1-1-1989

What Hath Patterson Wrought? A Study in the Failure to Understand the Employment Contract

Mack Player
Santa Clara University School of Law

What Hath *Patterson* Wrought? A Study in the Failure to Understand the Employment Contract

Mack A. Player*

Florida State University College of Law
Tallahassee, Florida

I. Introduction

A. *The Nature of Section 1981*

One portion of the broad and sweeping civil rights legislation enacted in 1866, now codified at 42 U.S.C. § 1981, provides: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." For 100 years it was assumed that this section, as other similar sections in the same Act, was directed at "state" or governmental infringements on the right to contract, and did not address discriminatory refusals to contract between private individuals.[1] That assumption was laid to rest in *Runyon v. McCrary*.[2] The 1866 Civil Rights Act, of which 42 U.S.C. § 1981 was a part, prohibits purely private discrimination in the making and enforcement of contracts.[3]

Moreover, the U.S. Supreme Court has recognized that the employment relationship was "contractual" in nature. Consequently, the refusal to hire and the termination of employment on racial grounds was denying the "right to make contracts as enjoyed by white citizens," and violated section 1981.[4] Section 1981, however, because of its roots in the thirteenth amendment, is limited to claims of "racial" discrimination.[5] The Act does not regulate racially neu-

---

* Professor of Law, Florida State University College of Law, A.B., Drury College, 1962; J.D., University of Missouri, 1965; LL.M., George Washington University, 1972.

1. See, e.g., *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

2. 427 U.S. 160, 168–70 (1976).

3. Id.

4. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir. 1970).

5. It protects not only blacks against racial discrimination, but also whites against discrimination because of their white race, according to the same standards as are applied to blacks. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 287–296. Moreover, under this Act "race" is not limited to the current "scientific" division of races into three or four major categories (e.g., Caucasian, Negroid, Mongoloid), but includes that conception of race prevailing in the midnineteenth century when Congress enacted the statute. At that time "ancestry" or "ethnic characteristics" were

tral factors imposed in good faith merely because of the impact of those factors on a particular race; rather, section 1981 reaches only actions motivated by racial considerations.[6] Improper motive need not be ill-will or animus directed toward a racial class. Use of race, even benignly, in making contract decisions falls within the Act.[7]

The 1866 Civil Rights Act has been a popular and effective remedy for racial discrimination for a number of reasons. The Act has no coverage limitations, and thus unlike Title VII, which requires for coverage fifteen employees for twenty calendar weeks,[8] section 1981 will apply to contract discrimination regardless of the size of the entity or number of employees.[9] Title VII is limited to the "employment relationship"; discrimination in other contractual relationships is outside the scope of that Act.[10] Suits under section 1981 require only the refusal to enter a contractual relationship. Consequently, a claim will be stated even where the contractual relationship refused is not strictly an employment relationship.[11] The 1866 Act has no administrative prerequisites to suit,[12] a complicated process that has plagued Title VII litigants.[13] Compared to Title VII, the

---

defined as "races." English, Irish, Mexicans, Poles, Scandinavians, Germans, Basques, Jews, and Gypsies were specifically mentioned by the 1866 Congress as being distinct races. Thus, it is racial discrimination to discriminate against a person because of ancestry or ethnicity, that is, discriminate because he is Oriental, Hispanic, Polish-American, middle-eastern, Jewish, etc. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 611 (1987); *Share Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). The Act does not protect, however, against discrimination based on national origin or citizenship. *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (en banc). Thus, it will not violate section 1981 to discriminate against someone because he is not a U.S. citizen. But it will violate the Act to discriminate against the person because he was of Swedish ethnic origin.

6. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

7. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

8. 42 U.S.C. § 2000e-(b). For a brief discussion of coverage, see Player, *Employment Discrimination Law*, 204-20 (West, 1988).

9. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1228 (D.C. Cir. 1984).

10. *Darks v. Cincinnati*, 745 F.2d 1040 (6th Cir. 1984); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983).

11. *T & S Service Associates v. Crenson*, 666 F.2d 722 (1st Cir. 1981); *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988).

12. *Johnson v. Railway Express Agency*, 421 U.S. at 454.

13. For an overview of Title VII procedures, see Player, *Employment Discrimination Law*, 470–90 (West 1988). As an illustration of the complexity see *Love v. Pullman*, 404 U.S. 522 (1972) (referral of charge to state agency a filing); *Mohasco v. Silver*, 447 U.S. 807 (1980) (filing with EEOC after referral from state); *EEOC v. Commercial Office Products, Inc.*, 108 S. Ct. 1666 (1988) (termination of state jurisdiction); *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (period in which to file following right to sue notice); *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376 (11th Cir. 1983) (failure of class member to file charge); *Clark v. Coates & Clark*, 865 F.2d 1237 (11th Cir. 1989) (content of charge); *Purdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091 (4th Cir. 1982) (failure of EEOC to grant right to sue letter); *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984) (receipt of notice of right to sue).

1866 Act allows relatively long periods in which to file suit.[14] Perhaps the most significant reason plaintiffs use section 1981 is the availability of compensatory and, where appropriate, punitive damages,[15] a remedy that is not available to a Title VII plaintiff.[16] Finally, unlike Title VII, parties to a section 1981 action seeking the legal relief of damages, upon timely demand, can secure a trial by jury.[17]

B. *The* Patterson *Holding*

The primary issue that petitioner brought before the Supreme Court in *Patterson v. McLean Credit Union*[18] was the Fourth Circuit's conclusion that harassment of a black worker by the employer was not the denial of a contract, and thus not protected by 42 U.S.C. § 1981.[19] The Court, however, decided to revisit the very premise of section 1981 liability. After initial argument the Court ordered the parties to brief and argue the issue of whether section 1981 reached private employment contracts. More specifically, should the Court overrule *Runyon v. McCrary*?[20] This direction caused tremors throughout the civil rights litigation community.

After creating this stir the year before, the Court ended up unanimously, albeit somewhat reluctantly, reaffirming the basic premise of *Runyon*; private racial discrimination in the contractual, and thus

---

14. As section 1981 has no specified limitation period, and there is no analogous federal statute of limitation, the time to file the section 1981 complaint will be governed by the law of the state in which the action is filed. While the claim under section 1981 is premised on the denial of a contract, the injury for that denial is a personal injury. Consequently, the federal courts will apply the state limitations applicable to personal injury actions. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661–62 (1987). Obviously this period will differ from state to state. Nonetheless, the limitation set by the state may not single out civil rights actions and assign a limitation period so short that it undermines the substantive federal right. See generally *Burnett v. Grattan*, 468 U.S. 42 (1984) (six-month period for filing EEO race discrimination charges with state agency is inappropriate and shall *not* govern section 1981 complaints).

15. *Johnson v. Railway Express Agency*, 421 U.S. at 454; *Harris v. Richards Mfg. Co.*, 675 F.2d 811, 814–15 (6th Cir. 1982); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 204–05 (1st Cir. 1987); *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *Poolaw v. Anadarko*, 738 F.2d 364 (10th Cir. 1984).

16. *Shah v. Mount Zion Hospital & Medical Center*, 642 F.2d 268 (9th Cir. 1981); *Claiborne v. Illinois Central Ry.*, 583 F.2d 143 (5th Cir. 1978).

17. *Harris v. Richards Mfg. Co.*, 675 F.2d 811, 814–15 (6th Cir. 1982); *Sester v. Novack Investment Co.*, 638 F.2d 1137 (8th Cir. 1981); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 204 (1st Cir. 1987).

Although there is no provision in section 1981 for a successful plaintiff to recover attorney fees, 42 U.S.C. § 1988 allows for recovery of attorney fees under section 1981. Fees will be awarded according to the same terms and conditions as are available to a Title VII litigant. Compare *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) (Title VII standard for awarding attorney fees) with *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (section 1988 attorney fees, using same standard).

18. 109 S. Ct. 2363 (1989).

19. 805 F.2d 1143 (4th Cir. 1986).

20. 485 U.S. 617 (1988).

employment, relationship continues to state a claim under 42 U.S.C. § 1981; "state action" is not required.[21]

However, as to the issue originally presented to the Court—claims of racial harassment under section 1981—the Court affirmed the court of appeals, holding that the trial court correctly withheld the plaintiff's section 1981 claim of racial harassment from jury consideration. The five-justice majority reads the language of section 1981, "to make," quite literally—

> [to] extend[] only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.[22]

The Court then turned to the "to enforce" language in section 1981. In a similarly crabbed construction, the Court held that "to enforce contracts" applies to "private efforts to impede access to courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing terms of a contract."[23] The Act, thus, does not reach discriminatory "enforcement" by a party to the contract who simply discriminates in the application of general contractual terms.

The plaintiff's claim also alleged denial of a requested promotion based on race. As to this claim the Court held:

> Petitioner's claim that respondent violated § 1981 by failing to promote her, because of race, . . . is a different matter. . . . Consistent with what we have said . . . the question upon whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981.[24]

---

21. 109 S. Ct. at 2369–72.
22. 109 S. Ct. at 2373.
23. Id.
24. 109 S. Ct. at 2377.

II. Critique of *Patterson*: The Nature of "The Contract" as a Guide for Resolving Future Issues

The Court's *ratio decidendi*, based on a premise that section 1981 protections "only extend to the formation of a contract," and thus do not apply to "postformation conduct," is, of course, a grudging construction of a civil rights statute, when such statutes generally are construed with a liberal spirit to reach the intent of the drafters.[25] But even if Justice Kennedy is correct in his reading of the statutory phrase "same right to make a contract,"[26] his application of that statutory principle displays, at best, a simplistic view of the contractual underpinnings of the employment relationship.

