Denver Law Review

Volume 67
Issue 4 *Tenth Circuit Surveys*

Article 8

February 2021

In the Wake of Patterson v. McLean Credit Union: The Treacherous and Shifting Shoals of Employment Discrimination Law

Harvey L. Cohen

IN THE WAKE OF *PATTERSON V. MCLEAN CREDIT UNION*: THE TREACHEROUS AND SHIFTING SHOALS OF EMPLOYMENT DISCRIMINATION LAW

I. INTRODUCTION

Perhaps no circuit better exemplifies the current chaos that reigns among the lower federal courts in the interpretation of *Patterson v. McLean Credit Union*[1] than Colorado's Tenth Circuit. In the wake of *Patterson*, judges within the same Colorado district have issued contradictory rulings on discriminatory firings,[2] while another Colorado judge has gone against the national grain by holding that retaliation may constitute discrimination in the enforcement of an employment contract within the protection of 42 U.S.C. section 1981.[3]

While the uncertainties left by these conflicting opinions may be answered later this year by the Tenth Circuit Court of Appeals,[4] there still exists the unmeasurable consequences of those employment discrimination cases that will never be brought.[5] Concerns over the impact of the *Patterson* decision and other recent Supreme Court rulings cutting back the scope of employment discrimination protections have prompted civil rights groups to call for new legislation. Currently, Senator Edward Kennedy and Representative Augustus Hawkins have introduced and begun hearings on the Civil Rights Act of 1990,[6] legislation designed to negate *Patterson* and several other recent decisions involving

1. 109 S. Ct. 2363 (1989).

2. It should be noted that the Tenth Circuit is not alone in its apparent lack of consensus. In the Seventh Circuit, two judges, one day apart, took radically different positions on whether employees fired in retaliation for complaints about racial discrimination could sue. *See generally* English v. General Dev. Corp., 717 F. Supp. 628 (N.D. Ill. 1989) (retaliation claim allowed); Hall v. County of Cook, 719 F. Supp. 721 (N.D. Ill. 1989) (retaliation claim no longer actionable under 42 U.S.C. § 1981). Prompted by this conflict, Richard Posner, a judge for the Seventh Circuit Court of Appeals and leader of the conservative "law and economics" movement, expressed concern over what he deemed the "treacherous and shifting shoals" of employment discrimination law since the *Patterson* decision. *See* Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989).

3. 42 U.S.C. § 1981 (1982).

4. Padilla v. United Airlines, 716 F. Supp. 485 (D. Colo. 1990), *appeal docketed*, No. 89-1246 (10th Cir. Aug. 9, 1989).

5. The chilling effect on lawsuits has been well documented by the NAACP Legal Defense and Education Fund which conducted a study of cases decided since June 15, 1989, when the *Patterson* decision was announced. The study found that at least 158 claims of intentional race discrimination have been dismissed in federal courts without any substantive ruling on the claims themselves. The dismissed cases included complaints of racial harassment on the job, failure to promote on the basis of race, and discriminatory discharge. *See* Gordon, *Last Hired*, THE NATION, Jan. 29, 1990, at 113.

6. H.R. REP. No. 4000, 101st Cong., 2d Sess., 136 CONG. REC. 362 (1990) and S. REP. No. 2104, 101st Cong., 2d Sess., 136 CONG. REC. 990 (1990). "The Supreme Court has issued a series of rulings marking an abrupt departure in the Supreme Court's historic vigilance in protecting civil rights," stated Senator Kennedy at a February 7, 1990, press conference to announce the bill's introduction. "The Supreme Court has erected artificial barriers for minorities and women. The Civil Rights Act of 1990 is intended to remove these barriers and restore and strengthen basic rights for all Americans." The Kennedy

employment discrimination.[7] Meanwhile, the Bush Administration has introduced its own, more limited, civil rights legislation.[8] While the ultimate impact of the *Patterson* decision is being debated on the floors of Congress, the expectations are starting to be realized as the fallout from the rulings begins to reach the lower federal courts, such as Colorado's Tenth Circuit.

