, however, the Legislature did include a prohibition against employment retaliation in the other statutes prohibiting age and sickle-cell discrimination. Consequently, many courts, including the leading state court on the matter, have held that Title 23 does not contain bans on retaliation in employment for race and gender claims. By explicitly including such a provision in some sections and not including such a provision in others, these courts have argued that it is strongly implied that the Legislature intentionally removed retaliation protection from the scope of race and gender discrimination.

In the process of amending Louisiana’s employment statutes, the Legislature did retain remnants of the former employment discrimination statutes found in Title 51. La. R.S. 51:2256 does contain an express anti-retaliation provision. That statute states that it “shall be an unlawful practice for a person . . . (1) To retaliate or discriminate in any manner because he has opposed a practice declared unlawful by this Chapter . . . .” This, of course, begs the question: What practices are unlawful under Title 51? The remaining substantive aspects of this Chapter of Title 51 only prohibit non-employment-related activities, such as breastfeeding and credit transactions. Title 51’s substantive sections do not prohibit race or gender retaliation in employment.

**The Tangled Web of Title 23 and Title 51**

Title 51 does mention Title 23’s employment discrimination statutes in its definitions section. La. R.S. 51:2232(13) defines “discriminatory practice in connection with employment” as “an employment practice prohibited by La. R.S. 23:312, 323, or 332.” La. R.S. 51:2232(14) declares any “discriminatory practice in connection with employment” to be an unlawful practice. Courts are split as to the meaning of these definitional statutes.

Notwithstanding these definitions, most federal and state cases on the issue have held that neither Title 51 nor Title 23 provides relief for retaliation in employment. As for Title 51, courts have forcefully argued that Title 51 simply does not deem employment retaliation to be a “practice declared unlawful by this Chapter.” Additionally, other decisions have stated that the lack of a retaliation provision in the applicable sections of Title 23 is overwhelming evidence that the Legislature did not intend to prohibit race and gender retaliation in employment. The same observations were made in a recent unpublished state court dissent.

On the other hand, a minority of courts has stated that these definitional statutes expressly provide a cause of action for employment retaliation. These courts have held that despite the gutting of Title 51, the clear wording of La. R.S. 51:2232(13) and (14) declares race and gender retaliation to be an unlawful practice by referencing Title 23. Therefore, because race and gender employment discrimination has been declared unlawful by definition in Title 51 itself, these courts found that La. R.S. 51:2256 prohibits both discrimination and retaliation on those grounds. Further, the federal 5th Circuit has stated in an unpublished decision on a race discrimination and retaliation claim that Title VII standards apply to actions under 51:2256, implying that employment retaliation is covered by 51:2256. So, the battle lines have been drawn over this thorny issue of Louisiana statutory interpretation. Now, it appears that the U.S. Supreme Court may have tangentially entered the fray.
**Gomez-Perez: Discrimination Statutes Include Retaliation**

The United States Supreme Court, perhaps inadvertently, has now entered into this legal thicket. Previously, the U.S. Supreme Court held in *Jackson v. Birmingham Board of Education* that, under Title IX of the Education Amendments of 1972, the term “discrimination” actually includes retaliation. Therefore, Title IX did not need to expressly prohibit retaliation since retaliation is part and parcel of discrimination. This case has been distinguished by *Sawyer v. JRL Enterprises*, a decision in the Eastern District of Louisiana, on the grounds that Title IX and Title VII are two distinct statutes that could not be interpreted identically. The court in *Jackson* certainly went to great lengths to demonstrate the differences between Title VII and Title IX and, thus, the *Sawyer* court’s distinction appeared to be on solid ground.

However, the U.S. Supreme Court’s recent ruling in *Gomez-Perez v. Potter* seems to cast significant doubt on that conclusion. *Gomez-Perez* concerned the issue of whether there is a prohibition on retaliation in the federal employees’ provision of the Age Discrimination in Employment Act (ADEA). Just as in Title IX and in Louisiana’s employment discrimination statutes, the federal-sector provision of the ADEA only proscribed discrimination and not specifically retaliation. The federal-sector provision of the ADEA is a small part of the ADEA. The main thrust of the ADEA, covering private employers, does include a specific reference to illegal employment retaliation.

The court broadly rejected the notion that *Jackson* applied only to Title IX and held that “discrimination based on age” also proscribes retaliation under the ADEA. The court in *Jackson* stated, “[R]etaliation against a person because that person has complained of sex discrimination is another form of sex discrimination.” *Gomez-Perez* found this equally applied under the ADEA.

While the majority opinion never explicitly states “prohibitions against discrimination always include retaliation,” the dissent certainly believes that was the result reached in the case. Justice Roberts, writing for himself and Justices Scalia and Thomas, writes, “[I]t cannot be — contrary to the majority’s apparent view — that any time Congress proscribes ‘discrimination based on X,’ it means to proscribe retaliation as well.” In other words, when a Legislature makes discrimination illegal, it also makes retaliation illegal by definition. That rule would almost certainly require the conclusion that Louisiana’s employment discrimination statutes include a prohibition on retaliation.

However, *Gomez-Perez* could be distinguished so that Louisiana’s statutes, as currently written, do not include retaliation. First, it could be argued that *Gomez-Perez* applies only to federal as opposed to state laws, although that argument has less force when considering that Title 23 models itself after Title VII. More importantly, the private-sector portion of the ADEA expressly made retaliation illegal while the federal-sector provision did not. The employer argued that Congress must have intentionally omitted retaliation from the scope of the federal-
sector provision of the ADEA. The court disagreed with that argument and instead relied on the fact that these ADEA provisions were not enacted simultaneously. Therefore, Congress did not necessarily intentionally omit retaliation from the federal-sector provision because the provisions were not drafted and enacted at the same time.

Unlike the ADEA, all provisions of Title 23 were enacted together in 1997. Notwithstanding the apparent attempt by the court in Gomez-Perez to hold that all retaliation claims are included in discrimination claims, this could be a way for the skillful attorney to argue that these statutes are distinguishable.

**A Call for Legislative Action**

Regardless of the legal nuances this issue provides, several courts have recognized that not prohibiting retaliation in employment represents “regressive social policy” and is “illogical.” Few reasonable persons could doubt the serious toll employment retaliation can place on affected employees, nor could anyone seriously contend that retaliation for protected characteristics is not manifestly unfair. It severely discourages affected employees from protesting or reporting illegal discrimination and can otherwise be a “back door” way to discriminate on the basis of protected characteristics.

The Louisiana Legislature could easily remedy this perceived “loophole” in Title 23 by simply passing legislation that prohibits both retaliation and discrimination in employment. As noted above, Gomez-Perez may now make such legislation unnecessary, but for the sake of clarity in the law, such a move would be highly recommended. Without such legislative action, these legal battles may continue unabated.

**FOOTNOTES**

8. Ware v. Cleco Power, L.L.C., 2004 WL 133869, fn. 3 (5 Cir.).
10. 2005 WL 354738 (E.D. La.).
11. 128 S.Ct. 1931 (2008), 170 L.Ed.2d 887.
12. Id. at 173-174.
13. Id. at 1944.