Basic contract analysis teaches that an employment relationship is not, as Justice Kennedy surmised, a single, monolithic contractual relationship that continues uninterrupted from the initial hiring until the point the employer-employee relationship is severed. If Justice Kennedy had looked at the relationship more closely he would have seen that the relationship is a series of distinct contractual undertakings. When the employer offers a job at a stated consideration, this is an offer for a unilateral contract, a promise that is accepted by the employee's commencing performance.[27] Contracts, however, must have a termination date, i.e., a point at which performance is complete. The parties may set a fixed period, as is common in academic circles. After this period is completed a new offer is tendered or not by the employer, with the employee having the option of rejecting or accepting any offer of another period of employment.[28] Or, as is often the case, as in *Patterson*, the parties are

---

25. See *Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979).

26. The attack on Justice Kennedy's construction of section 1981, its history, and its purpose is well stated in the dissent of Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens. 109 S. Ct. at 2379 (Brennan, J. dissenting). That dissent, which goes largely to the majority's construction of the statute, is seconded, but will not be reviewed. Perhaps the most glaring flaw in the Court's analysis is the Court's reliance on the existence of Title VII remedies as a rationale to limit the scope of section 1981. 109 S. Ct. at 2374–75. The Court seems to forget that section 1981 is applicable to all contracts, many of which fall outside the employment relationship protected by Title VII. Thus, racial discrimination in an educational relationship, at least in entering into the contract (admission to the school), states a claim under section 1981. See generally *Runyon v. McCrary*, 427 U.S. 160. But given the Court's conclusion that postcontractual conduct is not covered by section 1981, presumably a child, after admission could be segregated, humiliated, harassed, insulted, belittled, and otherwise abused by school officials without officials being liable under section 1981. May a landlord, who is required by 42 U.S.C. §§ 1981 and 1982 to rent property on a racially neutral basis (see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)) rent to black families but thereafter harass these tenants in the hope of driving them to other lodgings?

27. *Restatement (Second) of Contracts* § 32, 50 (1981).

28. See *Johnson v. Chapel Hill Ind. School Dist.*, 853 F.2d 375 (5th Cir. 1988).

silent as to the duration of the contract. In such cases the courts imply that the period understood by the parties was a "reasonable" time, often determined implicitly by the period of time that the parties have set for the payment of the employee's salary (weekly, bi-weekly, monthly, etc.) or that the parties deem necessary to complete a particular task. As is the case of employment for a fixed term, upon completion of the performance for the period of time implicitly contemplated by the parties (week, bi-week, month, semester, or job) the employee is entitled to the compensation promised for past performance. At this point the contract has been performed.[29]

To continue the employment relationship a new contract must be formed. This is accomplished by the employer offering the position and consideration which will be accepted implicitly by the employee commencing work. The employer's silence upon the commencement of each new period may, through tradition, be construed as an offer of employment for a like period under similar terms as performed in the immediate past period. Nonetheless, because a new offer is being implied, the employer remains free at the commencement of any period to overcome this implication by expressly withholding the offer of continued employment (e.g., "you are fired"). Or the employer may offer the job under different terms (e.g., "you are being reassigned," or, "your pay will be cut").[30] Similarly, the employee is free to reject or accept any offer of employment, expressed or implied, either by tendering or not tendering the performance that would signify acceptance of the employer's offer (e.g., showing up for work). If the offer is not made, or if made, not accepted, no contract is formed. But once the offer is made and accepted by the employee commencing work, a new and distinct contract is formed between the parties.[31]

---

29. 3A *Corbin on Contracts* §§ 676–84 (1951), Supplement Part I (Kaufman ed. 1988), particularly § 683; C. Bakaly & J. Grossman, *Modern Law of Employment Contracts*, ch. 3 (1983, 1988 Supp.), particularly § 3.3.1.

For illustrative cases, see, e.g., *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1496–97 (11th Cir. 1989); *Page v. Carolina Couch Co.*, 667 F.2d 1156, 1158 (4th Cir. 1982); *Harper v. Cedar Rapids Television Co.*, 244 N.W.2d 782, 788 (1976); *Prior v. Briggs Mfg. Co.*, 312 Mich. 476, 20 N.W.2d 279, 282 (1945); *Pubnam v. Producers Live Stock Mktg. Ass'n*, 256 Ky. 196, 75 S.W.2d 1075 (1934); *Moline Lumber Co. v. Harrison*, 128 Ark. 269, 194 S.W. 25 (1917); *Pollack v. Shubert Theatrical Co.*, 131 A.D. 628, 131 N.Y.S. 386 (1911).

See generally, Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England*, 5 Comp. Lab. L. 85 (1982).

30. *Adair v. United States*, 208 U.S. 161, 172–73 (1908). See *Restatement (Second) of Contracts*, § 31 (1981). See also, J. Calamari & J. Perillo, *Contracts*, 56–62 (3d Ed. 1987); W. Blackstone, *Commentaries on the Law of England* 425 (Bell, ed. 1771).

31. Or the parties can be reversed, to the same effect. The employee could be considered the offeror when she applies for a vacancy, offering to work on the terms articulated by the employer in announcing the vacancy. The employer accepts the offer by employing the applicant. The terms are implicitly set by express understand-

As Justice Stevens noted in concurrence, "[a]n at-will employee, such as petitioner, is not merely performing an existing contract, she is constantly remaking that contract."[32] Indeed, it is the concept of recurring discrete contracts that serves as the conceptual underpinning of the "employment at-will" notion, a notion that allows either party without liability, prospectively to end the relationship. It is because each period is deemed to be a new contractual undertaking that the employer and the employee are "at-will" to refuse to enter the relationship for a future like period.[33]

Thus, notwithstanding the superficial continuity of the employment relationship that beguiled the Court into assuming that employment is a single contract, in the contemplation of contract law an ongoing employment relationship consists of a chain of distinct contracts; each new period of the ongoing relationship implicitly produces a new offer of continued employment that is accepted anew by the employee commencing work. The easily identified initial entry date and the obvious point where the relationship ends may make the employment relationship look like a single contract. Indeed, the internal lines of contractual demarcation that break this apparently monolithic relationship into discrete contractual units may not be clear. But the lines are there, nonetheless.

The Court's cramped view that section 1981 did not reach "post-formation conduct" thus did not alone produce the conclusion that working conditions are not within the scope of section 1981. The Court's view of section 1981, coupled with the simplistic idea that the entire employment relationship was but a single contract, resulted in the conclusion that changing employment terms during the employment relationship does not state a claim. Even with its cramped view that section 1981 reaches only discriminatory formation of contracts, had the Court at least been willing to recognize that the employment relationship is a recurring series of distinct "formations," the Court would have reached the conclusion that most changes in working conditions indeed involve discrimination in the "formation" of the contract. When, at the beginning of any

---

ing or tradition which is implicitly understood. If payment is to be made periodically, say monthly, the offer of the employee is to work for a month, and the employer's hiring is an acceptance. Nonetheless, the employee is free not to make a similar offer at the beginning of the next period, and the employer is free to reject any offer that is made. See C. Bakaly & J. Grossman, *Modern Law of Employment Contracts* ch. 3 (1983 & 1988 supp.)

32. *Patterson v. McLean Credit Union*, 109 S. Ct. at 2396 (Stevens, J. concurring in part, dissenting in part).

33. Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404 (1967); Krauskopf, *Employment Discharge: Survey and Critique of the Modern Employment at Will Rule*, 51 U.M.K.C. L. Rev. 189 (1983).

discrete employment period, the employer offers employment on terms that are different according to race from the terms offered other employees, it is failing to make, or refusing to enter, a contract on racially neutral terms. Such discriminatory terms, including a hostile environment, are being offered for the upcoming employment period. If these terms are not part of the white employee's contractual terms, then this is not postcontractual discrimination as the Court assumed, but is discrimination in the "*making*" of the contract for the next contractual period. It makes no difference that the initial contract between the parties' terms were offered on a nondiscriminatory basis. If, for the upcoming period, the terms now being offered are offered on a racially discriminatory basis, then a section 1981 claim should lie.[34]

While the Court's analysis, as applied to the facts, is an extremely narrow view of the contractual nature of the employment relationship, the holding on the facts, nonetheless, is clear. It is a holding we must live with until the Court recognizes and corrects its error; simple harassment or discriminatory allocation of working conditions to current employees is outside the protection of section 1981. But given the Court's less than complete analysis of the contractual relationship involved, the decision should be limited to its holding. Moreover, while the application of section 1981 to hiring discrimination remains firm, because the Court's analysis does not reflect contractual reality, it leaves unclear the application of section 1981 to four other categories of discrimination: promotion, discharge, compensation, and retaliation.

As might be expected, the lower courts have reached different constructions of *Patterson*. The weight of authority appears to construe *Patterson* broadly, far beyond its holding or its language, to the point that many courts seem to view section 1981 as protecting nothing more than discriminatory hiring. These decisions are marked by surprisingly little analysis of either section 1981 or *Patterson*. The Ninth Circuit in *Overby v. Chevron, USA*[35] seems to read *Patterson* to eliminate from the scope of section 1981 discrimination specifically covered by Title VII. Title VII prohibits retaliation for filing EEOC charges.[36] Consequently, the court reasons, section 1981 is not applicable to discharges based on an employee's filing EEOC

34. Thus, in an employment for a fixed period—like an academic contract—altered conditions during that term would not, given the Court's construction of section 1981, be discrimination in formation of the contract. In such cases the discrimination would continue to be midterm. However, in contracts "at-will," which by their nature are short term, recurring contracts, altering working conditions beginning with each new term, would be considered discrimination in regard to entry.

35. 884 F.2d 470 (9th Cir. 1989).

