

1977

Civil Rights - Title VII - 42U.S.C. 1981 - Discrimination in Employment - Applicability to Whites

Larry A. Silverman

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Larry A. Silverman, *Civil Rights - Title VII - 42U.S.C. 1981 - Discrimination in Employment - Applicability to Whites*, 15 Duq. L. Rev. 495 (1977).

Available at: <https://dsc.duq.edu/dlr/vol15/iss3/7>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Recent Decisions

CIVIL RIGHTS—TITLE VII— 42 U.S.C. § 1981—DISCRIMINATION IN EMPLOYMENT—APPLICABILITY TO WHITES—The United States Supreme Court has held that Title VII of the Civil Rights Act of 1964 bars racial discrimination against white persons in private employment upon the same standards as nonwhites and that section 1981 of the Civil Rights Act of 1866 provides a federal remedy against private discrimination in employment against whites as well as nonwhites.

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

In 1970, petitioners L.N. McDonald and Raymond L. Laird, both white, and Charles Jackson, a black, all employees of Santa Fe Trail Transportation Company (Santa Fe), were jointly and severally charged with misappropriating cargo from one of Santa Fe's shipments. Petitioners were subsequently fired by Santa Fe, but the black employee was retained.¹ After receiving no redress through their union's grievance procedures, the petitioners filed complaints with the Equal Employment Opportunity Commission (EEOC) charging that the respondents violated Title VII of the Civil Rights Act of 1964² by discharging them because of their race. The EEOC

1. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended by The Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-15 (Supp. IV 1974) [hereinafter referred to as Title VII or the Act], declares it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a).

The Equal Employment Opportunity Commission (EEOC) is charged with the administration of the Act. *Id.* § 2000e-4(a). An aggrieved individual may file charges with the EEOC or a member of the Commission may file the charges. If the EEOC determines there is no reasonable cause to believe the charge is true, it can dismiss the complaint. If reasonable cause is found, the Commission must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(a), (b). For a general discussion of EEOC procedures see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1195-1275 (1971) [hereinafter cited as *Developments*].

dismissed the complaint for lack of reasonable cause, whereupon the petitioners filed suit in the United States District Court for the Southern District of Texas.³ The suit alleged discrimination on account of race in violation of section 1981 of the Civil Rights Act of 1866⁴ as well as Title VII.⁵ The district court dismissed petitioners' section 1981 claims for want of jurisdiction, asserting that section 1981 confers no actionable rights on white persons.⁶ On the Title VII issue, the court held that white petitioners dismissed after being charged with theft of company property had not stated a claim upon which Title VII relief could be granted, even though the company retained a black employee charged with the same wrong.⁷

The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of both claims.⁸ It noted that the language of section 1981 gives all persons equal benefit of the laws as is enjoyed by white persons, but without elaboration, agreed with the district court that the statute confers no actionable rights on white persons.⁹ The Title VII claim was also dismissed since there was no allegation that petitioners were falsely charged with the crime.¹⁰

In an opinion written by Justice Marshall, the Supreme Court reversed.¹¹ Initially, the Court dealt with whether whites who allege

3. 427 U.S. at 275. See note 6 *infra*. If the conciliation efforts of the EEOC are unavailing, the EEOC may file a civil action in federal district court against an employer or union. 42 U.S.C. § 2000e-5(f). If the charge filed with the EEOC is dismissed, as was the case in *McDonald*, the Commission must notify the persons aggrieved that a civil action in federal district court may be brought against the employer and union. *Id.* § 2000e-5(f)(1).

4. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (1970), reads in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and all proceedings for the security of persons and property as is enjoyed by white citizens

Id. § 1981.

5. The joining of Title VII and § 1981 claims in cases involving employment discrimination is fairly common. See, e.g., *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (suit alleging that civil service test given to Boston firefighters had racially discriminatory impact).

6. *McDonald v. Santa Fe Trail Transp. Co.*, No. 71-891 (S.D. Tex. May 2, 1974).

7. See 427 U.S. at 278.

8. 513 F.2d 90 (5th Cir. 1975) (*per curiam*).

9. *Id.* at 90. See note 4 *supra* for the text of § 1981.

10. 513 F.2d at 90.

