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A Case of Statutory Interpretation: Does 42 U.S.C. § 1981 Prohibit Retaliation?

by Barbara J. Fick

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Case at a Glance

This case revolves around competing theories of statutory interpretation. The issue is whether 42 U.S.C. § 1981 prohibits retaliation for asserting rights under the statute. By its terms, the statute guarantees to all persons the same rights as white citizens to “make and enforce contracts.” The explicit language of the statute does not use the term *retaliation*. The parties examine the various sources of statutory interpretation, including the plain text, congressional intent, legislative history and precedent, to argue whether a retaliation claim is cognizable under § 1981.

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ISSUES

Can an employee bring a claim under 42 U.S.C. § 1981 if he is terminated from employment because he has complained about racial discrimination at work?

Can the language of the statute be interpreted to include retaliation claims?

FACTS

Hedrick Humphries, an African American, was an associate manager of a Cracker Barrel restaurant from 1999–2001. Initially, he received excellent performance evaluations, merit raises, and bonuses. Circumstances changed, however, when a new store manager took over. Humphries alleged that the new manager made racially derogatory remarks and handed out discipline in a racially discriminatory manner. On several occasions, Humphries complained to the district manager about the store manager’s behavior. Shortly thereafter, Humphries was fired for allegedly leaving the store safe unlocked over night.

Subsequently, Humphries filed a lawsuit alleging discrimination based on race and retaliation under both Title VII and 42 U.S.C. § 1981. Cracker Barrel filed a motion to dismiss the Title VII claim on the basis that the lawsuit was untimely filed. The district court granted the motion and dismissed Humphries’ Title VII claims. *Humphries v. CBOCS West, Inc.*, 343 F.Supp.2d 670 (N.D. Ill. 2004). Humphries did not appeal that decision.

Thereafter, Cracker Barrel filed a motion for summary judgment seeking dismissal of Humphries’s remaining claims under § 1981. The district court granted summary judgment on Humphries’s claim that his discharge was motivated by either race or retaliation, holding that he failed to produce sufficient evidence from which a trier of fact could presume that race or retaliation was a motive for his termination. *Humphries v. CBOCS West, Inc.*, 392 F. Supp.2d 1047 (N.D. Ill. 2005).

Humphries appealed the grant of summary judgment. In response, Cracker Barrel, for the first time, raised the issue that retaliation

CBOCS WEST, INC. v. HUMPHRIES
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FROM: THE SEVENTH CIRCUIT



claims are not cognizable under § 1981. In reviewing the district court's decision, the U.S. Court of Appeals for the Seventh Circuit decided to consider the legal issue raised by Cracker Barrel in addition to determining whether Humphries had produced sufficient evidence to survive the motion for summary judgment. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007).

The Seventh Circuit held that the Supreme Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports the conclusion that § 1981 covers retaliation claims. In *Sullivan*, a nonprofit corporation that operated a community park for residents refused to allow a white homeowner to assign his membership to an African American. When the homeowner protested, he was expelled from the corporation. The homeowner sued under § 1981 and 42 U.S.C. § 1982. The Supreme Court ruled that he had standing to bring a claim under § 1982 because he was the victim of retaliation for asserting the rights of the African American to "purchase, lease, sell, hold and convey real ... property" on the same basis as white citizens (which are the rights protected by § 1982). The Seventh Circuit indicated that since § 1981 and § 1982 share a common genesis in § 1 of the Civil Rights Act of 1866, they can be read coterminously. Indeed, the *Sullivan* Court emphasized the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866" in reaching its conclusion that § 1982 prohibited retaliation.

The Seventh Circuit noted that after *Sullivan* the consensus among the circuit courts was that § 1981 should be read broadly to prohibit discrimination in all aspects of the employment relationship, both pre- and post-formation, including retaliation.

However, in 1989 the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The *Patterson* Court narrowed the reach of § 1981, holding that the protection of the right to make and enforce contracts only applies to discriminatory conduct related to the formation of a contract and does not extend to post-formation discrimination. It specifically does not apply to claims of harassment, which was the subject of the plaintiff's lawsuit in that case. After *Patterson*, most of the circuits held that retaliation claims were not cognizable under § 1981 since such claims involved post-formation conduct, which the court in *Patterson* specifically found not within the reach of § 1981.