36. 42 U.S.C. § 2000e-3(a).

charges. This reading seems to ignore what *Patterson* in fact said about the "to enforce" provisions of section 1981.[37] The Sixth Circuit in an unreported decision simply concludes, again without analysis, and presumably with no precedential effect, that *Patterson* teaches that section 1981 is not applicable to discharges.[38] A number of district courts, again either with no analysis or analysis that at best is incoherent, agree with the Sixth Circuit's conclusion.[39]

The Fifth Circuit recently held that harassment ultimately resulting in the employee resigning did not state a section 1981 claim for constructive discharge.[40] This article will attempt to illustrate the error of such shallow readings of *Patterson*.[41]

Two promotion cases carried *Patterson* to an extreme not even remotely justified by the Court's holding.[42] They held that section 1981 does not apply to a denial of a promotion to a facially different job involving new responsibilities and higher pay. For reasons set

---

37. See *Jordan v. U.S. West Direct Co.*, 50 Fair Empl. Prac. Cas. (BNA) 633 (D. Colo. 1989), which held, somewhat ironically, that while racially premised harassment that included a demotion did not state a section 1981 claim, such harassment and demotion would state a claim if premised on the employee complaining about racial discrimination directed against him. In this regard, the court relied upon the "right to enforce" language of section 1981.

38. *Singleton v. Kellogg Co.*, 1989 Lexis U.S. App. 17920, mem. 890 F.2d 417 (6th Cir. 1989).

39 See, e.g., *Jones v. ANR Freight Systems*, 1990 Lexis 501 (N.D. Ill., Jan. 12, 1990), in which Judge Kocoras held that section 1981 applies only to contract formation, and not to "contract termination," and that discharge is a "termination." This is a curious analysis of an "at-will" relationship. Judge Kocoras reasons further that an employer's reinstatement of the former employee on discriminatory grounds is not a contract formation within the meaning of section 1981, but rather constitutes "continuity" of the previous "termination." Reinstatement is a continuation of termination! Judge Kocoras obviously was not going to allow logic to interfere with his denial of plaintiff's claim. See also *Alexander v. N.Y. Medical College*, 50 Fair Empl. Prac. Cas. (BNA) 1729 (S.D.N.Y. 1989); *Griddine v. Dillard Dep't Stores*, 51 Fair Empl. Prac. Cas. (BNA) 306 (W.D. Mo. 1989); *Coleman v. Domino's Pizza*, 1990 Lexis 259 (S.D. Ala. Jan. 9, 1990); *Gregory v. Harris-Teeter Super Markets*, 1990 Lexis 642 (W.D.N.C. Jan. 22, 1990); *Joseph v. Zachary Manor Nursing Home*, 1990 Lexis 755 (N.D. La. Jan. 22, 1990); *Goodson v. Cigna Ins. Co.*, 1990 Lexis 680 (E.D. Pa. Jan. 23, 1990).

40. *Carroll v. General Account Accident Ins. Co.*, 1990 U.S. App. Lexis 423 (Jan. 16, 1990). Accord *Leong v. Hilton Hotels Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 738 (Haw. 1989). The Eleventh Circuit, *sua sponte* and apparently without argument from the parties, held that section 1981 would not reach retaliation by a former employer who caused a former employee to be discharged by the plaintiff's subsequent employer. The court reasoned, with some logic, that since the contractual relationship between the plaintiff and his former employer had been severed at the time of the alleged retaliation took place there was no denial of a contract right by the former employer. See *Sherman v. Burke Contracting Co.*, 1990 U.S. App. Lexis 520 (11th Cir. Jan. 16, 1990).

41. See *Gamboa v. Washington*, 50 Fair Empl. Prac. Cas. (BNA) 524 (N.D. Ill. 1989); *English v. General Development Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1989), which held that section 1981 is applicable to discriminatory discharges.

42. See *Greggs v. Hillman Distributing Co.*, 50 Fair Empl. Prac. Cas. (BNA) 429 (S.D. Tex. 1989); *Byrd v. Pyle*, 51 Fair Empl. Prac. Cas. (BNA) 556 (D.D.C. 1989).

forth in this article, these decisions, too, seem to be an overly enthusiastic reading of *Patterson* totally unsupported by the language of section 1981 or basic contract principles.[43]

III. The Future of *Patterson*

A. *Hiring and the Allocation of Burdens*

Patterson reaffirmed that use of racial considerations in denying an initial contract, or the discriminatory application of terms in the contract at the time of formation, will state a section 1981 claim.[44] *Patterson* also recognized that direct evidence of illegal motive is not necessary to prove the necessary racial motive; inferences of illegal motive would be created under the same standards of proof applicable to Title VII of the Civil Rights Act of 1964.[45]

Under traditional disparate treatment analysis for proving improper motivation, once plaintiff proves that she possessed the basic qualifications for a vacancy, applied, and was rejected in favor of a person from another class, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the rejection of the plaintiff.[46] Failure of defendant to present evidence of a legitimate reason for the decision to reject the plaintiff, evidence that would support a fact finder's concluding that the reason motivated the action, will result in a judgment for the plaintiff. If defendant carries the burden of presenting a legitimate reason for its rejection of the plaintiff, then in order to prevail, plaintiff must carry the ultimate burden of persuading the fact finder of defendant's illegal motive.[47]

The Fourth Circuit in *Patterson* had held that if the employer's articulated reason for rejecting the plaintiff was that the person actually hired was better qualified for the vacancy than was the plaintiff, the burden returned to the plaintiff to convince the fact finder that plaintiff was better qualified than the incumbent employee. That is, if plaintiff cannot convince the fact finder that she

---

43. See *Williams v. National R.R. Passenger Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 721 (D.D.C. 1989) (construing *Patterson* to preclude section 1981 claims based on pay discrimination, at least if no new and distinct job was involved).

44. 109 S. Ct. at 2372 and 2376–77. See *Teamsters v. United States*, 431 U.S. 324, 363–71 (1977), which applied section 1981 to racial discrimination in hiring and to class members who, because of the pattern of discrimination, were deterred from seeking employment. Presumably, deterred applicants would continue to be treated as actual applicants for purposes of class action remedies.

45. 109 S. Ct. at 2373. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1983).

46. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

47. *Texas Dep't of Community Affairs v. Burdine*, at 254; *United States Postal Service v. Aikens*, 460 U.S. 711 (1983); see Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 Mo. L. Rev. 17 (1984).

was *more* qualified than the white employee who received the job, according to the Fourth Circuit, the employer was entitled to prevail.

The Supreme Court properly rejected this analysis.[48] The Court held that plaintiff's burden is simply to prove improper motive, to prove that defendant's articulated reason was merely a pretext. This may be accomplished in many ways. Certainly, evidence that plaintiff was more qualified than the employee awarded the job is relevant to, if not conclusive evidence of, the pretextual nature of the defendant's proffered reason.[49] But, even if that relative superiority is not proved by plaintiff, plaintiff may still be able to prove the pretextual nature of defendant's reason through other evidence,[50] and pretext is the only fact that plaintiff must prove. "[Plaintiff] may not be forced to pursue any particular means of demonstrating that [defendant's] stated reasons are pretextual."[51]

Title VII models used in "direct evidence/fixed motive" cases[52] will presumably continue to be applied in section 1981 actions.[53]

B. *Promotions*

The court of appeals in *Patterson* held that "[c]laims of racially discriminatory promotions go to the very existence and nature of the employment contract and thus fall easily within section 1981's protection."[54] Justice Kennedy thought this "somewhat overstates the case" and thus was unwilling to concede that promotions *always* state section 1981 claims. He reasoned:

> [T]he question whether a promotion claim is actionable under section 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under 1981. . . . Only where the promo-

---

48. 109 S. Ct. at 2378–79.

49. See *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978). See also, Player, *Applicants, Applicants in the Hall, Who's the Fairest of Them All? Comparing Qualifications Under Employment Discrimination Law*, 46 Ohio St. L.J. 277, 290–312 (1985).

50. The Court specifically mentioned instances of racial harassment as such evidence. 109 S. Ct. at 2378. Other evidence indicating the pretextual nature of articulated reasons has included the timing of the reason given (*Locke v. Kansas City Power & Light*, 660 F.2d 359, 365 (8th Cir. 1981)); statistical showing of underrepresentation of plaintiff's class (*Person v. J.S. Alberici Const. Co.*, 640 F.2d 916 (8th Cir. 1981); *Etzell v. Mobile Housing Bd.*, 709 F.2d 1276, 1382 (11th Cir. 1983)); statements indicating a class prejudice (*Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 546 (8th Cir. 1984)); disparate application of the reason being articulated (*Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989 (8th Cir. 1984)); *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983)).

51. 109 S. Ct. at 2378.

52. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

53. *Estes v. Dick Smith Ford Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988); *Mullen v. Princess Ann Volunteer Fire Co.*, 853 F.2d 1130, 1133 (4th Cir. 1988).

54. 805 F.2d at 1145.

> tion rises to the level of an opportunity for a new and distinct relation between the employee and employer is such a claim actionable.[55]

In spite of the Court's misgivings, given a proper analysis of the contractual relationship, it is difficult, perhaps impossible, to envision a promotion that does not "rise to the level of a new and distinct relation." Even if we can assume that employment in a particular job is but a single employment,[56] by definition a promotion entails new duties, responsibilities, and loyalties, not to mention a different, presumably higher, compensation. If the employer is under no obligation to offer this position to the plaintiff, and if the plaintiff is under no obligation to accept the position if offered, a new contractual relationship is being contemplated. If that new and different contractual relationship is denied plaintiff on the basis of race, or offered on racially discriminatory terms, a section 1981 claim is stated. Such reasoning is applicable to any job change, vertically or laterally, to any job that the employer was not under a prior contractual obligation to offer.

This is as it must be. If an outside, nonemployee seeks, and is denied, the distinct position the employer is seeking to fill, and this denial is because of the outside applicant's race, clearly that denial violates section 1981. A current employee who seeks and is denied the same position because of race cannot have any less of a claim to statutory protection than does an outside applicant for the position.

Perhaps the only "promotion" subject to the *Patterson* exclusion from section 1981 protection would be automatic salary increases that come as a matter of course, subject only to the employer taking affirmative steps to deny the increase. One example of this would be the nearly automatic in-grade, step increases common in the civil service, which are dependent only on satisfactory job performance.