11. 427 U.S. at 278. The vote was unanimous on the Title VII issue. Justice White and Justice Rehnquist dissented from the Court's view that § 1981 reached discrimination in the private sector. See notes 30-33 and accompanying text *infra*.

discrimination in private employment could obtain relief under Title VII. *Griggs v. Duke Power Co.*,¹² which enunciated the basic objectives of Title VII, had stated that the Act prohibits discriminatory preferences for any racial group, white or nonwhite.¹³ After briefly noting that the EEOC has held the provisions of Title VII applicable to whites,¹⁴ and that the Act's legislative history clearly reveals an intent to bar all discrimination in private employment,¹⁵ the Court concluded that Title VII is applicable to whites "upon the same standards" as nonwhites.¹⁶ The Court did emphasize, however, that its decision did not consider the permissibility of affirmative action programs,¹⁷ since Santa Fe had not claimed that its actions were part of such a program.¹⁸

Justice Marshall rejected Santa Fe's contention that since petitioners were charged with a serious criminal offense, it had a legitimate right to dismiss them from their jobs.¹⁹ The essence of a Title VII claim is whether race is the "but for" cause of the discharge.²⁰ Santa Fe's dismissal of only its white employees was arguably racially motivated; accordingly, petitioners had adequately stated a

12. 401 U.S. 424 (1971) (standardized tests which disproportionately exclude blacks and are not related to job performance violate Title VII).

13. In *Griggs*, the Supreme Court described Title VII as prohibiting "[d]iscriminatory preference for any [racial] group, minority or majority . . ." *Id.* at 431 (emphasis added).

14. 427 U.S. at 280 n.7.

15. *Id.* at 280. The legislative remarks cited by the Court reveal that Title VII was intended to "cover all white men and white women and all Americans." 110 CONG. REC. 2579 (1969) (remarks of Representative Celler).

16. 427 U.S. at 280.

17. Affirmative action programs seek to achieve equal opportunity in employment. They require that positive steps be taken to remedy the effects of past discrimination; such programs do more than merely require that future discriminatory conduct cease. See generally *Developments, supra* note 2, at 1242, 1291-1304.

18. In a carefully worded footnote the Court stated: "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." 427 U.S. at 280-81 n.8.

19. *Id.* at 281-85.

20. *Id.* at 282. The "but for" test was first enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The *McDonald* Court found *McDonnell Douglas* indistinguishable. In *McDonnell Douglas*, the Court held that a prima facie Title VII case is established when a petitioner shows that: (1) he belongs to a racial minority; (2) he applied and was qualified for an open job; (3) he was rejected; and (4) after the rejection, the employer continued to seek applicants with similar qualifications. *Id.* at 802. Once a petitioner demonstrates that these circumstances exist, the burden of proof shifts to the employer to establish some legitimate reason for the rejection or dismissal. The petitioner is then given the opportunity to show that the employer's stated reason was a pretext for discrimination. *Id.* at 804.

Title VII claim.²¹

The majority also disagreed with the lower courts' position that section 1981 confers no actionable rights on white persons. Citing the Court's previous holdings that section 1981 affords a federal remedy against racial discrimination in private employment,²² Justice Marshall framed the issue as whether that same remedy was available to whites alleging such discrimination.²³ Since the language of section 1981 provides that it be applicable to "all persons,"²⁴ the Court reasoned that the phrase "as is enjoyed by white citizens" merely emphasized the racial character of the rights being protected²⁵ and in no way limited the statute's applicability to black complainants; the Act prohibited discrimination in private employment regardless of the race of the aggrieved person.²⁶ An examination of section 1981's legislative history revealed that the impetus of the Reconstruction Civil Rights Acts²⁷ was to provide relief for freed slaves; however, nothing in the legislative debates suggested

21. 427 U.S. at 285. Since the district court had dismissed petitioners' claims on the pleadings, the Court remanded the case for an assessment of the merits of the claim. *Id.* at 296.

22. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *Jones* is the leading case on the availability of the Reconstruction Civil Rights Acts, including § 1981, as a federal remedy for discrimination in private employment. The case involved an alleged violation of 42 U.S.C. § 1982 (1970), which gives all citizens the same right "as is enjoyed by white citizens" to "inherit, purchase, lease, sell, hold, and convey real and personal property." *Jones* held that § 1982 prohibits racial discrimination by private individuals in the purchase and sale of real property. 392 U.S. at 413. Although *McDonald* involved § 1981 rather than § 1982, the two sections are part of the Civil Rights Act of 1866 and the Supreme Court has indicated that they should be interpreted and applied in a similar manner. See *Runyon v. McCrary*, 427 U.S. 160, 169 (1976).

