

# CLIENT ALERTS

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## ADEA Protects Federal Employees from Retaliation

Expanding employees' rights to sue for retaliation, the United States Supreme Court in *Gomez-Perez v. Potter*, No. 06-1321, 553 U.S. \_\_\_\_ (May 27, 2008), held that a federal employee who filed a charge of age discrimination under the Age Discrimination in Employment Act ("ADEA") may assert a retaliation claim under the federal-sector provision of the ADEA. This decision gives federal employees the same right to sue for alleged retaliation that private-sector employees have long held under the ADEA.

### Case Overview

The ADEA was enacted in 1967 to protect persons age 40 and older from age discrimination in the private workplace. With the passage of the amendments in 1974, the ADEA became applicable to federal government workers.

Section 623 of the ADEA (29 U.S.C. §623) prohibits private employers from discriminating based on age. This section also prohibits private employers from retaliating against any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the ADEA. Federal employees are protected under Section 633a of the ADEA. While Section 633a prohibits the federal government from making personnel decisions based on age, it does not specifically address retaliation against federal employees who have charged their employer with ADEA violations.

Plaintiff Myrna Gomez-Perez ("Gomez-Perez") worked as a full-time clerk for the United States Postal Service ("USPS") in Puerto Rico. In October 2002, she requested a transfer to an office closer to her mother, who was ill. Her request was granted for a part-time position, but, after one month, she asked to be transferred back to her old job. Because her old position had been changed to a part-time job and had been filled by another employee, Gomez-Perez's request was denied. After Gomez-Perez filed a USPS equal employment opportunity complaint alleging age discrimination, she claimed she was subjected to various forms of retaliation by her supervisors, including reduction in her work hours and false complaints of sexual harassment. She sued alleging that her supervisors had retaliated against her in violation of Section 633a of the ADEA. The federal court

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granted summary judgment in favor of the USPS and the First Circuit Court of Appeals affirmed, concluding that the ADEA did not create a cause of action for retaliation for federal employees.

In a 6-3 decision, the Supreme Court reversed the First Circuit, holding that the phrase “discrimination based on age” as stated in Section 633a includes claims based on retaliation for filing an age discrimination complaint. Justice Alito, writing for the majority, compared the ADEA language with similar language in both 42 U.S.C. §1982 and Title IX which the Court had previously found permits retaliation claims.

The Court rejected the USPS’s argument that the fact that there is an express retaliation provision in Section 623 for private sector actions and no similar in Section 633a implied that retaliation claims were specifically excluded for federal employees. Justice Alito observed that the two sections were enacted seven years apart and the federal provision was not modeled on the private-sector provision, but directly after Title VII’s federal-sector discrimination ban, which prohibits in broad terms retaliation based on discrimination.

Dissenting, Chief Justice Roberts said Congress protected federal workers from retaliation through the civil service process and “did not intend those employees to have a separate judicial remedy for retaliation under the ADEA.”

## **What This Means for Employers**

For federal employers, workers can now sue for retaliation under the ADEA in the same manner as private-sector employees. While federal employers likely were careful not to permit retaliatory conduct against employees previously, the decision means that they will have to be more diligent than ever, as they may now face ADEA claims for retaliation.

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If you have any questions on *Gomez-Perez v. Potter* or similar issues, please contact Michael Kun at (310) 557-9501 ([mkun@ebgklaw.com](mailto:mkun@ebgklaw.com)) or Kathryn McGuigan at (310) 557-9570 ([kmcGuigan@ebglaw.com](mailto:kmcGuigan@ebglaw.com)) at the Firm’s Los Angeles office.

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