Prior to *Patterson* the lower courts had uniformly applied section 1981 to racial denial of promotions.[57] There is no reason to

---

55. 109 S. Ct. at 2377.

56. See notes 27–33 and accompanying text, for a critique of the Court's analysis.

57. See, e.g., *Gay v. Waiters & Dairy Lunchmen's Local Union No. 30*, 694 F.2d 531, 536 (9th Cir. 1981); *Dougherty v. Barry*, 869 F.2d 605 (D.C. Cir. 1989); *Swapshire v. Baer*, 856 F.2d 948, 952 (8th Cir. 1989); *Foster v. Board of School Commissioners of Mobile County*, 872 F.2d 1563 (11th Cir. 1989); *Schwenke v. Skaggs Alpha Beta, Inc.*, 858 F.2d 627, 628 (10th Cir. 1988); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1395 (8th Cir. 1983); *Larkin v. Pullman-Standard Div. Pullman, Inc.*, 854 F.2d 1549, 1554, 1567 (11th Cir. 1988); *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108, 1115 (3d Cir. 1988); *Roebuck v. Drexel University*, 852 F.2d 715 (3d Cir. 1988) (tenure denial); *Cowan v. Prudential Insurance Co.*, 852 F.2d 688 (2d Cir. 1988).

Note also that section 703(e) of Title VII, 42 U.S.C. § 2000-2(e), allows employers "to hire" on the basis of sex, religion, or national origin in those instances where sex, religion, or national origin are "bona fide occupations." Clearly, the terms "to hire" are applicable to promotions and lateral transfers, allowing the defense to be asserted

believe that the Court altered this well-established law.[58] To the extent that promotions are treated as refusals to contract, the standards of proof generally applicable to hiring cases, as outlined in *Patterson*, will be applied.[59]

C. *Discharges*

1. Actual Terminations (or the Refusal to Renew)

Unlike promotions, which the Court at least addressed, the discussion of discharges is conspicuous by the Court's total silence; the word "discharge" was not mentioned. While the analysis of the Court could be superficially construed to exclude discharges from the scope of the Act,[60] upon closer analysis, the Court did not and could not have excluded discharges from the protection of section 1981.

On at least seven occasions the Court has had section 1981 discharge claims before it, and in each case the Court either held or assumed that discharges on the basis of race fall within the protections of section 1981.[61] This line of authority began with *Johnson v. Railway Express Agency*,[62] where the Court held that pursuit of Title

---

in those situations. The employees are being *hired* into those positions. See *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984). There is no reason why the same broad concept of hire should not be applicable under section 1981.

58. Cf. *Griggs v. Hillman Distributing Co.*, 50 Fair Empl. Prac. Cas. (BNA) 429 (S.D. Tex. 1989), where Judge Harmon held that denying a promotion from a "sales manager" to a "district manager" was not a "new and distinct" relationship which stated a claim under section 1981. This ruling was made in granting defendant's motion under Fed. R. Civ. P. 12(b)(6), to dismiss plaintiff's section 1981 claim. The court was thus holding, without any inquiry into the factual differences between the two jobs ("sales manager" and "district manager"), that, as a matter of law, the complaint failed to state a claim. This holding is so wrong in its application of basic contract principles, wrong in its application of even the mean spirited language of *Patterson*, and wrong in the proper use of Rule 12(b)(6) of the Federal Rules that the decision needs no comment to illustrate its error. Presumably, it will be reversed on appeal. At the very least, there was a potential factual issue of whether the "district manager" job denied to the plaintiff because of his race was a "new and distinct" position. This case illustrates how a narrow, mean spirited decision like *Patterson* can inspire and embolden lower courts hostile to civil rights claims to emasculate even further the rights created by the legislation.

59. See notes 46-53 and accompanying text.

60. A discharge, by definition, comes after the original hiring. Thus, if section 1981 does not apply to "posthiring" treatment, the argument follows that section 1981 cannot apply to discharges.

61. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 459–60 (1975); see generally *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Delaware State College v. Ricks*, 479 U.S. 250 (1980); *Burnett v. Grattin*, 468 U.S. 42 (1984); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987), all of which predated *Patterson*. Since *Patterson*, the Court assumed, without deciding, that section 1981 covered racially discriminatory discharges. See generally *Jett v. Dallas Ind. School Dist.*, 109 S. Ct. 2702 (1989).

62. 421 U.S. 454 (1974).

VII procedures for a racially premised discharge did not toll the statute of limitations for a section 1981 claim.

Delaware State College v. Ricks[63] similarly involved the application of a statute of limitations to a section 1981 discharge claim. The issue was whether the limitation period began running at the last day of employment or when the employee was unequivocally informed of the employer's decision to terminate the relationship. Obviously, there would have been no need to reach this issue if terminations were not within the scope of section 1981.[64]

The seminal case, however, is *McDonald v. Santa Fe Trail Transportation Co.*[65] The Court was faced with the specific issue of whether a discharge of a white worker for theft, while retaining an equally guilty black worker, stated a claim under section 1981. A basic argument of the employer was that whites are not protected by the 1866 Act. The Court held that section 1981 prohibitions against race discrimination were equally applicable to all races, and thus a racially premised discharge violated section 1981.

This premise was unambiguously reaffirmed in *St. Francis College v. Al-Khazraji*.[66] An Iraqi was denied reappointment as a professor, and the employer denied liability on the grounds that there was no discrimination that could be described as "racial." The Court disagreed, and held that discriminatory refusal to retain the Iraqi

---

63. 479 U.S. 250 (1980).

64. This case illustrates also the conceptual difficulty of distinguishing between a discharge and a refusal to offer continued employment. Was the professor denied a position for the next school year being discharged, or was the employer refusing to hire the teacher? Contractually it makes no difference. The individual was not being offered a job for the next period of employment. The Court held that the employer's unequivocal statement that the employee would not be retained triggered the statutory time period. This supports the idea that a discharge of an employee is identical to the decision not to hire an applicant.

See also *Burnett v. Grattin*, 468 U.S. 42 (1984), that also involved the applicable statute of limitations to a section 1981 discharge claim. The trial court dismissed the section 1981 complaint of discharged white workers based on the application of a state six-month statute of limitation. The court of appeals reversed and remanded. The Supreme Court agreed with the court of appeals and affirmed the reversal on the grounds that the trial court had applied the wrong statute of limitations. Significantly, all of the courts, including the Supreme Court, assumed that the dismissal of white workers on the basis of race fell within section 1981. And, again, if discharges were not within section 1981, the Court, presumably, would have affirmed the trial court dismissal of the complaint on the alternative ground that the complaint failed to state a claim. That it again, for the third time, was addressing the obviously complex issue of statutes of limitations for discharge claims under section 1981 establishes that section 1981 covered discharges.

65. 427 U.S. 273 (1976).

66. 481 U.S. 604 (1987).

on the basis of his ethnic origins was racial discrimination that the 1866 Act remedied.[67]

Thus, two cases specifically faced the issue of racially premised discharges under section 1981, and in each case held that a claim was stated. Four others assumed that section 1981 applied to discharges as the Court repeatedly wrestled with the application of the appropriate statute of limitations applicable to such discrimination. Given these holdings, it is not surprising that every circuit that has decided the issue has recognized without dissent that racially premised discharges are within the protection of section 1981.[68]

To hold that discharges are not within the scope of section 1981, the Court would have to reverse a long line of its own cases and overturn the law in every circuit. Save for a lame attempt to explain *Goodman v. Lukens Steel*,[69] the Court did not criticize, distinguish,

---

67. Again, as in *Ricks*, note 55, *Al-Khazraji* illustrates the conceptual difficulty of distinguishing between the discharge of an employee and the refusal to retain that employee for a future period of time. Did St. Francis College refuse to hire Mr. Al-Khazraji, or did they discharge him? The answer is, they denied him a contract, and such a denial states a section 1981 claim.

Soon after *Al-Khazraji*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), addressed the harassment and discharge of a number of black employees represented by a union. The issues before the Court were (1) the proper state statute of limitations and (2) union liability for its failure to file grievances on behalf of the employees harassed and discharged by the employer. In addressing the latter issue, the Court assumed that the employer's discharge of the workers violated section 1981, and held that the union, too, by its failure to file grievances on behalf of the employees, using race as a factor in that decision, also violated section 1981. Moreover, and again, for the fourth time the Court, assuming that section 1981 applied to discharges, analyzed the appropriate statute of limitations applicable to such discharges.

See also *Johnson v. Chapel Hill Ind. School Dist.*, 853 F.2d 375 (5th Cir. 1988).

68. *Hudson v. Souutheim Duictile Casting Corp.*, 849 F.2d 1372, 1375 (11th Cir. 1899); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446–47 (10th Cir. 1988); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987); *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1439, 1445 (9th Cir. 1989); *Edwards v. Jewish Hospital of St. Louis*, 855 F.2d 1345 (8th Cir. 1988); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102, n.2 (8th Cir. 1988); *Reeder-Baker v. Lincoln Nat'l Corp.*, 834 F.2d 1373, 1378 (7th Cir. 1987); *Price v. Digital Equip. Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988); *Kelly v. TKY Refractories Co.*, 860 F.2d 1188, 1198 (3d Cir. 1988); *Taitt v. Chemical Bank*, 849 F.2d 775, 777 (2d Cir. 1988); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 202 (1st Cir. 1987).