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court noted that although it had not specifically held that § 1981 provides a federal remedy against private racial discrimination in employment, the issue was settled in the federal courts of appeals and "we now join them." *Id.* at 459. See note 49 *infra* for further commentary on *Johnson*.

23. 427 U.S. at 285.

24. See note 4 *supra* for the text of § 1981.

25. 427 U.S. at 287. See *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966).

26. 427 U.S. at 287. Section 1981 has been expressly limited to claims of racial discrimination and thus provides no relief for sex, age, religious, or other forms of discrimination. See, e.g., *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974) (discrimination based solely on sex not actionable under § 1981); *Veres v. County of Monroe*, 364 F. Supp. 1327 (E.D. Mich. 1973) (§ 1981 claim based on alleged illegal commitment dismissed because phrase "as is enjoyed by white citizens" indicates that statute only applies to racial discrimination). Employment discrimination against aliens has been held to be actionable under § 1981. See *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

27. The present § 1981 was originally enacted as part of the Civil Rights Act of 1866. See 427 U.S. at 286.

that the statute was limited to that goal.²⁸ Justice Marshall concluded, therefore, that section 1981 bars discrimination in private employment against whites as well as nonwhites.²⁹

Justice White wrote a dissenting opinion.³⁰ He disagreed with the majority's conclusion that section 1981 could be used to combat private discrimination, arguing that the civil rights statute does not provide a federal remedy for discrimination outside the public sector, be it directed toward whites or nonwhites.³¹ The Court's previous decision in *Jones v. Alfred H. Mayer Co.*,³² holding that section 1982 bars discrimination by private individuals in the sale or rental of real property, was not controlling since the two sections derived their authority from different constitutional amendments.³³

The Supreme Court's decision in *McDonald* resolves the apparent conflict in the lower courts regarding Title VII's applicability to white complainants³⁴ as well as the dispute over whether whites could avail themselves of section 1981 as a remedy for discrimination in private employment.³⁵ Since the EEOC, which administers

28. 427 U.S. at 287-96. See generally Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1 (1974); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

29. 427 U.S. at 296.

30. Justice White's dissent in *McDonald* is based on the reasons articulated in his opinion in *Runyon v. McCrary*, 427 U.S. 160, 192-214 (1976) (dissenting opinion). See note 33 *infra*.

31. *Id.* at 192 (dissenting opinion).

32. 392 U.S. 409 (1968). See note 22 *supra*.

33. 427 U.S. at 213 (dissenting opinion). In Justice White's view, § 1982 derives from the thirteenth amendment under which Congress may reach private conduct, whereas § 1981 derives from the fourteenth amendment under which Congress may only reach state action. *Id.* at 213 (dissenting opinion). Lower courts have consistently applied these statutes in a parallel manner, however, and the Supreme Court has countenanced this view. See note 22 *supra*. See generally Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972).

34. See *Mele v. United States Dep't of Justice*, 395 F. Supp. 592 (D.N.J. 1975) (white plaintiff is not a member of the class of persons protected by Title VII and therefore may not invoke protections of EEOC guidelines on standardized tests); *Haber v. Klassen*, 10 Fair Empl. Prac. Cas. (BNA) 1446 (N.D. Ohio 1975) (only racial minorities may obtain relief under Title VII). See 14 Duq. L. Rev. 269 (1976), where the author questions the correctness of the holdings in *Mele* and *Haber*.

The *Haber* decision was based in part on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although there was some indication in *McDonnell Douglas* that only minorities were entitled to Title VII's protections, see note 20 *supra*, Justice Powell stated unequivocally in his *McDonnell Douglas* opinion that "Title VII tolerates no racial discrimination, subtle or otherwise." 411 U.S. at 801.

35. Compare *Hollander v. Sears, Roebuck & Co.*, 392 F. Supp. 90 (D. Conn. 1975) (white student excluded from summer internship program because of his race could bring suit under

Title VII, had held that the Act bars all racial discrimination,³⁶ and the legislative history strongly supports the position that Title VII was intended to be a color-blind statute,³⁷ the Court's holding regarding Title VII was arguably not a difficult one.