II. *PATTERSON V. MCLEAN CREDIT UNION*

In order to fully understand the quagmire within which the federal district courts of the Tenth Circuit are currently embroiled, it is important to understand the Supreme Court's decision in *Patterson*. In the most closely watched civil rights case of the 1989 term, the Court was faced with the plight of Brenda Patterson, a black woman who alleged hostile and demeaning treatment by racist supervisors. Mrs. Patterson claimed that from 1972 to 1982 she was harassed, denied promotion, and eventually dismissed by her former employer, the McLean Credit Union in Winston-Salem, North Carolina. She testified that the company president, who had hired her as a file clerk, warned her that she would be working with white women who would not like her because she was black. She alleged that he made her do menial chores not required of white co-workers, gave her an oppressive workload, denied her merit raises and promotion, and told her when she fell behind that "blacks are known to work slower than whites by nature."[9] The company, however, denied that any discrimination took place.

Mrs. Patterson invoked the Civil Rights Act of 1866, which guarantees to all persons the same right "to make and enforce contracts" as "is enjoyed by white citizens."[10] In its 1976 *Runyon v. McCrary*[11] decision, the Court ruled that the 1866 law barred private parties from discriminating on grounds of race in determining with whom they would enter into contracts, including employment contracts.

Specifically, in *Runyon*, the Court held that section 1981[12] was violated when a private school refused to admit a black child because of the child's race. The Court held that section 1981 applied to making and enforcing purely private contracts and that it was illegal for the school to

---

and Hawkins bills would appear to remedy the effect of the *Patterson* decision by clarifying that § 1981 prohibits all racially-motivated employment discrimination.

7. For an excellent survey of the shifting directions taken last term by the conservative Reagan Supreme Court majority, *see* Holdeman, *Civil Rights in Employment: The New Generation*, 67 DEN. U.L. REV. 1 (1990).

8. H.R. REP. No. 4081, 101st Cong., 2d Sess., 136 CONG. REC. 426 (1990) and S. REP. No. 2166, 101st Cong., 2d Sess., 136 CONG. REC. 1497 (1990).

9. *Patterson*, 109 S. Ct. at 2392 (Brennan, J., dissenting).

10. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982).

11. 427 U.S. 160 (1976).

12. 42 U.S.C. § 1981 (1982) provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

use race as a basis for refusal to contract with the parents of the child.[13] The *Runyon* ruling was based on legislative and judicial history cited in the 1968 case, *Jones v. Alfred H. Mayer Co.*[14]

Originally, the Supreme Court agreed to review whether the Fourth Circuit Court of Appeals had erred in dismissing Mrs. Patterson's racial harassment claim on the ground that section 1981 bars employers from discriminating only in hiring, firing and promotions.[15] After hearing arguments on that point in February 1988, the majority (Justices Rehnquist, Scalia, White, O'Connor and Kennedy), on April 25, 1988, raised the stakes by questioning whether the post-Civil War Congress had intended the law to cover racial discrimination in private transactions *at all*.[16]

The reargument order transformed the case into a *cause celèbrè*. Civil rights advocates organized a broad-based coalition of support. Numerous amicus curiae briefs were submitted to the Court[17] arguing that the *Runyon* interpretation of section 1981 correctly expressed the intent of the Reconstruction-era Congress, and that *Runyon* should be reaffirmed as an important embodiment of the modern consensus against racial discrimination.[18]

In *Patterson*, the Court unanimously upheld the 1976 decision of *Runyon v. McCrary* which had interpreted a Reconstruction-era civil rights law (later codified as 42 U.S.C. section 1981) to bar private, as well as officially sponsored, acts of racial discrimination.[19] The *Patterson* decision is grounded in the notion of *stare decisis*, and the "fundamental importance" of preserving a judicial system not based upon arbitrary discretion.[20]

By a five-to-four vote, however, the majority then placed sharp lim-

13. *Runyon*, 427 U.S. at 173 (seven-to-two decision).

14. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), a black man had been denied the right to buy a house in a white neighborhood on the basis of his race. He sued to enforce another post-Civil War civil rights statute known as 42 U.S.C. § 1982 (1964) which provided that all persons shall have the same right to lease, buy or convey real property as is enjoyed by white persons. The Supreme Court held that pursuant to section 2 of the thirteenth amendment, Congress has the power "to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. The Court went on to hold that § 1982 and § 1981 are legitimate exercises of that congressional authority. *Id.*

15. Both the district court and the Fourth Circuit Court of Appeals held that § 1981 applied to Mrs. Patterson's claims for failure to promote and discriminatory discharge, but that § 1981 did not apply to her claims for racial harassment. Patterson v. McLean Credit Union, 805 F.2d 1143, 1144 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989).

