Legal Update Article

Looking Back: Spotlight on Justice Breyer's Employment Law Legacy

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February 22, 2022

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- *On the bench 1994–2022 (28 years)*
- *Appointed by President Bill Clinton*
- *Authored the seminal decision establishing the legal standard for retaliation claims under Title VII of the Civil Rights Act of 1964.*

On January 27, 2022, Justice Stephen Breyer formally announced his retirement from the nine-member U.S. Supreme Court, effective at the start of the 2022 summer recess.

In his nearly three decades on the bench, Justice Breyer became known as a pragmatic justice who sought compromise and shunned the spotlight. He once wrote, "The real-world consequences of a particular interpretive decision, valued in terms of basic constitutional purposes, play an important role in constitutional decision making." This approach to jurisprudence is especially apparent in his decisions establishing the scope of Title VII's anti-retaliation provision, the definition of a complaint under the Fair Labor Standards Act (FLSA), and the scope of prohibited acts under sections 1981 and 1983 of the Civil Rights Act of 1866. While generally considered "wins" for employees, Justice Breyer provides concise and clear guidance for employers seeking to avoid liability under these laws. Highlighted below are some of Justice Breyer's most notable employment law decisions.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)

Bottom Line: Expanded the scope of retaliation under Title VII to include actions and harms beyond those directly affecting employment terms and conditions to prohibit employer actions that are likely to deter discrimination victims from complaining.

Sheila White was a forklift operator at Burlington Northern & Santa Fe Railway Co. She made an internal complaint that her immediate supervisor made discriminatory comments based on gender, which led to the supervisor's discipline. At the same time White was advised of the discipline decision, White was advised that she was being removed from her forklift duty and reassigned to perform only standard track laborer tasks. White was told that coworkers complained that a more senior male colleague should have the forklift operator position. White filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging the change in duties constituted retaliation under Title VII. A few days later, White had a dispute with a different supervisor about transportation from one work location to another, and White was suspended for insubordination. An internal investigation later found she had not been insubordinate, and Burlington then paid White backpay for the 37 days she was suspended. White filed another EEOC charge claiming the suspension was also retaliatory.

The Court granted *certiorari* to consider what type of employer actions constitute

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retaliation under Title VII and how much harm these actions must cause to come within the scope of the statute's anti-retaliation provision.

Writing for a unanimous court (Justice Samuel Alito wrote a concurrence), Justice Breyer examined the language and Congressional intent of Title VII and concluded that the anti-retaliation provision of Title VII was broader in scope than the substantive anti-discrimination provision. He explained, "The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." Justice Breyer held "the anti-retaliation provision does not confine the actions and harms it forbids to those that related to employment or occur at the workplace" and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." Thus, for a plaintiff to prevail under this standard, they must show that the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." He went on to provide guidance regarding what type of employer action a reasonable employee might find materially adverse, specifically, the imposition of a retaliatory work assignment or an indefinite unpaid suspension. Justice Breyer also noted that Burlington's reinstatement of White with backpay did not excuse it from liability for the retaliatory conduct. With characteristic pragmatism, Justice Breyer wrote, "Many reasonable employees would find a month without a paycheck to be a serious hardship .... A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former."

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011)

Bottom Line: Held that "complaint" as used in the FLSA included oral and written complaints.

Kevin Kasten claimed that his employer, Saint-Gobain Performance Plastics Corporation, committed FLSA violations because the location of the time clocks prevented employees from accurately recording time spent donning and doffing their required protective gear. Kasten raised these concerns verbally to multiple managers. Saint-Gobain terminated Kasten's employment, allegedly in retaliation for these verbal complaints. Kasten filed suit, and both the District Court and U.S. Court of Appeals for the Seventh Circuit held that the FLSA's anti-retaliation provision did not cover oral complaints.

The Supreme Court granted *certiorari* on the sole question of whether an oral complaint of an FLSA violation is protected conduct under the statute's anti-retaliation provision.

The Court concluded that verbal complaints fell within the scope of the FLSA's anti-retaliation provision. In his majority opinion, Justice Breyer stated that narrowly construing the FLSA's anti-retaliation provision to exclude verbal complaints would undermine the statute's basic objective: prohibiting detrimental labor conditions and discouraging workers from quietly accepting substandard conditions due to fear of retaliation. Approaching his analysis from a practical perspective, Justice Breyer asked, "Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it

difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?"

CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008)

Bottom Line: Section 1981 of the Civil Rights Act of 1866 prohibits retaliation, as well as discrimination, based on race.