The question of the breadth of section 1981 presented a more difficult problem for the Court. Since the Court's decision in *Jones v. Alfred H. Mayer Co.*³⁸ in 1968, section 1981 has been held to provide a federal remedy for private racial discrimination in employment.³⁹ The lower courts were split, however, over whether the statute afforded whites the same relief.⁴⁰ The confusion was compounded by section 1981 claims brought by whites who were not claiming they had been discriminated against because of their race, but rather that their employer was discriminating against them on account of their efforts to vindicate the civil rights of black employees.⁴¹ The dismissal of these claims, which could have been interpreted as denying the Act's protections to whites, merely affirmed the view that a complainant may seek relief under section 1981 only when he has faced discrimination because of *his* race.⁴² Although

§ 1981), and *WRMA Broadcasting Co. v. Hawthorne*, 365 F. Supp. 577 (M.D. Ala. 1973) (white broadcaster allegedly fired because of his race could bring suit under § 1981), with *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973) (white discharged due to his association with black employees could not bring suit under § 1981 since that statute does not protect whites), and *Perkins v. Banster*, 190 F. Supp. 98 (D. Md.), *aff'd*, 285 F.2d 426 (4th Cir. 1960) (white plaintiff has no remedy under § 1981).

36. See, e.g., Decision 74-94, 8 Fair Empl. Prac. Cas. (BNA) 701 (EEOC 1974) (white professor at black university allegedly fired due to his race could use Title VII's protections); Decision 74-31, 7 Fair Empl. Prac. Cas. (BNA) 1326, 1328 (EEOC 1973) ("the employment opportunities of any group [are] protected by Title VII, including Caucasians"). For a discussion of Title VII's color-blindness objective see *Developments, supra* note 2, at 1113-19.

37. See note 15 *supra*.

38. 392 U.S. 409 (1968). See note 22 *supra*.

39. See, e.g., *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971).

40. See note 35 *supra*.

41. See, e.g., *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973) (white male denied advancements and salary increases due to his attempts to change hiring policies toward minorities could not bring suit under § 1981 since retaliatory measures were not based on race, but rather his attempts to change company policy); *NOW v. Bank of California*, 5 Empl. Prac. Dec. (CCH) ¶ 8510 (N.D. Cal. 1973) (suit under § 1981 brought by white allegedly fired when he sought to change employer's discriminatory practices dismissed since firing was not based on petitioner's race).

42. See note 41 *supra*. Cf. *Foust v. Transamerica Corp.*, 391 F. Supp. 312, 315 (N.D. Cal. 1975) (standing under Title VII restricted to those who are the objects of the prohibited discrimination); *Elk Grove Firefighters Local 2340 v. Willis*, 391 F. Supp. 487, 488 (N.D. Ill.

section 1981 on its face prohibits discrimination against "all persons,"⁴³ its language giving every individual the same rights "as [are] enjoyed by white citizens" has also engendered confusion. Some courts have construed that phrase as negating 1981's broader language and evincing a congressional intent to make the Act available only to blacks facing racial discrimination.⁴⁴ Section 1981's historical setting arguably offers some support for that view. The Act's legislative history is admittedly inconclusive, but it would seem that the thrust of the legislation was a desire to preserve the newly accorded rights of freed blacks.⁴⁵

McDonald's construction of section 1981 nevertheless would appear to be the better view.⁴⁶ Its emphasis on the Act's broader im-

1975) (one has no standing to sue for the deprivation of another's civil rights).

43. See note 4 *supra* for the text of § 1981.

44. See *Perkins v. Banster*, 190 F. Supp. 98 (D. Md.), *aff'd*, 285 F.2d 426 (4th Cir. 1960) (employing this reasoning).

45. The *McDonald* Court quoted several excerpts from the nearly one hundred pages of debate on the Civil Rights Act of 1866, from which § 1981 derives. Among these was a statement by Senator Trumbull of Illinois, a leading sponsor of the bill, in which he described the Act as a "[b]ill to protect all persons in the United States in their civil rights . . ." CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866). Justice Marshall also referred to Representative Wilson's remarks that the purpose of the measure was to provide "for the equality of citizens . . . in the enjoyment of their civil rights and immunities." *Id.* at 1117.

Those who argue that § 1981 was not intended to apply to whites cite remarks from Senator Guthrie, who stated that the bill "enforces prosecution of the citizens who . . . commit what they suppose is an infraction of it, in favor of the black population and the black population only." *Id.* at 601.