69. 482 U.S. 656 (1987). The *Patterson* Court explained *Lukens Steel* on the grounds that the union's liability under section 1981 was its failure "to enforce" the contract between the individual and the employer. *Patterson*, 109 S. Ct. at 2373. First, the union's failure was based on allegedly discriminatory job assignments and discharges *by the employer*. The Court assumed that the illegal conduct by the employer triggered the union's duty to grieve the treatment. If the employer had not acted illegally, the union's duty to protect the employee would have been less clear. Moreover, and more importantly, it is the enforcement of the union's contractual and legal obligation *to its members* that serves as the basis of the union's section 1981 liability. Any contractual right between the union and employer protecting employees against racial discrimination is not between the union and the employer. It is the union that enforces this contract right, and it is the alleged failure of the union that serves as

or limit in any way this existing authority.[70]

The lower courts, therefore, continue to be bound by unreversed Supreme Court authority unambiguously applying section 1981 to racially premised discharges. They must assume that until that authority is reversed or limited by the Court, *Patterson* worked no change in this aspect of section 1981.

This conclusion is confirmed by *Jett v. Dallas Ind. School Dist.*,[71] which was decided seven days after *Patterson*. The Court reviewed a court of appeals' conclusion that local governmental bodies cannot be liable under a theory of *respondeat superior* for their agents' violations of the rights guaranteed by section 1981.[72] A white football coach was removed from his coaching job by a school system principal. The coach alleged that his removal and reassignment were racially motivated, and thus violated 42 U.S.C. § 1981. He sued the

---

the basis for the union's liability to the employee. This liability has little to do with whether or not the employer has breached a contract with the individual. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554 (1976). The union's duty is an ongoing obligation of the union to the member. It is the breach of this obligation between union and member on racial grounds that serves as the basis of the union's section 1981 liability to the member, not, as *Patterson* assumed, whether the union is selectively enforcing the collective contract between the union and the employer. Finally, this reasoning results in a paradox: an employer responsible for an employee's injury will not be liable for racially premised discharges under section 1981, but the union is liable for its failure to protest these discharges. The employer, which is primarily responsible for the employee's injury, would not have to respond, while the union, which is only secondarily liable, would be solely liable under section 1981 for the damages suffered by the employee. The union then becomes the insurer of employer conduct. Such is hardly sound labor policy. See *Vaca v. Sipes*, supra; *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983).

70. Indeed, the Court stated, "Neither our words nor our decisions should be interpreted as signaling one inch of *retreat* from Congress' policy to forbid discrimination in the private, as well as the public, sphere." 109 S. Ct. at 2379. This emphasizes the subsequent statement of the Court that "the Act simply does not cover the *acts of harassment alleged here*." Id. (emphasis added). Such limiting language suggests, therefore, a narrow application of the decision to the facts before it, and not a sweeping *sub silentio* reversal of established constructions of Congress' intent.

Moreover, the district court below had submitted the issue of discriminatory discharge and promotion to the jury. The Fourth Circuit did not challenge the propriety of this action. 805 F.2d at 1143. While the Supreme Court did comment on what it saw as an overstatement by the court of appeals on the protection for promotions, 109 S. Ct. at 237, conspicuously, the Court did not comment on the district court's instruction as to racially premised discharge being a violation of section 1981. Given the Court's comment on the promotion instruction, if the Court had found the discharge submission improper, it presumably would have given similar critical comment regarding discharges. The Court's silence in this context thus suggests approval of the lower court's submission of the discharge claim.

Finally, the dissent most certainly would have raised the discharge issue had they read the majority as undermining well-established authority applying section 1981 to discharges. The dissent's failure to raise a challenge on this issue suggests that no change in existing law was proposed by the majority.

71. 109 S. Ct. 2702 (1989).

72. Id. at 2709.

school system. In resolving the issue presented, that section 1981 does not allow municipal liability premised on *respondeat superior*, the Court noted that neither party even "raised the contention that the substantive scope of the right . . . to make . . . contracts protected by section 1981 does not reach the injury suffered by petitioner here."[73] The Court proceeded to analyze the narrow *respondeat superior* issue, stating, "[W]e assume for the purpose of these cases, without deciding, that petitioner's rights under section 1981 have been violated by his removal and reassignment."[74]

While, of course, such a disclaimer allows the Court itself to revisit the issue free from claims of *stare decisis*, until it does so, the Court's continued application of section 1981 to discharges should be binding on the lower courts. If the Supreme Court assumes, in light of its holding in *Patterson*, that section 1981 is applicable to discharges, the lower courts are not free to make a contrary assumption. Moreover, the Court's assumption is itself instructive in that it seems relatively clear that if, in light of *Patterson*, a discharge was no longer protected under section 1981, there would have been no need for *Jett* to address the more narrow issue of *respondeat superior* liability for that discharge. If *Patterson* had, in fact, resolved this issue—that discharge claims do not fall within section 1981—it is unlikely that the Court would have assumed the exact opposite only one week later.[75]

Wholly apart from this authority, analytically, discharges must continue to be considered within the scope of section 1981. A termination, or discharge, is a way of articulating the employer's ex-

---

73. Id at 2709. This, of course, suggests that the parties and the lower court simply assumed the obvious from existing law, that section 1981 reaches racially premised discharges. They accepted this premise even with the *Patterson* decision from the Fourth Circuit. Thus, even with the *Patterson* holding by the Fourth Circuit that harassment did not fall within section 1981, it was so well established that discharges fall within section 1981 even defendant did not raise it, perhaps for fear of incurring sanctions for litigating frivolous issues!

74. Id. at 2710.

75. See also *Lytle v. Household Manufacturing, Inc.*, in which the plaintiff alleged a section 1981 claim for racially premised discharge. The Court of Appeals for the Fourth Circuit affirmed a dismissal of a section 1981 claim. The Court granted certiorari, presumably to resolve the issue of the collateral estoppel effect of a Title VII dismissal on a section 1981 claim in regard to the petitioner's constitutional right to a trial by jury. 109 S. Ct. 3239 (1989). Perhaps, when it resolves the case, the Court will use it as a vehicle to analyze further the scope of section 1981 and reverse *McDonald, Al-Khazraji, et al.* But even if that is so, the grant of certiorari in *Lytle* clearly indicates that *Patterson* itself does not hold that racially premised discharges are outside the scope of section 1981. If *Patterson* held that section 1981 does not reach racially premised discharges, the Court simply would have denied certiorari, allowing the trial court's dismissal of the section 1981 claim to stand. At best, the grant of certiorari suggests, as does *Jett*, that a discharge claim can be made under section 1981. At worst, the grant of certiorari in *Lytle* suggests that *Patterson* did not resolve the issue.

pressed refusal to offer a renewed contractual relationship. Or, alternatively, depending on which party is deemed to be the offeror, by "discharging" an employee the employer is refusing to accept the employee's offer of continuing employment service. In short, and however it is analyzed, the employer is doing nothing more, nothing less, than *refusing to contract* further with the employee for the employee's services. Therefore, even with *Patterson*'s myopic view of the Act, when the employer refuses on the basis of race, to contract further for the employee's services by "discharging" the employee, section 1981 is violated.[76] Any attempt to distinguish in contractual terms the refusal to hire and the discharge of a current employee is futile.[77]

An example will illustrate this futility. Assume that a discharged worker immediately reapplied for the very vacancy created by his discharge. Of course, the discharged employee would be denied the position, based on the same reasons that motivated his discharge. If the termination was racially motivated, a section 1981 claim has been created, because upon reapplication, the former employee (now as an applicant) would be directly and immediately denied a contract because of race. Since the Court could not be requiring the terminated employee to take the futile step of applying for the job from which he was discharged as a condition precedent for a section 1981 claim, we must assume that the discharge itself is treated as tantamount to a refusal to contract. The Court surely would not deny the former employee a claim when he was rejected for the vacancy on racial grounds, when a third party applying for

---

76. See *Estes v. Dick Smith Ford, Inc.*, 856 F.2d at 1102.

77. See *Delaware State College v. Ricks*, 479 U.S. 250 (1980), where a professor was told that he was not going to be issued a contract for the next academic year. This was treated as a discharge which took place, not as an indication that the contract period had ended but as an indication that the teacher would not be employed, thus triggering the statute of limitations period at the point of this notice, and not at the end of the employment period. But the facts could have been construed as an announced refusal of the employer to tender an offer of employment. Either way it was the refusal to contract which the Court correctly assumed to state a section 1981 claim.

See also *Hishon v. King & Spalding*, 678 F.2d 1022, 1030 (dissent), rev'd 467 U.S. 69 (1984) (refusal to promote that results in termination is tantamount to discharge); *Roebuck v. Drexel University*, 852 F.2d 715 (3d Cir. 1988) (denial of tenure and termination for failure to secure tenure are inseparable). See generally *Johnson v. Chapel Hill Ind. School Dist.*, 853 F.2d 375 (5th Cir. 1988). Nonetheless, at least one court has made a distinction between hiring discrimination which is within the scope of section 1981 and discharges, which are not. *Greggs v. Hillman Distributing Co.*, 50 Fair Empl. Prac. Cas. (BNA) 429 (S.D. Tex. 1989). See generally *Carter v. Aselton*, 50 Fair Empl. Prac. Cas. (BNA) 633 (D.Colo. 1989). Contra *Gamboa v. Washington*, 50 Fair Empl. Prac. Cas. (BNA) 524, 528 (N.D. Ill. 1989), that correctly recognizes that *Patterson* does not alter the law regarding section 1981's application to racially motivated discharges. Accord *English v. General Development Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1989).

the same vacated position clearly would have a section 1981 claim if he were rejected.

Moreover, assume the discharged worker was fired to allow employment of a white worker, and to fulfill its goal of hiring a white worker the employer rejected another black applicant who also applied for the vacancy. The black applicant who was simply denied a job will have a section 1981 claim, but if section 1981 does not apply to discharges, the black employee who lost his job to create the vacancy for the white worker will be without a section 1981 claim. Thus, the person most injured by this discrimination, the discharged employee, is the one denied a section 1981 remedy.