16. The Court requested that the parties submit written briefs and argue the additional question: "Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered." Patterson v. McLean Credit Union, 485 U.S. 617 (1988).

17. Contributors included 66 United States senators; 145 House members; 47 of the 50 state attorneys general; prominent historians; over 100 civil rights, religious, and civic groups.

18. Taylor, *Rehnquist's Court: Tuning Out the White House*, N.Y. Times, Sept. 11, 1988 (Magazine), at 98, col. 5.

19. *Patterson*, 109 S. Ct. at 2369.

20. *Id.* at 2370.

its on the case's precedential value.[21] In a majority opinion by Justice Kennedy, the Court adopted an extremely narrow reading of section 1981, holding that the statute is only applicable at the initial hiring stage and could not be used to bring a lawsuit over racially biased treatment occurring on the job.[22] The Court reasoned that the "making" of a contract[23] covers only the contract's formation, and could not be construed to reach subsequent problems arising from the conditions of continuing employment.[24] The Court also adopted a strict construction of the term "enforcement,"[25] holding that section 1981 can be invoked only when discrimination occurs along those legal process "access routes" which exist to resolve contract claims.[26] Under this formalistic interpretation, Brenda Patterson's claims of racial harassment and discrimination clearly fell outside the purview of making or enforcing her employment contract.

In the wake of *Patterson* there have been over one hundred decisions in the lower courts which have tried, with varied results, to interpret the meaning of the case. While judges are searching for the Supreme Court's meaning, however, there is one trend that cannot be ignored; the courts "uniformly have rejected attempts to redress discriminatory discharges and demotions" under section 1981.[27]

It should be noted that some employees whose claims have been invalidated by the *Patterson* decision may be able to sue under state law. In fact, concern about duplication of the remedial scheme of Title VII of the Civil Rights Act of 1964[28] appears to have influenced the *Patterson* majority in its reluctance to read section 1981 broadly. Most employees retain the option of suing under Title VII, a federal statute that prohibits race and sex discrimination in hiring, promotions, discharges and conditions of employment.

An individual, however, who establishes a cause of action under Title VII is entitled to a dramatically more limited remedy than under sec-

21. In the words of Justice Brennan, "What the Court declines to snatch away with one hand, it takes with the other." *Id.* at 2379 (Brennan, J., dissenting).

22. *Id.* at 2372.

23. *Id.* at 2373.

24. *Id.*

25. *Id.*

26. *Id.* at 2772-73.

27. *See* Alexander v. New York Medical College, 721 F. Supp. 587, 587-88 (S.D.N.Y. 1989) ("[C]ourts construing 42 U.S.C. § 1981 since *Patterson* uniformly have rejected attempts to redress discriminatory discharges and demotions, among other things, under § 1981.... [L]imiting the availability of § 1981 comports with *Patterson* by harmonizing the procedures and remedies for civil rights violations within the rubric of Title VII."); *see also* Leong v. Hilton Hotels Corp., No. 87-0840 (D. Haw. Apr. 24, 1989) ("It is true that the *Patterson* court was not faced with the question whether a constructive discharge motivated by racial animus is actionable under § 1981. However, the Court did hold that § 1981 only protects two rights, contract formation and contract enforcement.").

28. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) (effective July 2, 1964). "By reading § 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any sigificant coverage of the civil rights laws." *Patterson*, 109 S. Ct. at 2375.

tion 1981. Successful Title VII plaintiffs may obtain only back pay and affirmative job relief.[29] Employees who are harassed but not forced off the job cannot win money damages.[30] In contrast, employees who sue under section 1981 may obtain broad equitable and legal relief, including punitive damages.[31] Section 1981 suits are also tried before a jury, unlike Title VII actions which are decided by a judge.[32] As a result of these diminished incentives, Title VII has been much less attractive to plaintiffs and their lawyers than section 1981. *Patterson* has cut off these section 1981 advantages from all but those plaintiffs alleging discrimination in the "making" of, or in the "enforcement" of, an employment contract.