Although not raised by the respondents in *McDonald*, it might also be argued that Congress lacked the power under the thirteenth amendment, which § 1981 was enacted to implement, to pass protective legislation for whites, since the thirteenth amendment was enacted in response to the institution of slavery. However, the courts that have dealt directly with this issue have rejected this proposition. See *WRMA Broadcasting Co. v. Hawthorne*, 365 F. Supp. 577, 581 (M.D. Ala. 1973): "[I]t is entirely consonant with the purpose of Section 1981 that whites discriminated against for racial reasons should have standing under Section 1981, and the power of Congress so to provide is a power ancillary to the enabling clause of the Thirteenth Amendment." Cf. *Walker v. Pointer*, 304 F. Supp. 56, 58 (N.D. Tex. 1969) (thirteenth amendment freedom from involuntary servitude not based on individual's race, but on whether the individual "suffered from the wrong the amendment was created to cure").

46. See generally Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1, 16 (1974) ("the rights possessed by white citizens . . . became the yardstick for measuring the rights possessed by all citizens"). See also Larson, *The New Law of Race Relations*, 1969 Wis. L. Rev. 470, 488. The author notes the inherent faults in using legislative history from the 19th century to justify modern interpretations of the civil rights statutes. He discussed the Court's analysis of legislative history in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See note 22 *supra*. Justice Stewart, writing for the majority, supplied seven pages of legislative history to support the Court's view that Congress intended § 1982 to reach private racial discrimination. Justice Harlan, in dissent, countered

port, proscribing racial discrimination against all persons, supports the proposition that Congress intends to treat all citizens equally when it passes anti-discrimination legislation. Even if the Act was originally intended to only benefit emancipated blacks, the Supreme Court may have believed that to ascribe a color-conscious label to an equal rights statute would have been inherently repugnant to the constitutional guarantee of equal protection of the laws. In any event, to construe a statute which demands that all persons be treated equally, in a manner that excludes from the Act's protection a majority of the nation's citizens would have been a somewhat anomalous, if not incongruous, exercise in statutory interpretation.

Although *McDonald* settled the issue of whether whites may statutorily challenge discriminatory employment practices, its holding that both Title VII and section 1981 are available as federal remedies against such practices raises serious questions concerning the relationship between the two federal statutes.⁴⁷ Although Title VII was hailed as the first effort by the federal government to outlaw private discrimination,⁴⁸ the Supreme Court approved the use of section 1981 as a separate and distinct remedy against private racial discrimination in employment in *Johnson v. Railway Express Agency, Inc.*⁴⁹ While there are similarities in the types of relief affordable under the two statutes,⁵⁰ Title VII and section 1981 have distinct differences as well. Title VII not only bars racial discrimina-

with thirteen pages of legislative history, arguing for a contrary result. Professor Larson concluded that "[a]ny attempt to fix the content of a hundred-year-old statute by samplings of what individual congressmen said is both improper and impossible." *Id.* at 488.

47. See generally Comment, *Selecting a Remedy for Private Racial Discrimination: Statutes in Search of Scope*, 4 FORDHAM URB. L.J. 303 (1976) [hereinafter cited as *Selecting a Remedy*].

48. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 8 (1966).

49. 421 U.S. 454 (1975). In *Johnson*, the plaintiff filed with the EEOC a timely charge of employment discrimination under Title VII. The plaintiff argued that this filing tolled the statute of limitations for a § 1981 cause of action arising from the same facts. The Supreme Court disagreed. It reasoned that the statutes provide separate, distinct, and coextensive remedies for discrimination in employment and thus the filing of a claim under one statute does not toll the statute of limitations on the other. *Id.* at 466.

50. For example, Title VII authorizes affirmative relief, 42 U.S.C. § 2000e-5(g) (1970), and such relief has been awarded in § 1981 cases, including the imposition of hiring quotas. See, e.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), cert. denied, 406 U.S. 950 (1972). The burden of proof in Title VII and § 1981 cases is also similar. See *Long v. Ford Motor Co.*, 496 F.2d 500, 505 n.11 (6th Cir. 1974) (the principles of *McDonnell Douglas*, the leading Title VII case on plaintiff's burden of proof, apply with equal force to a § 1981 action). See note 20 *supra*.