Congress responded to *Patterson* (as well as several other recently decided Supreme Court cases involving Title VII) by enacting the Civil Rights Act of 1991, which amended, among other things, § 1981, to define the term "make and enforce contracts" as including the performance, modification, termination, and enjoyment of all benefits and terms and conditions of the contractual relationship. The Seventh Circuit noted that the legislative history of the amendment indicated that Congress intended retaliation to be included within the new definition. Thereafter, several circuit courts of appeals determined, as a result of the 1991 amendments, that retaliation claims were now covered under § 1981. Agreeing with the weight of authority, the Seventh Circuit determined that the plain text of § 1981, as amended, covers retaliatory discharge from employment.

The Seventh Circuit also noted that this result is consistent with the recent Supreme Court decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). In *Jackson* the Supreme Court was

required to decide if Title IX of the 1972 Education Amendments to the Civil Rights Act of 1964 prohibited a school board from retaliating against a basketball coach who complained about sex discrimination in the school's athletic program. Title IX prohibits sex discrimination in education programs operated by federal-fund recipients, but does not expressly prohibit retaliation. In deciding that the prohibition on discrimination necessarily includes retaliation, the *Jackson* Court relied upon its prior decision in *Sullivan*. The Court noted that *Sullivan* held that the general prohibition against discrimination contained in § 1982 covered retaliation even though that specific term is not contained in the statutory language. Furthermore, the *Jackson* Court indicated that the objective of preventing discrimination would be impeded if retaliation were not prohibited.

Finally, the Seventh Circuit rejected the argument that since Title VII prohibits retaliation there is no need to interpret § 1981 as also covering retaliation. Congress has been aware of the overlap and parallel status of Title VII and § 1981 and has consistently indicated its intent to maintain these two causes of action as separate, distinct and independent. Thus, the Seventh Circuit concluded that § 1981 prohibits retaliation.

In reviewing the district court's grant of summary judgment, the Seventh Circuit agreed that Humphries failed to effectively substantiate his claim that his termination was because of his race and so affirmed the grant of summary judgment in favor of Cracker Barrel on that aspect of the case. With regard to the retaliation claim, however, the Seventh Circuit found that Humphries had provided sufficient evidence to establish a prima facie case that his termination from employment was in retaliation for

(Continued on Page 206)

his complaints about racial discrimination and reversed the district court's grant of summary judgment on the retaliation claim.

The Supreme Court granted Cracker Barrel's petition for a writ of certiorari on the question of whether a retaliation claim is cognizable under 42 U.S.C. § 1981. *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 30 (2007).

CASE ANALYSIS

In its argument, the petitioner addresses the plain text of the statute, congressional intent, legislative history, Supreme Court precedent, and public policy.

Petitioner Cracker Barrel initially notes that the statute does not include the word *retaliation*. The equal right to make and enforce contracts protected by the statute is decidedly different from a prohibition against retaliation; thus, the right protected by the statute cannot fairly be interpreted to mean a totally different concept. Section 1981 by its terms prohibits discrimination based on status (i.e., race) but not discrimination based on conduct (i.e., complaints about race discrimination).

This distinction between the right to equal treatment and the prohibition of retaliation is recognized in Title VII, which contains separate provisions dealing with the two concepts and explicitly spells out the prohibition against retaliation.

Cracker Barrel argues that because the plain text of § 1981 is clear and unambiguous, there is no need for the Court to determine legislative intent. However, given that both the lower court and respondents rely, in part, on legislative intent and history, the petitioner addresses these principles.

When Congress intends to prohibit retaliation, it expressly uses that language, as evidenced by the many federal statutes that contain explicit anti-retaliation clauses, e.g., Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, and the Fair Labor Standards Act. But neither the original nor the amended 1991 version of § 1981 include an anti-retaliation clause.

Over the last 30 years, the petitioner reasons, Supreme Court jurisprudence regarding statutory interpretation has evolved and Congress, when amending § 1981 in 1991, was aware of that evolution. In the 1960s, the Court had adopted an approach of broadly construing generally worded statutes, supplementing the statutory language to make the statute more effective. In recent years, however, the Court has abandoned that approach, adhering more closely to the statutory text. In particular, in *Patterson*, the Court expressly stated that where the statutory language was clear, it would not rely on Congress's subjective intent to supplement the language. Thus, when Congress amended § 1981 in response to *Patterson*, it was well aware of the Court's emphasis on the plain text of the statute. If, therefore, Congress had intended § 1981 to cover retaliation, it knew it would have to include the specific prohibition in the text of the statute. It did not do so.