III. Federal District Court Opinions within the Tenth Circuit

The federal district court opinions within the Tenth Circuit construing section 1981 since the *Patterson* decision have been sensitive to the concerns which apparently influenced the Supreme Court majority. The reported section 1981 cases have consistently dismissed employees' allegations of post-contract harassment, including purposeful discriminatory demotion. There is, however, a very definite split of opinion among Colorado's federal judges as to the validity of section 1981 claims for discriminatory discharge, including instances of retaliation.

A. *The Discriminatory Discharge Cases*

1. *Padilla v. United Airlines*

In *Padilla v. United Airlines*,[33] Alan Padilla ("Padilla"), a black male, filed a lawsuit against his former employer, United Airlines ("United"), contending that his termination was a violation of section 1981. Padilla had been employed as a temporary ramp serviceman with United for a short period of time in 1985. From June 1984 to April 1986, United's policy dictated that supervisors should terminate employees involved in safety violations. Padilla's supervisor terminated him on April 8, 1985, for leaving a vehicle parked in an improper area allegedly in violation of a safety rule.[34]

Judge Arraj entered judgment in favor of Padilla on June 14, 1989, finding that United had discriminated against Padilla because of his race. Specifically, the court held United responsible for terminating Padilla

29. Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

30. *See* Walker v. Ford Motor Co., 684 F.2d 1355, 1363-64 (11th Cir. 1982).

31. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).

32. *Patterson*, 109 S. Ct. at 2391 (Brennan, J., dissenting). In addition, Title VII's statute of limitations is substantially shorter than the customary two or three year statute of limitations applicable to § 1981 claims; § 1981 requires no complex administrative procedures prior to suit; and § 1981 reaches conduct by *any* person, while Title VII covers only employers of fifteen or more persons, labor organizations, and certain conduct by employment agencies. 42 U.S.C. §§ 2000e(b), 2000e-2(a) to (c) (1982).

33. 716 F. Supp. 485 (D. Colo. 1989).

34. Padilla v. United Airlines, No. 88-A-400, slip. op. at 4 (D. Colo. June 14, 1989) (unpublished slip opinion dealing with the merits of the case).

without conducting an investigation aimed at determining whether he had committed the safety violation for which he was allegedly disciplined.[35] As a result of the disparate treatment undertaken by United, the court awarded Padilla back pay in the amount of $4,117.68. This amount constituted lost earnings for the period beginning April 19, 1985, the day after Padilla was terminated, and ending June 16, 1985, the end of an eighty-nine day temporary employment period.

Both parties filed post-trial motions. In his first post-trial motion, Padilla requested that the court amend its prior judgment for purposes of determining the amount of time for which he was entitled to back pay. Padilla argued that the defendant had the burden to prove by a preponderance of the evidence that Padilla would not have been hired as a permanent full-time employee but for the discrimination by the defendant.[36] The court was not persuaded; instead, it found that in the absence of any credible evidence that Padilla would have applied for a permanent position, United was not required to prove that Padilla would not have been hired as a permanent employee but for race discrimination.[37]

Padilla's second post-trial motion sought to expunge the "not eligible for rehire" notation on his employment record.[38] The court granted this part of Padilla's motion, holding that United must eliminate its "not eligible for rehire" notation from Padilla's employment record.[39] The court reached its decision by invoking its equitable discretion in order to remove the vestiges of past discrimination: "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' "[40]

United's post-trial motion was the direct result of the Supreme Court's decision in *Patterson*.[41] Citing *Patterson*, United contended that section 1981 did not establish liability for termination. United requested the court to amend its judgment to hold that Padilla's claims were governed solely by Title VII and that his racial discrimination claim should therefore have been dismissed. Alternatively, United requested a new trial to make new findings of fact and conclusions of law that Padilla's claims were not cognizable under section 1981.

United argued that *Patterson* limits the application of section 1981 to cases involving either the "formation" or the "enforcement" of the employment contract. According to United, because Padilla asserted that his termination was based upon his race, his section 1981 claim should

35. *Padilla*, 716 F. Supp. at 489.
36. *Id.* at 486-87.
37. *Id.* at 487.
38. *Id.* at 488.
39. *Id.*
40. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
41. The *Patterson* opinion was announced on June 15, 1989, one day after the *Padilla* court set forth its findings of fact and conclusions of law.

have been dismissed because the incidents of allegedly discriminatory behavior arose in the post-contract formation stages of his employment contract.