tion, but also discrimination on the basis of religion, sex, and national origin.⁵¹ Title VII, however, covers only employers with fifteen or more employees,⁵² whereas section 1981 can be asserted against any employer. Title VII also has various procedural requirements prerequisite to filing a claim in federal court—procedural requirements that do not attend section 1981.⁵³ Although back pay relief has been granted under both statutes,⁵⁴ back pay awards under Title VII are expressly limited by statute to two years.⁵⁵ Furthermore, the district courts have been hesitant to award compensatory or punitive damages under Title VII,⁵⁶ yet such relief seems to be available under section 1981.⁵⁷

Due to the advantages section 1981 may offer, litigants might make use of that Act to obtain relief rather than resorting to the administrative machinery established under Title VII. This would

51. See 42 U.S.C. § 2000e-2 (1970).

52. *Id.* § 2000e(b).

53. See notes 2 & 3 *supra*. If a charge with the EEOC is dismissed as in *McDonald*, the EEOC notifies the plaintiff who then has 90 days to file a civil action in federal district court. 42 U.S.C. § 2000e-5(f)(1) (1970). In essence, this 90-day period serves as a statute of limitations for the filing of a suit under Title VII. Section 1981 has no such limitation period; its timeliness is determined by the limitations period of a comparable state action. See *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 763 (3d Cir. 1971).

54. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discussing in detail the appropriateness of back pay relief under Title VII); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972) (back pay relief granted to employee under § 1981).

55. See 42 U.S.C. § 2000e-5(g) (1970).

56. See, e.g., *Loo v. Gerarge*, 374 F. Supp. 1338, 1341-42 (D. Hawaii 1974) (defendant's motion to dismiss plaintiff's demand for compensatory damages granted since Title VII makes it clear only equitable relief can be granted). *But cf. Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832, 843 (W.D. Tex.), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974) (where plaintiff was disabled and unavailable for work, court could fashion equitable relief in form of compensatory damages).

57. See, e.g., *Cofield v. Goldman, Sachs, & Co.*, 364 F. Supp. 1372, 1374 (S.D.N.Y. 1973) (plaintiff entitled to any compensatory and punitive damages he is able to show under § 1981). Title VII does offer litigants some definite advantages. The Act authorizes a federal district court to appoint counsel and pay attorneys fees and costs under certain circumstances. See 42 U.S.C. § 2000e-5(k) (1970). The Supreme Court recently has refused to permit an award of attorneys fees in federal litigation unless a federal statute specifically provides for awards of such fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975). However, Congress has since authorized district courts to award attorneys fees to successful litigants under the civil rights acts, including § 1981. See *Civil Rights Attorney's Fees Awards Act of 1976*, Pub. L. No. 94-559, 90 Stat. 2641, *amending* 42 U.S.C. § 1988 (1970). The EEOC or the attorney general (in cases involving public employers) can file suit for a complainant in a Title VII action, whereas only a private citizen can initiate a § 1981 action. See 42 U.S.C. § 2000e-5(g) (1970).

contravene Title VII's express mandate that its administrative machinery be used to settle and conciliate claims to avoid unnecessary litigation.⁵⁸ Despite this possibility, the *McDonald* Court never addressed this issue. The lower courts, however, have taken some measures to curb what they perceive to be an undermining of this preferred administrative remedy. Thus, although a plaintiff need not exhaust his Title VII remedy before proceeding into federal court on his section 1981 claim,⁵⁹ a court may stay the 1981 proceedings pending disposition by the EEOC of the Title VII charges.⁶⁰ Other courts have allowed the EEOC to intervene during the pendency of a section 1981 suit.⁶¹ Especially in light of *McDonald's* expansion of section 1981's coverage to include white litigants, the Supreme Court may soon be forced to articulate its views on the proper relationship between these two statutes, thereby resolving this important question of federal law.

Despite Justice Marshall's statement that the Court was not considering the permissibility of affirmative action programs,⁶² *McDonald* may add more uncertainty to the sensitive issue of reverse discrimination. A broad reading of *McDonald* and its construction of section 1981 may suggest that all preferential treatment favoring minorities at the expense of whites constitutes discrimination impermissible under that section. Indeed, the Court's position that section 1981 was intended to proscribe discrimination against,

58. 42 U.S.C. § 2000e-5(b) (1970). See notes 2 & 3 *supra*. Under Title VII, it is only when conciliation is unsuccessful that the complainant can resort to litigation. *Id.* § 2000e-5(f)(1). See generally *Selecting a Remedy*, *supra* note 47, at 313.