A well-accepted principle of statutory construction holds that a statute specifically focused on a particular issue controls over a more generally worded statute. Title VII specifically addresses retaliation and provides an administrative procedure for enforcement. An expansive reading of § 1981 to include retaliation would undermine the administrative and conciliatory procedures con-

tained in Title VII, allowing a plaintiff to do an end run around both Title VII's statute of limitations and its mandated conciliation process.

According to Cracker Barrel, the lower court's use of legislative history in reaching its conclusion was inappropriate because the statutory language is clear, thereby obviating the need for an examination of the statute's history. Furthermore, the court relied on a single line from a House committee report that listed retaliation as one of the acts of discrimination covered by the 1991 amendment to § 1981. An examination of the Senate committee report, however, contains no similar mention of retaliation. There is no basis for relying on the House report as evidence of congressional intent rather than the Senate report. That is why the plain text of the statute controls.

The petitioner also contends that the lower court's reliance on *Sullivan* and *Jackson* was misplaced. When deciding *Sullivan*, the Supreme Court was applying a norm of statutory construction in which it supplemented the plain language of statutes to make them more effective. This norm has subsequently been disavowed by the Court and replaced with the principle that courts should base their interpretations on a close adherence to statutory text. In deciding *Jackson*, the Court was interpreting a statute enacted in 1972 against a backdrop of statutory interpretation where the norm was to read statutory language expansively. The *Jackson* Court noted that this timing provided a context for interpreting Title IX. Congress would have expected that the Court would expansively read the general language it used in enacting that statute. Thus, the fact that Title IX did not expressly use the term *retaliation* but instead used the more general term *dis-*



crimination was not an impediment to finding that the term *discrimination* included the prohibition of retaliation.

On the other hand, the 1991 amendment to § 1981 was enacted against the backdrop of a statutory construction norm requiring close adherence to the text of the statute. Congress was equally aware of that jurisprudence and knew that it would need to be explicit in its use of statutory language if it wanted to include a prohibition of retaliation. Moreover, Title IX expressly prohibits discrimination, a term not found in § 1981. The *Jackson* Court indicated that the term *discrimination* was sufficiently ambiguous that it could be interpreted to include the concept of retaliation.

Finally, in neither the *Sullivan* nor the *Jackson* case was the Court confronted with the problem of reconciling two overlapping statutes, which problem arises in the current case given the overlap between Title VII and § 1981.

Petitioner's final argument is based on public policy concerns. An interpretation of § 1981 that includes retaliation would undermine the public policy behind Title VII. A plaintiff may enforce his or her rights under § 1981 by directly filing a claim in court within four years of the incident. Under Title VII, however, before a claimant can file a lawsuit, he or she must first submit the claim to the EEOC where the agency has the opportunity to conciliate the claim and obviate the need for litigation. Bypassing the EEOC deprives the parties of the opportunity to resolve the claim without the cost of litigation and places added burdens on the judiciary. Additionally, Congress capped the time limit for filing a Title VII claim at 300 days, whereas a § 1981 claimant enjoys a four-year

statute of limitations. Since § 1981 covers only race and certain ethnic-based discrimination claims but not claims based on sex, it is inherently unequal to allow a plaintiff with a retaliation claim based on a complaint about race discrimination up to four years to file a lawsuit while requiring a plaintiff with a retaliation claim based on a complaint about sex discrimination to file within 300 days. In his argument, respondent also relies on the plain text of the statute, Supreme Court precedent, and legislative intent.

Humphries emphasizes that the language of § 1981 encompasses more than merely an anti-discrimination mandate. It seeks to ensure not only equal treatment based on status (i.e., race) but also equal treatment based on conduct (i.e., "make and enforce contracts, to sue, be parties, give evidence. ..."). The text guarantees enumerated rights to all citizens. The Supreme Court has consistently held that the existence of a right includes not only protection against direct impairment of the right but also protection against reprisal for exercising the right.

The backdrop against which Congress enacted the original § 1981 in 1866 was replete with instances of reprisals and attacks against former slaves who had exercised their rights. In seeking to ensure that former slaves had the right to make and enforce contracts, Congress obviously intended to protect them against reprisals for doing so.

Mr. Humphries' act of complaining about race discrimination is a right specifically guaranteed by the text of § 1981. Such a complaint can be seen either as an exercise of a right to enjoy a benefit of a contract or as an exercise of the right to enforce the contract. Thus, firing Humphries for complaining consti-

tuted a direct interference with his rights under § 1981.