Hedrick G. Humphries' brought a claim against CBOCS West, Inc. alleging CBOCS terminated his employment as restaurant manager because he complained to managers about the dismissal of another Black employee. Humphries filed suit alleging violations of section 1981 and Title VII. The District Court dismissed his claims on summary judgment, and the U.S. Court of Appeals for the Seventh Circuit remanded for trial with respect to the section 1981 retaliation claim only. Section 1981 provides, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens."

The Supreme Court granted *certiorari* to clarify whether section 1981 encompassed complaints of retaliation.

The Court held that section 1981 encompassed retaliation claims. In his majority opinion, Justice Breyer cited the "well-embedded interpretation" of section 1981 as encompassing retaliation claims. Justice Breyer succinctly concluded "that considerations of *stare decisis* strongly support" the Court's conclusion, cautioning that "those considerations impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents."

Heffernan v. City of Paterson, 578 U.S. 266 (2016)

Bottom Line: Perceived, as opposed to actual, engagement in protected political activity is sufficient to allege retaliation.

Jeffrey Heffernan was a detective with the Paterson, New Jersey, police department during a mayoral election. Heffernan's mother asked him to pick up a yard sign supporting the incumbent mayor's challenger. Other Patterson police offers saw Heffernan with the yard sign and, the following day, Heffernan's supervisors demoted him to patrol officer to punish him for what they perceived as his opposition to the sitting mayor. Heffernan filed suit, and the lower courts held that a section 1983 claim for retaliation is actionable only if the employer's action was prompted by an actual, rather than a perceived, exercise of First Amendment rights.

The question before the Supreme Court was whether Heffernan's demotion deprived him of a Constitutional right, even though he had not actually engaged in protected political activity.

The Court concluded that the City of Paterson did deprive Heffernan of his constitutionally protected right. Justice Breyer wrote that a demotion designed to punish *perceived*, rather than actual, protected political activity is subject to challenge under section 1983. He clarified that such a conclusion is supportable only when the employer's action was motivated by activity the employer perceived as political. Justice Breyer instructed would-be litigants that they would find it

"complicated and costly" to "prove an improper employer motive," as merely describing their own protected political activity would not carry the day.

Other Important Employment Law Decisions Authored by Justice Breyer

National Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022): Justice Breyer led the dissent in a 6-3 decision staying Occupational Safety and Health Administration's (OSHA) emergency temporary standard requiring employers to require vaccinations or a combination of masking and testing in response to the COVID-19 pandemic. Criticizing the majority for substituting its own judgment for that of OSHA, Justice Breyer wrote, "In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger."

Doe v. Mills, 142 S. Ct. 17 (2021): On behalf of the majority, Justice Breyer denied an application for injunctive relief seeking to prevent the state of Maine from enforcing a COVID-19 vaccine mandate for healthcare workers that lacked a religious exemption.

E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57 (2000): In upholding an arbitrator's authority to determine an appropriate award in an employment dispute, even when that award could be seen as contrary to public policy, Justice Breyer wrote, "We recognize that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here. But both employer and union have agreed to entrust this remedial decision to an arbitrator."

NLRB v. Canning, 573 U.S. 513 (2014): The Court held that the recess appointments clause of the Constitution was not triggered when President Barack Obama made recess appointments to the National Labor Relations Board while the Senate was holding two pro forma sessions per week, but otherwise on year-end break. Justice Breyer succinctly explained, "Three days is too short a time to bring a recess within the scope of the clause."

US Airways, Inc. v. Barnett, 535 U.S. 391 (2002): In a 5-4 decision analyzing the relationship between the Americans with Disabilities Act and an employer's preexisting seniority system, the Court held that any request for an accommodation that conflicts with an employer's seniority system is, by definition, unreasonable. Justice Breyer extolled the virtues of seniority systems as creating fair, uniform treatment. He wrote, "[T]o require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment — expectations upon which the seniority system's benefits depend."

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Justice Breyer's legacy will be subject to considerable examination in the months to come. While his decisions may be interpreted as employee-friendly, his thoughtfully written opinions offered practical guidance to employers seeking to avoid liability

under expanded interpretations of anti-retaliation statutes.

While waiting for President Joe Biden to announce his official nominee for the vacancy Justice Breyer will leave, we will look at the top contenders (including Judge Ketanji Brown Jackson, Justice Leondra R. Kruger, and Judge J. Michelle Childs) and how their appointment might affect the future of employment law.