59. See, e.g., *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir.), *cert. denied*, 405 U.S. 916 (1971), where the plaintiff intentionally bypassed his Title VII remedy through the EEOC and proceeded directly into federal court on his § 1981 claim. The court held that the two remedies were coextensive and independent of each other; thus exhaustion of administrative remedies was not necessary for relief under § 1981.

60. See, e.g., *Stringer v. Nosef*, 388 F. Supp. 1389, 1390 (N.D. Miss. 1975) (recognizing the propriety of a discretionary stay of § 1981 actions until conciliation efforts of the EEOC have had a chance to succeed).

61. See *Caldwell v. National Brewing Co.*, 443 F.2d 1044, 1046 (5th Cir.), *cert. denied*, 405 U.S. 916 (1971) (district court can stay § 1981 relief and in the proper case, the EEOC can intervene). One circuit court has expressed this view on a proper accommodation of the two federal statutes: "By fashioning equitable relief with due regard to the availability of conciliation and by encouraging in appropriate cases a resort to the EEOC during the pendency of § 1981 cases, the courts will carry out the policies of both statutes." *Young v. International Tel. & Tel. Co.*, 438 F.2d 757, 764 (3d Cir. 1971).

62. See note 18 and accompanying text *supra*.

or in favor of, any race⁶³ is difficult to reconcile with the imposition of hiring quotas which necessarily exclude whites from employment opportunities. Yet such quotas, as one form of affirmative action, have frequently been used by lower courts to remedy the effects of past discrimination in employment.⁶⁴ The Supreme Court has until recently declined to decide the constitutionality of such color-conscious remedies.⁶⁵ Since *McDonald* did not involve benign discrimination,⁶⁶ but rather the bare allegation of preferential treatment of a black employee over two white employees, to interpret the decision as a ban on such forms of affirmative action relief is probably unwarranted. There are indications, however, that *McDonald* is already having some impact on the intractable affirmative action/reverse discrimination problem.⁶⁷

In *McDonald*, the Court broadened the scope of Title VII and

63. See 427 U.S. at 295, where the Court stated: "[T]he Act was meant . . . to proscribe discrimination . . . against, or in favor of, any race."

64. See, e.g., *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 405 U.S. 854 (1971) (Philadelphia Plan which ordered construction industry to initiate affirmative action plans including specific goals for minority hiring of 20% to 24%). But see *Pennsylvania v. Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974) (hiring quotas on city of Pittsburgh fire department rejected despite a finding of discriminatory hiring practices). See generally Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Comment, *Carter v. Gallagher: From Benign Classification to Reverse Discrimination*, 34 U. PITT. L. REV. 130 (1972).

65. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (issue of whether preferential admissions policy discriminated against white applicant to state-related law school held moot since petitioner had entered law school and would soon graduate). The Supreme Court has recently agreed to decide the issue of the constitutionality of reverse discrimination in *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977) (No. 76-811).

66. The problems and complexities of affirmative action programs, particularly where such programs take the form of benign discrimination, are beyond the scope of this note. For an interesting debate on these issues, compare Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, with Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

67. See *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977) (No. 76-811). Relying in part on *McDonald* as a signal of the Supreme Court's reluctance to apply different standards to determine the rights of minorities and members of the majority, the California Supreme Court in *Bakke* invalidated a medical school admissions program which gave preferential treatment to minority applicants. But cf. *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976), where the New York Court of Appeals upheld the constitutionality of preferential admissions policies utilized by a state-funded medical school despite claims of reverse discrimination. See also *Selecting a Remedy*, supra note 47, at 323 (asserting that the statute may be used to challenge judicially imposed affirmative action programs).

section 1981 to bring whites within the class of persons protected against racial discrimination in employment. In light of the all-inclusive language of these civil rights statutes, and the anomaly that would result from a construction of anti-discrimination statutes so that only a select group would benefit from their provisions, it is difficult to argue with the Court's decision. However, the Court's silence on the relationship between the two statutes raises troubling questions concerning the use of section 1981 to circumvent Title VII's preferred administrative machinery. Moreover, the case at least raises the possibility that section 1981 may proscribe affirmative action programs which accord minorities preferential treatment in order to remedy the effects of past discrimination. These lingering issues raised by the *McDonald* decision will probably require the Court to return to the sensitive area of employment discrimination in the near future.

Larry A. Silverman