Finally, the failure to protect employees from racially motivated terminations under section 1981 renders the protection granted to employees entering an employment contract an extremely fragile shell. The employer bent on discrimination could engage in ostensibly neutral hiring, followed by racially premised terminations, and thus destroy any true ability of racial minorities to maintain a racially neutral contractual relationship. Congress could not have intended its guarantee of contractual equality granted in the 1866 Act to be so fragile or so easily circumvented.[78]

2. "Constructive Discharge": Indirect Protection Against Harassment

We know from *Patterson* that section 1981 does not reach discrimination in the allocation of working conditions or the creation of a hostile working environment. But if section 1981 reaches discharges, as it must, section 1981 must be applicable also to treatment that is designed to force, and succeeds in forcing, an employee to quit. Protection against direct discriminatory discharges is meaningless if an employer can avoid such prohibitions by the expedient

78. As is clear from its face, section 1981 is applicable to all contracts, not just employment. Consequently, the refusal to enroll a student in a private school because of race, similar to the refusal to hire, will state a section 1981 claim. *Runyon v. McCrary*, 427 U.S. 160 (1976). If *Patterson* makes section 1981 inapplicable to contract terminations, presumably section 1981 would not apply to racially premised dismissals from schools. Thus, while a school could not refuse to enroll an applicant because of race, the school would be free either to expel the student on racial grounds, or more subtly, simply to deny reenrollment of the student for the next following school term. Similarly, a lessor is required by the 1866 Act to rent property on a race-neutral basis. See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Surely the Act cannot be construed to allow the lessor, after leasing the property to the black tenant, to evict the tenant on the grounds that termination is an unprotected "postcontractual" action.

of simply driving the employee away.[79] It is thus well established that when an employer makes working conditions so intolerable that the employee is forced to quit, the quitting will be treated as a "constructive discharge."[80] There is no reason to believe that the logic underlying the concept of indirect, or constructive, discharge is any less valid under section 1981. When an employer desires to sever his relationship with the employee on racial grounds and achieves this result so that the employee cannot reasonably continue the relationship, it must be said that the employer has discharged the employee as surely as if the employer had directly ordered the employee from the premises. Stated somewhat differently but in more accurate contractual terms, if the employer harasses the employee for the purpose of causing the employee not to accept the pretextual offer of continued employment, this should be treated as though the employer in fact refused to tender an offer of employment. The employer was tendering employment on such discriminatory terms that the employee had no reasonable choice but to reject the offer.[81]

While constructive discharge analysis has been broadly applied under section 1981,[82] two unique problems arise. The first is the Court's holding in *Patterson* that simple harassment is not illegal under section 1981. Under the majority and preferred Title VII analysis, if an employee quits in reasonable response to the illegal treatment, the employee's resignation is treated as a discharge, even if

---

79. Treating "constructive" termination of a relationship as an actual termination is an established principle of law. In the law of landlord and tenant, for example, it has long been established that a lessor who drives out a tenant by affirmative acts designed to cause the tenant to vacate the premises will be deemed to have evicted the tenant. *American Law of Property*, 279–83 (Casner, ed. 1952); Cribbet & Johnson, *Principles of the Law of Property* 248–49 (3d Ed. 1989); Cunningham, Stoebuck & Whitman, *The Law of Property* 296–98 (1984).

80. *Levendos v. Stern Entertainment Inc.*, 860 F.2d 1227, 1230 (3d Cir. 1988); See generally *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369 (5th Cir. 1981); *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559 (1st Cir. 1986); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50 (6th Cir. 1985); *Bruhwiler v. University of Tennessee*, 859 F.2d 419, 421 (6th Cir. 1988); *Henry v. Lennox Industries, Inc.*, 768 F.2d 746, 752 (6th Cir. 1985).

81. Cf. *Leong v. Hilton Hotels*, 50 Fair Empl. Prac. Cas. (BNA) 738 (D.C. Haw. 1989), which reasoned that since *Patterson* held that harassment does not state a section 1981 claim, a constructive discharge claim based on harassment must likewise be dismissed. Such reasoning is of course a *non sequitur*. Forcing an employee to sever a contractual relationship is patently distinguishable from treating a person differently while maintaining a desire to continue the contractual relationship.

82. *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989); *Lopez v. S.B. Thomas*, 831 F.2d 1184, 1188–89 (2d Cir. 1987); *Maratin v. Citibank, N.A.*, 762 F.2d 212, 221 (2d Cir. 1985).

the employer had *no specific intent to cause the employee to quit.*[83] Under section 1981 when an employee quits in response to workplace harassment, unlike under Title VII where such harassment is illegal, the quitting employee will not be responding to treatment made illegal by this Act. The section 1981 plaintiff will not be entitled to a remedy based solely on the fact that she was responding reasonably to illegal treatment, but will have to prove illegal treatment apart from the workplace discrimination. The second problem is that section 1981 liability is premised on proving a racial motivation for the treatment.[84] Thus, if the employer does not intend on racial grounds to cause the employee to quit, the employer will not be liable.[85]

There are thus two motivational elements plaintiff must prove to establish a claim of constructive discharge under section 1981. First, plaintiff must prove that defendant acted with the purpose of causing the plaintiff to resign (or not to accept the offered employment). Second, plaintiff must prove that defendant was motivated in its desire to cause plaintiff to resign (or reject the offer of employment) by racial considerations. Treatment without an intent to cause the employee to quit, or treatment desiring the employee to quit, but based on a nonracial reason, would not violate the Act.

The plaintiff should be aided in the quest of proving that the employer intended the employee to quit by the evidentiary assumption that persons are presumed to intend the natural and foreseeable consequences of their actions.[86] Thus, if a natural and foreseeable consequence of the harassment is that the worker would quit (or not accept an offer of continued employment), we can infer from this

---

83. Id.; see particularly, *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), aff'd in part, rev'd in part, 109 S. Ct. 1775 (1989) where the court stated: "[A] number of cases, including one relied on by this court in *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981)] have rejected the notion that the employer must have the specific intent of forcing the employee to quit. See, e.g., *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Bourque v. Powell Electrical Manufacturing Co.*, 617 F. 2d 61, 66 (6th Cir. 1980). These courts instead held that it is sufficient if the employer simply tolerates discriminatory working conditions that would drive a reasonable person to resign. 825 F.2d at 472. On certiorari to the Supreme Court, the Court noted: "Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to propose [plaintiff] for partnership amounted to a constructive discharge." 109 S. Ct. 1775, 1781 n.1 (1989); cf. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981); *Coe v. Yellow Freight System Inc.*, 646 F.2d 444, 454 (10th Cir. 1981); *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268 (4th Cir. 1981), that suggest a requirement of a specific intent.

84. *General Building Contractors Ass'n v. Pennsylvania*, 457 U.S. 375 (1982).

85. See *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989), where alleged constructive discharge for exercise of free speech required proof of specific intent.

86. *NLRB v. Erie Resistor*, 373 U.S. 221, 228 (1963); *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 675 (1961).

that the employer intended that result.[87] As the Court stated at one time, "[I]t is discriminatory and it does discourage . . . [I]t carries with it unavoidable consequences which the employer not only foresaw but which he must have intended."[88]

Plaintiffs are aided in proving the second element, that of racial animus for the desired resignation, by the Court's discussion in *Patterson*. "We agree that racial harassment may be used as evidence that a divergence in the explicit terms of particular contracts is explained by racial animus."[89] Thus, expressed animus or midcontractual treatment along racial lines will be strong evidence of the employer's racial motive for the harassment.

If plaintiff succeeds in proving those two motivational elements—(1) desire that the employee quit and (2) racial basis for this desire—plaintiff will have to establish, in addition, that the quitting was a reasonable response to the employer's treatment. If the employee's response is deemed unreasonable, the employee will not be treated as though she were discharged. Minor or sporadic insult would not reasonably cause one to quit her job, and thus would not be considered as a discharge.[90] Nonetheless, treatment need not be onerous, particularly if laced with recurring racial insult, for a pattern of treatment to reach a level where a person reasonably would quit rather than continue to suffer.[91] Even single events of serious discrimination can be considered constructive discharges. In *Price Waterhouse*,[92] for example, the refusal to promote an employee was considered a constructive discharge.[93] Similarly, a transfer to a "dead end" position has been considered tantamount to a discharge, warranting the employee's resignation.[94] Forced participation in a religious devotional service, which caused the employee to quit rather than attend, was considered a discharge.[95]

Perhaps even less harassment will suffice under section 1981 than is necessary to state a Title VII claim. One of the reasons a significant level of harassment is required in the Title VII context is that the employee has available a legal remedy under Title VII

---

87. See *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir. 1984). See also, *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511, n.5 (11th Cir. 1989).

88. *NLRB v. Erie Resistor*, note 78, at 228.

89. 109 S. Ct. at 2376.

90. See, e.g., *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981); *Heabney v. University of Washington*, 642 F.2d 1157 (9th Cir. 1981); *Cazzola v. Codman & Shurtleff, Inc.*, 751 F.2d 53 (1st Cir. 1984).

91. See, e.g., *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227 (3d Cir. 1988).

92. *Hopkins v. Price Waterhouse*, 825 F.2d at 472–73.

93. Accord *Bruhwiler v. University of Tennessee*, 859 F.2d 419 (6th Cir. 1988).

94. *Parrett v. City of Connersville*, 787 F.2d 690 (7th Cir. 1984), cert. denied, 469 U.S. 1145 (1985).

95. *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975).

that would stop the harassment. Thus, when the employee quits rather then pursue the Title VII remedy, the question of the reasonableness of the employee's response is framed as to whether a reasonable person would have quit rather than seek available legal redress. In light of the legal remedy alternative, it takes a significant level of harassment to justify a person foregoing available legal remedies in favor of leaving her job. However, since *Patterson* holds that an employee has no legal redress under section 1981 against recurring harassment, the level of hostility that must be reached before a reasonable person would quit—the victim having no recourse but to quit—should be lower than it would be in a Title VII context.[96]

Thus, perhaps unbeknownst to the Court, the concept of constructive discharge should serve as an indirect method by which harassment will continue to be remedied.[97] In reality, therefore, perhaps the only persons adversely affected by *Patterson* will be those employees who do not respond to the harassment by terminating their employment.[98]

D. *Compensation*

Prior to *Patterson* claims addressing discriminatory salary adjustments, raises, bonuses, etc., were rountinely recognized as being

---

96. Plaintiff must prove also that she in fact quit in response to the treatment, and not for unrelated personal reasons. *Henson v. City of Dundee*, 682 F.2d at 907–08.