Cracker Barrel maintained an "open-door policy" that it required employees to use to report incidents of discrimination or harassment. This policy constituted a benefit of the contractual employment relationship. Humphries used that benefit to make his complaint. According to Humphries, when Cracker Barrel fired him because he was a black worker exercising his right to that benefit, it violated the express terms of § 1981, which requires that black workers have the same right to the benefit of the contract as white workers.

Under Illinois law (which applies to Humphries's employment, as his job was located in Illinois), a clear and specific policy statement disseminated to employees who continue to work after receiving the policy creates an enforceable contract right. Thus Cracker Barrel's anti-discrimination policy and open-door policy themselves constituted terms of its contract with Humphries. His complaint, therefore, constituted enforcement of his contract, and by firing him for enforcing his contract, Cracker Barrel violated the specific terms of § 1981, which prohibits discrimination in enforcing contracts.

By its terms § 1981 forbids race-based retaliation. It prohibits an employer from handing out the benefits of the contractual relationship based on race. Thus (looking at the statutory language alone), while an employer could fire all workers who complained about race discrimination, an employer could not fire black workers who made such a complaint while not firing white workers who made the same complaint.

The Supreme Court's decisions in *Sullivan* and *Jackson* compel a

(Continued on Page 208)



finding that § 1981 prohibits retaliation. *Sullivan* held that the enjoyment of the right to purchase, sell, and convey real property protected by § 1982 included a prohibition against retaliation. Section 1981 should be interpreted consistently with § 1982. Both statutes originated in the Civil Rights Act of 1866 and share the same purpose and history. For this reason the Court has often looked to § 1982 in interpreting § 1981. Thus the right to make and enforce contracts protected by § 1981 should also be interpreted to include retaliation.

The vitality of *Sullivan* was affirmed by *Jackson*, which held that Title IX prohibits retaliation. As the Court recognized in *Jackson*, protection from retaliation is necessary to protect the rights guaranteed in Title IX. Similarly, protection against retaliation is necessary to ensure protection of the rights guaranteed in § 1981. While it is true that some § 1981 plaintiffs receive protection against retaliation under the anti-retaliation clause in Title VII, not all § 1981 plaintiffs would be covered. Employers with fewer than 15 employees are not covered by Title VII but do fall within the purview of § 1981. Similarly, independent contractors are not protected by Title VII but are entitled to the rights guaranteed under § 1981.

The overlap between Title VII and § 1981 does not require a narrow interpretation of § 1981. The Court has consistently recognized that Congress intended for Title VII and § 1981 to coexist as separate and independent sources of rights and remedies, regardless of any overlap. Congress reconfirmed its intent that Title VII not displace § 1981 in passing the Civil Rights Act of 1991 which amended both Title VII and § 1981. In the amendment, it placed a cap on damages available under

Title VII while expressly providing that such a cap did not apply to claims under § 1981.

When it amended § 1981 in 1991, Congress also restored the protection against retaliation that had been unanimously recognized by the lower courts prior to the *Patterson* decision. Prior to *Patterson*, the lower courts had interpreted the “right to make and enforce contracts” as encompassing conduct that occurs after the formation of the contract, including retaliation. When the *Patterson* Court read this language more narrowly, as only applying to the initial formation of a contract, most subsequent claims of retaliation were moot since they generally arise in the context of current employees complaining about discrimination in the post-formation stage of the contract. When Congress amended § 1981 to include post-formation conduct, it was restoring the status quo ante, which had included retaliatory conduct. Thus, Congress did not need to specifically mention retaliation.

SIGNIFICANCE

On one level, this case is of great concern to employers whose liability for retaliation will be greatly expanded if the statute is interpreted to include retaliation claims. As noted by the parties, although Title VII clearly prohibits employer retaliation against employees attempting to enforce their right to be free from discrimination in the workplace, allowing such claims under § 1981 will result in smaller employers, currently exempt from Title VII, being subject to liability for retaliatory action, as well as causing all employers to face increased monetary damages for such action as there is no cap on damages under § 1981 as there is under Title VII.

From the plaintiff’s perspective, a broad reading of the statute will benefit not only employees, but also independent contractors who receive no protection under Title VII but are within the purview of § 1981. A narrow reading excluding retaliation claims will place at least some plaintiffs in the precarious position of asserting their rights under fear of losing their jobs.

On a different level, however, this case has the potential for implications beyond both the employment context and § 1981. The parties have laid out competing theories of statutory interpretation to support their arguments, and how the Court responds to, and applies, those theories may provide guidance to how the Court will resolve disagreements over the interpretation of other statutes in future cases.

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