Judge Arraj decided that the holding in *Patterson* did *not* apply to the *Padilla* case. The court distinguished *Patterson* on the ground that the Supreme Court "did not say that *termination* of an employee does not involve the formation process" because the issue of whether Brenda Patterson's claim for discriminatory firing was actionable under section 1981 was never before the *Patterson* Court.[42]

In limiting the *Patterson* holding to a section 1981 claim for discriminatory harassment, Judge Arraj reasoned that

> Termination is part of the making of a contract. A person who is terminated because of his race, like one who was denied an employment contract because of his race, is without a job. Termination affects the existence of the contract, not merely the terms of its performance. Thus, discriminatory termination directly affects the right to make a contract contrary to section 1981.[43]

The court's *ratio decidendi* was based almost exclusively on two United States Court of Appeals cases, including the lower *Patterson* decision.[44] The *Padilla* court apparently found solace in the Fourth Circuit Court of Appeals rendering that "[c]laims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within section 1981's protection."[45] Similarly, an Eleventh Circuit Court of Appeals decision involving "work environment" discrimination bolstered the *Padilla* court's broad interpretation of what *Patterson* did *not* say.[46]

The *Padilla* court also expressed its belief that Padilla's claim could fit in the opening left by the Supreme Court's statement that discriminatory conduct involving "promotions" may be actionable under section 1981 "where the promotion rises to the level of an opportunity for a

---

42. *Padilla*, 716 F. Supp. at 489 (emphasis in original). Only one other post-*Patterson* opinion has held that § 1981 is applicable to actions based on discriminatory terminations. In Birdwhistle v. Kansas Power & Light Co., 723 F. Supp. 570 (D. Kan. 1989), the plaintiff alleged discrimination in the termination of his employment contract. The *Birdwhistle* court found that *Patterson* did not affect the plaintiff's claim, stating that the Supreme Court "was not asked to address, and did not address, whether alleged discriminatory discharge is actionable under § 1981." *Id.* at 575. The court stated in light of *Patterson*, "We believe that discharge is directly related to contract enforcement and thus is still actionable under § 1981." *Id.*

43. *Padilla*, 716 F. Supp. at 490.

44. Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S.Ct. 2363 (1989).

45. *Patterson*, 805 F.2d at 1145.

46. The Eleventh Circuit rejected an employer's argument that racial harassment claims were not actionable under § 1981 by stating: "We need not reach the issue of whether § 1981 covers 'pure' harassment claims, because [the plaintiff] presented evidence that the harassment caused her to stop working at Western Way, thereby impairing her ability to make and enforce her employment contract." Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1509 n.3 (11th Cir. 1989).

new and distinct relation between the employee and the employer."[47] From this perspective, Judge Arraj reasoned that United's allegedly discriminatory actions prevented Padilla from obtaining future employment with United, thereby constituting a direct barrier to his ability to "make" a new contract.[48] Based on the facts before the court, Judge Arraj apparently was convinced that by terminating Padilla's temporary employment, United abruptly ended any possible future opportunities to contract for full-time employment.[49]

In reaching this conclusion under the *Padilla* circumstances, however, Judge Arraj ignored the very fact upon which he had relied in denying Padilla's first post-trial motion;[50] that is, at no time did Padilla ever produce any credible evidence that he would have applied for a permanent position, and thus "make" a new contract.[51] In the absence of this evidence, it hardly seems plausible to assert that United discriminated against Padilla because of his race when United impaired his ability to make an employment contract by terminating him and by preventing him from obtaining future employment with United.[52]

The *Patterson* Court specifically cautioned against straining the clear meaning of the language in section 1981. Here, Padilla neither alleged that United discriminated against him when it entered into the employment relationship with him, nor that United impaired his ability to enforce through legal process his established contractual rights. Padilla's only allegation in his original complaint to support his section 1981 claim was that he was terminated. Logically, the termination of an employment "contract" comes after the employment relationship has been established, and is therefore post-contract formation conduct of the type no longer covered by section 1981. As it stands, Judge Arraj's opinion reads contrary to the *Patterson* command.