97. See *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d at 1503, where the issue was whether plaintiff demonstrated sufficient racial harassment to justify a jury finding that the plaintiff had been constructively discharged because of his race. The employer, citing the Fourth Circuit decision in *Patterson*, argued that plaintiff failed to state a claim when the claim ultimately was based on harassment. The court rejected this argument and distinguished *Patterson* as a "pure" harassment case, which would not control where the harassment rose to the level of being a constructive discharge. The court reasoned that harassment causing a person to stop working is impairing the ability to make and enforce her employment contract. 863 F.2d at 1509, n.3 Accord, *Gamboa v. Washington*, 50 Fair Empl. Prac. Cas. (BNA) at 528 (post-*Patterson* holding that harassment amounting to a demotion or constructive discharge states a section 1981 claim). Contra, *Leong v. Hilton Hotels*, 50 Fair Empl. Prac. Cas. (BNA) 738 (D. Haw. 1989).

98. Id. This, in turn, suggests the silliness in excluding harassment itself from the scope of the Act. For reasons set forth above, protection against hiring discrimination requires protection against discriminatory discharge. Otherwise an employer could avoid liability by hiring and immediately firing the employee. If discharges are protected, it follows that the Act must also protect against constructive discharges. If constructive discharge is not within the scope of section 1981, the employer, unable to fire the employee on racial grounds, would simply hound and harass the employee into quitting. Therefore, the protection against hiring discrimination, as well as the protection against direct discharges, would be rendered meaningless unless forced quits are recognized as being within the Act. Consequently, if harassment reaches the level where the employee is forced to quit she will have a remedy *if* she quits. However, the employee can secure no remedy if she remains on the job and endures the insult.

within the scope of section 1981.[99] By its analysis *Patterson* raises doubt as to whether this established law has been undermined. Clearly, if *at the time of the initial employment* the employer sets a wage lower because of the race of the new employee, that would be offering employment on racially discriminatory terms, thus creating a section 1981 claim.[100] However, if thereafter, the employer does not raise the wages of black workers, while granting white workers raises, or grants bonuses to whites but none to blacks, the reasoning of the Court suggests that the black workers may have no claim because this would be mere "postcontractual" discrimination. The Court made no such express holding; it did not even mention wages. Nonetheless, one of the elements of plaintiff's alleged harassment had been pay discrimination. Moreover, denying a remedy to compensation discrimination could be a natural product of the Court's simplistic view of the contractual relationship between employers and employees, that so long as the employee had the same job and did not undertake a totally new and different job, any midterm treatment is beyond the reach of section 1981.[101]

However, as pointed out above, the correct view of the indefinite employer-employee relationship is that each working or pay period is implicitly a new job offer to be accepted or rejected by the employee commencing work.[102] The employer is not required to tender the offer for employment into the new work period, and, if offered, the employee need not accept it. But when the job is tendered and accepted, a new contract is formed for the period set by the parties, even if compensation and the nature of the job being performed remain largely unchanged.[103]

With this in mind it is important to remember that compensation is the consideration for the employee's performance of service, and

---

99. See, e.g., *Beeder-Baker v. Lincoln Nat'l Corp.*, 834 F.2d 1373, 1378 (7th Cir. 1987); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 202 (1st Cir. 1987); *Carter v. Duncan-Huggins, Ltd.*, 729 F.2d 1225, 1228 (D.C. Cir. 1984); *EEOC v. Inland Marine Industries*, 729 F.2d 1229 (9th Cir.), cert. denied, 469 U.S. 855 (1984).

100. 109 S. Ct. at 2372, 2376.

101. Particularly, the Court's discussion of whether a denial of a promotion states a section 1981 claim suggests a result that would deny claims to salary adjustments. In the context of discussing promotions, the Court indicated that merely blocking a normal upward progression, as opposed to refusing a "new and distinct relation," would not be actionable. See 109 S. Ct. at 2377. Thus, applying these criteria to interim wage adjustments, one could argue that simply failing to grant a pay increase to a single individual does not state a section 1981 claim.

102. See notes 27-31 and accompanying text.

103. Indeed this concept of each period representing a distinct obligation is imposed by the Fair Labor Standards Act, 29 U.S.C. §§ 206, 207, where minimum wage and overtime obligations must be calculated by the employer on a weekly basis. The mere fact that the employer paid over the minimum in one week is not offset against underpayment in subsequent weeks. Each week creates a new and distinct obligation. See *Tennessee Coal, Iron & Ry. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944).

thus is a key and central component to the contractual relationship. When the consideration for the requested performance is to be altered, as a pay increase or decrease would be, this necessarily requires a new contractual relationship between the parties; changing the obligation is not accomplished by a unilateral announcement.[104] When new wages are proposed by the employer, the employee must accept this offer or no contract will be formed. When they are proposed and the employee accepts the new offer by commencing the performance of services, there is a new and different relationship between the parties. The employee now has a contractual right to claim this different amount, something the employee could not have claimed prior to the wage adjustment. If the new wages are premised on the race of the worker, then this is a racially premised contract, regardless of the fact that six months or a year ago, when the employment relationship was first commenced, the compensation was not racially premised. *This contract* for the upcoming contractual period, proposing new and different consideration, is a new contract, and as a new contract is subject to the guarantees of section 1981.

Perhaps an example will illustrate this point. Assume that a current employee requests an increase in pay. This request for a pay raise can be construed in contract terms as an offer for a different employment contract on terms differing from those currently governing the relationship of the parties. If the employer accepts the offer a new contract is formed. But if the employer rejects the offer by restating the current pay as the proposed consideration for the employee's service, or if the employer proposes a compromise salary, e.g., an increase over the current salary but one less than proposed by the employee, this response by the employer would be a counteroffer, to be accepted or rejected by the employee. Regardless of the form of the employer's response (rejection or counteroffer), if the employer proposes compensation on racial grounds, this constitutes offering a contract to the employee on racially discriminatory grounds, or refusing to contract with the plaintiff on the basis of race. Either way it should violate section 1981.[105]

---

104. For example, if the employee decided that he wanted to work a thirty-five-hour week rather than the understood forty-hour week, he would have to tender this proposal to the employer for acceptance. He could not simply unilaterally refuse to work. Similarly, if the employer wants to decrease, or increase, wages the proposal is made to the employee, who is free to accept the proposed modification or reject it by refusing to work.

105. Alternatively, the request by the employee for a pay increase might be construed as a proposal, or a request for an offer from the employer, as opposed to a formal contractual offer. The employer's reaction would thus be to either make the requested offer, which would be accepted by the employee, or to refuse to make the offer. In either case there has been a refusal to contract, and the result should not depend upon which party can be identified as the offeror.

The same result should be reached if the employer fails to raise the wages of black workers while granting wage increases, through new contracts, to white workers. When an employer, without a request, unilaterally elects to offer an increased salary to white workers but elects not to offer a similar increase to the black plaintiff, and these contractual decisions are premised on the race of the employees, then this failure to make a contractual offer to black workers would be a failure to grant the black workers "the same right to make contracts as is enjoyed by white citizens." White employees are being given contractual offers not tendered to black employees, with the failure to make these contractual offers being based on race. Making or withholding offers on racial grounds cannot be construed as the "same right to make a contract" as is accorded white citizens.[106]

E. *Retaliation*

1. Generally

Title VII of the 1964 Civil Rights Act specifically prohibits retaliation against an employee for participating in Title VII proceedings and for opposing practices made illegal by Title VII.[107] The 1866 Civil Rights Act has no similar provision. Nonetheless, the courts have uniformly accepted the proposition that if an employer takes an adverse employment action because the employee has complained about, or filed charges of, racial discrimination, the employment action is sufficiently premised on "race" to allow a claim under section 1981.[108] *Patterson* did not undermine this established law. The uniform assumption remains unchallenged that retaliation against racial discrimination complaints is itself a form of "racial" discrimination within the reach of section 1981.

---

106. See *Bazemore v. Friday*, 478 U.S. 385, 394–97 (1986).

107. 42 U.S.C. § 2000e-3(a) provides in part, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title." For a summary see, Player, *Employment Discrimination Law* 269–78 (1988).

108. *Skinner v. Total Petroleum*, 859 F.2d 1439, 1446–47 (10th Cir. 1988); *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981); *Collins v. State of Illinois*, 830 F.2d 692, 701 (7th Cir. 1987); *Breeder-Baker v. Lincoln Nat'l Corp.*, 834 F.2d at 1378; *Setser v. Novack Investment Co.*, 638 F.2d 1137, 1146 (8th Cir. 1981); *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 202 (8th Cir. 1987); *Choudhury v. Polytechnic Institute of N.Y.*, 735 F.2d 38 (2d Cir. 1984); *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1229 n.15 (5th Cir. Unit B. 1982), cert. denied, 459 U.S. 1105 (1983); *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982).

2. Participation in Proceedings:
Protecting the Right "to Enforce"

In rejecting the application of the "to enforce" clause of section 1981 to discrimination in the application of an existing contract, *Patterson* construed the "to enforce" provision of section 1981 to cover "wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes. . . ."[109] Therefore, if an employer reacts to an employee's filing of a legal or administrative proceeding charging race discrimination by making a discriminatory job assignment, reducing the employee's pay, engaging in harassment, or by discharging the employee, the employer would be denying to the employee freedom "to enforce" the contract by "impeding access to the courts or obstructing nonjudicial methods of adjudicating disputes." The broad language of the Court would protect against employer impediments, the filing of charges with any entity that could adjudicate the alleged race discrimination, such as filing a grievance under a collective bargaining agreement.