47. *Patterson*, 109 S. Ct. at 2377. It should be noted that the Supreme Court's ruling, suggesting that allegations of discriminatory promotions may also lie outside the rubric of § 1981, was made even though the defendant credit union had not put the issue before the Court.

48. Padilla v. United Airlines, 716 F. Supp. 485, 490 (D. Colo. 1989). In Luna v. City and County of Denver, 718 F. Supp. 854 (D. Colo. 1989), another discriminatory promotion case, Judge Babcock made a similar argument. In finding the claim of an Asian-American employee against his municipal employer to be actionable under § 1981, Judge Babcock was persuaded by the argument that his promotion, from the position of Project Inspector I to Engineer III, would have provided the employee with the opportunity to "enter" into a new and distinct contractual relationship with the municipal defendants. *Id.* at 856. In reaching his decision, Judge Babcock relied on the same language from *Patterson* as did Judge Arraj.

49. Apparently, Judge Arraj was persuaded by the fact that the "Ineligible for Rehire" status assigned to Padilla would effectively preclude him from entering into any future employment with United. *Padilla*, 716 F. Supp. at 490 n.4.

50. *See supra* text accompanying note 37.

51. Judge Arraj even states that "Padilla's own self-serving testimony that he intended to make a permanent career with United does not persuade me to the contrary." *Padilla*, 716 F. Supp. at 487 n.2.

52. *Id.* at 490.

2. *Rivera v. AT&T Information Systems, Inc.*

In *Rivera v. AT&T Information Systems, Inc.*,[53] Dorothy M. Rivera ("Rivera"), an Hispanic female, alleged that she was subjected to disparate treatment based upon her national origin when AT&T Information Systems, Inc. ("AT&T") terminated her employment in violation of section 1981. Rivera had been employed by AT&T in Salt Lake City, Utah, beginning in 1973. In January of 1984, Rivera transferred to AT&T's Denver facility. On December 22, 1986, Rivera was terminated for theft of a base telephone set. Rivera did not dispute the actual theft; rather, she alleged that AT&T treated non-Hispanics more favorably in instances of theft, thus giving rise to her claim of disparate treatment. In its dispositive pre-trial motion, AT&T contended that summary judgment should be granted in its favor on Rivera's claim under section 1981 because her claim was barred by the *Patterson* decision.[54]

The court addressed Rivera's national origin discrimination claim under section 1981 by construing the *Patterson* command in its most narrow circumstance. According to Judge Babcock, the first prong of the *Patterson* opinion dealing with the right to "make" contracts effectively precluded any use of section 1981 in the post-contract formation stage where, by definition, a "termination" would occur:[55]

> The Supreme Court's rationale in *Patterson* . . . leads me to conclude that under the plain language of section 1981, discriminatory discharge, like racial harassment amounting to a breach of contract, is post-contract formation conduct. Discriminatory discharge occurs after the commencement of the employment relationship and does not affect the employee's right to make or enforce contracts.[56]

The *Rivera* court was convinced that the scope of section 1981 had been clarified by the Supreme Court in its confirmation that the right to make contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment."[57] The rationale in the *Rivera* decision is in accord with the

53. 719 F. Supp. 962 (D. Colo. 1989).

54. AT&T argued for summary judgement claiming that Rivera's state law breach of contract claim was preempted by the Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1982). On this issue, Judge Babcock decided that Rivera was entitled to more discovery as to whether her claims against AT&T existed outside of the collective bargaining agreement. *Rivera*, 719 F. Supp. at 965.

55. Apparently, Judge Babcock's position is the majority one. *See* Busch v. Pizza Hut, Inc., No. 88-C-8241 (N.D. Ill. Oct. 2, 1989) (LEXIS, Genfed library, Dist file) ("Although *Patterson* did not directly address the question whether constructive discharge claims are still actionable under § 1981, given the narrow scope of the statute defined in *Patterson*, it appears that constructive discharge claims are similarly excluded from § 1981's coverage."); Bush v. Union Bank, No. 88-0252-CV-W-9 (W.D. Mo. Sept. 12, 1989) (LEXIS, Genfed library, Dist file) ("Although racial harassment and failure to promote, not termination, were involved in *Patterson*; the Supreme Court's explanation of its ruling furnishes guidance in determining whether plaintiff has stated a claim under § 1981. . . . [P]laintiff's claim that she was discriminated against on the basis of her race because she was discharged [does not] involve the rights to make or to enforce contracts.").