Thus, ironically, while it does not violate section 1981 to harass an employee because of his race, if the employee files a formal complaint with an enforcing agency, public or private, or a grievance under a collective bargaining agreement challenging that harassment, and the employer, in turn, harasses the employee for filing the complaint, a section 1981 complaint will lie.[110]

Patterson will also allow a section 1981 claim when an employer retaliates against a former employee by giving the former employee poor references, thus inhibiting the plaintiff's ability to enter an employment contract with another employer. Not only will such conduct deny the plaintiff the ability "to enter" a contract,[111] it will also interfere with the "enforcement" of its rights by punishing such enforcement.

---

109. 109 S. Ct. at 2373 (emphasis in original).

110. See *Jordan v. U.S. West Direct Co.*, 50 Fair Empl. Prac. Cas. (BNA) 633, 635 (D. Colo. 1989), which held, inexplicably, that while a demotion based on race did not state a section 1981 claim, demotion because the employee complained of discrimination and instigated an investigation of his charges does state a section 1981 claim. This underlines, again, the utter silliness of the *Patterson* holding. Contrast, *English v. General Development Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1989).

The conduct complained of need not in fact be in violation of the statute. The filing of charges will be protected against employer retaliation regardless of the outcome of the initial charge. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969); *Hicks v. ABT Ass'n Inc.*, 572 F.2d 960 (3d Cir. 1978). See *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 53 (1983).

111. *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981).

3. Informal Opposition: Back to the "To Make" Clause

Where *Patterson* may work a change is in retaliation premised on mere opposition to racial practices, as opposed to filing enforcement proceedings. Such discrimination is racial, no doubt, but since the employee is not being punished for "enforcement" of the right, and by this interfere with enforcement, the "to enforce" clause presumably is not invoked. The Court emphasized that the "to enforce" provision applied only to "methods of adjudicating disputes *about the force of binding obligations*. . . ."[112] Thus, while invoking contractual grievance arbitration or filing state administrative EEO charges would be steps for "adjudicating disputes," and thus protected by the Court's analysis, mere informal objections to the employer, to fellow employees, or to outsiders about the perceived racial discrimination practiced by the employer do not utilize an accepted method of resolving the dispute concerning "the force of binding obligations."[113]

Protection of informal opposition, therefore, must come solely from the "to make" clause of section 1981, and that protection will be subject to all the constraints of the *Patterson* analysis. Section 1981 would clearly apply to an employer's refusal to hire someone because of prior racial protests, and would appear to prohibit this employer from interfering with the plaintiff's ability to contract elsewhere.[114] Likewise, *Patterson* should not undermine the applicability of section 1981 to promotions, because a promotion necessarily is a new contractual undertaking. Consequently, if an employer were to refuse to promote the employee based on prior objections to discrimination, this would fall within the "to make" protections of section 1981.

Patterson's analysis, hopefully, will not be used to undermine the traditional section 1981 protection for racially discriminatory

---

112. 109 S. Ct. at 2373.

113. Thus, if the employer and union have a collective bargaining agreement, filing a grievance under that contract would be attempting "to enforce" contractual obligations, and thus be fully protected against employer retaliation. However, if the employer is nonunion and has no collective agreement, filing an identical protest with the employer, pleading with the employer's personnel department, or invoking internal grievance machinery, asking the employer to obey his legal obligations, is not protected by the "to enforce" clause; the employee is not seeking a binding interpretation of the contract. Difference in protection is based on whether the employer is or is not unionized!

114. See *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1229 n.15 (5th Cir. Unit B. 1982), cert. denied, 459 U.S. 1105 (1983) ("A claim under section 1981 may be based upon retaliatory action taken against an employee for the employee's lawful advocacy of the rights of racial minorities.") See also *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972). Accord, *London v. Coopers & Lybrand*, 644 F.2d at 818.

discharges.[115] Consequently, it will continue to violate section 1981 to discharge an employee because of reasonable protests[116] of racial discrimination.[117]

However, *if* section 1981 no longer reaches pay discrimination, an employer will not be violating this Act by reducing the pay of an employee because the employee objected to the racial discrimination of the employer. Consequently, *if* pay discrimination is not protected by section 1981 and the employee complains about perceived pay differences, the employer can retaliate by further reductions in pay. Finally, and this is almost unbelievable—but given the holding in *Patterson* it is unavoidable—because section 1981 does not protect harassment, if an employee informally raises racial discrimination issues with the employer, or engages in a peaceful protest against such treatment, the employer will not violate section 1981 by undertaking a program of retaliatory harassment against the employee. Only if the employee quits in response to the harassment, thus setting up a possible claim for constructive discharge, will the employee have any chance for section 1981 relief.

Now consider the results. If an employee were to file a racial discrimination charge with the Equal Employment Opportunity Commission (EEOC), a state EEO office, a state or federal court, or even a grievance under a collective bargaining agreement, the employee would be protected against all forms of retaliation—including harassment—by the "to enforce" provision of section 1981. But by raising the same objection informally in the hope of securing informal redress, the employee is vulnerable to on the job harassment that cannot be remedied under section 1981.

This last distinction, as well as the entire *Patterson* decision, defies logic, basic contract principles, and sound public policy. One would hope, and perhaps assume, that *Patterson* is a decision that

---

115. For a discussion of the application of section 1981 to discharges, see notes 60–78 and accompanying text.

116. Protests must be "reasonable" in light of the employee's assigned duties. *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 545 F.2d 222 (1st Cir. 1976); *Poddar v. Youngstown State University*, 480 F.2d 192 (6th Cir. 1973). Protests must not violate state tort law and must not incite others to violate the law. *Green v. McDonnell Douglas Corp.*, 463 F.2d at 341, rev'd on other grounds, 411 U.S. 792 (1973). The employee's protests must be temperate and refrain from attacking the products or services of the employer. *Pendelton v. Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983).

117. *Jordan v. U.S. West Co.*, 50 Fair Empl. Prac. Cas. (BNA) at 635. This underscores the need to have section 1981 apply to discharges. The protection against retaliation would be meaningless if the employer could fire an employee because the employee objected to the employer concerning perceived racial discrimination. Yet, if the Court were to hold that section 1981 does not protect against discharges, this would be the result. An employee who files a formal charge of racial discrimination would be protected against retaliatory discharge. An employee who wrote a letter to his employer seeking a peaceful resolution of the issue would be vulnerable.

will not stand the test of time, and upon further reflection it will be repudiated. Certainly, one would hope that the lower courts will apply this case no further than its precise holding.

IV. Conclusion

In *Patterson v. McLean Credit Union*, the civil rights movement dodged the proverbial bullet when the Court elected not to overturn *Runyon v. McCrary*,[118] which had allowed section 1981 contract actions against private persons without any requirement of "state action." But by denying section 1981 protection to victims of racial harassment, the opinion appears at first glance, as Justice Brennan alleges in dissent, to have taken away with one hand what it refused to snatch away with the other.[119] That prediction was unnecessarily dire.[120] While the majority's holding is premised on what can be charitably described as a crabbed view of section 1981, a myopic reading of the legislative history of the 1866 Civil Rights Act, and an unsophisticated vision of the contractual relationship between an employee and employer, there is no reason that such an analysis, with its multitude of faults, will be or even can be, applied beyond the narrow holding of the Court.

Clearly, all racially premised hiring decisions remain within section 1981, as should, notwithstanding the Court's hesitancy, virtually all promotion decisions. Similarly, because discharges are merely a way of expressing a refusal of the employer to contract with the employee, it would seem that even with the Court's pinched analysis, section 1981 continues to protect racially premised discharges. Moreover, because the Court has repeatedly held and assumed that racially premised discharges state a claim under section 1981, until that authority is overruled, it remains binding on the lower courts.

As discharges continue to be protected by section 1981, plaintiffs who quit in response to the employer's racial harassment seeking to drive them away should continue to have the traditional remedy for a constructive discharge, provided that the quitting employee can establish not only the reasonableness of his decision to quit, but also the subjective elements of the employer's specific purpose to cause the employee to quit and a racial motivation behind that purpose.

The Court conceded that initial discriminatory pay rates and

---

118. 427 U.S. 160 (1976).

119. 109 S. Ct. at 2379 (Brennan, J. dissenting).

120. Indeed, such gloom and doom statements often contribute to lower courts expanding the majority decision far beyond what even the language or logic of the opinion will carry. See, e.g., *Greggs v. Hillman Dist. Co.*, 50 Fair Empl. Prac. Cas. (BNA) 429 (S.D. Tex. 1989).

segregated job assignments continue to be proscribed by section 1981. And if logic were to be followed, the Act would continue to cover, as it has in the past, discriminatory alteration of pay rates. Correctly viewed, each new pay period is a new contract, which if offered on racially discriminatory terms states a section 1981 claim.

Retaliation claims, save those based on harassment and perhaps salary differences, in response to mere opposition, should not be undermined by the *Patterson* decision. Indeed, the Court's analysis of "to enforce" strengthens the theoretical ability of plaintiffs to protect against all forms of retaliation, including salary and harassment, based upon the employee's filing of formal enforcement actions.

What, then, did *Patterson* change? Very little, at least for now. Only posthiring alteration of working conditions not amounting to constructive discharges are clearly excluded from the scope of section 1981. The danger of *Patterson* is that the lower courts will read too much into the holding, perhaps encouraged by well-intended but uninformed statements in the popular press, that *Patterson* undermined virtually all claims under section 1981. We must hope, even if we cannot assume, that lower courts will have a sounder understanding of the employment relationship than did the Supreme Court, and will not apply *Patterson*'s wilted notions of contract law beyond the narrow confines of the Court's holding.