56. *Rivera*, 719 F. Supp. at 965.

57. *Patterson*, 109 S. Ct. at 2372.

Supreme Court's command that 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."[58] Under this analysis, and because Rivera did not allege that AT&T discriminated against her when it entered into their employment relationship, it was not difficult for Judge Babcock to find that Rivera's alleged discriminatory discharge claim was not actionable under section 1981.[59]

What is most intriguing about Judge Babcock's decision is its diametric opposition to the stance taken by Judge Arraj in *Padilla*.[60] Although Judge Babcock agreed with Judge Arraj's assertion that the *Patterson* Court never specifically addressed the issue of discriminatory discharge, he concluded that the express language of *Patterson* and the clear implication of its holding bar a *Padilla*-like holding:

> [R]acial harassment amounting to breach of contract, like racial harassment alone, impairs neither the right to make nor the right to enforce a contract. It is plain that the former right is not implicated directly by an employer's breach in the performance of obligations under a contract already formed. Nor is it correct to say that racial harassment amounting to a breach of contract impairs an employee's right to enforce his contract. To the contrary, conduct amounting to a breach of contract under state law is precisely what the language of section 1981 does not cover. That is because, in such a case, provided that plaintiff's access to state court or any other dispute resolution process has not been impaired by either the State or a private actor, . . . the plaintiff is free to enforce the terms of the contract in state court, and cannot possibly assert, by reason of the breach alone, that he has been deprived of the same right to enforce contracts as is enjoyed by white citizens.[61]

Accordingly, Judge Arraj's assertion that "termination" is part of the "making of a contract" had no place in Judge Babcock's formalistic section 1981 analysis. In fact, Judge Babcock's view represents the overwhelming majority of post-*Patterson* opinions addressing this issue.[62]

---

58. *Id.* at 2372-73.

59. It should be noted that Rivera still retained her rights under Title VII. As such, and because the *Patterson* decision was announced nearly six months after Rivera filed her original complaint, Judge Babcock granted her leave to file an amended complaint to assert a claim for relief under Title VII.

60. Apparently, Judge Babcock is not alone in his criticism of the *Padilla* decision. In Hall v. County of Cook, 719 F. Supp. 721 (N.D. Ill. 1989), Judge Rovner stated: "After careful consideration of the Supreme Court's opinion in *Patterson*, this Court has determined that it must respectfully disagree with the Colorado court. If there were any indication that the right to make a contract under § 1981 should be construed broadly as the right to enjoy the benefits of that contract, the Colorado court would no doubt be correct in its reasoning. But the Court in *Patterson* did not interpret the right to make a contract under § 1981 in this manner." *Id.* at 723.

61. Rivera v. AT&T Information Sys., 719 F. Supp. 962, 964-65 (D. Colo. 1989) (quoting *Patterson*, 109 S. Ct. at 2376).

62. *See* Singleton v. Kellogg Co., No. 89-1073 (6th Cir. Nov. 29, 1989) (The court, in affirming the district court's dismissal of plaintiff's § 1981 claim, noted that the plaintiff

Under the majority view, once an individual has secured employment, the protection of section 1981 ceases. With respect to conduct that occurs after the formation of the contract, including discharge, the employee must look to the remedial scheme of Title VII for protection. As such, it would appear that *Rivera* is the properly decided decision, in that a plaintiff's claim of racially discriminatory discharge is no longer actionable under section 1981.

B. *Retaliatory Discharge:* Jordan v. U.S. West Direct Co.

The second protection referenced under section 1981 prohibits discrimination in the legal process that prevents the enforcement of established contract rights. In *Jordan v. U.S. West Direct Co.*,[63] Judge Carrigan wrestled with the issue of whether a retaliatory discharge claim could still fall within the rubric of section 1981 protection, notwithstanding the *Patterson* Court's determination that section 1981, by its plain terms, can only protect the narrow right "to make contracts" and "to enforce contracts."

In *Jordan*, Timothy Jordan ("Jordan") filed a lawsuit against his former employer, U.S. West Direct Company ("U.S. West"), alleging workplace harassment and retaliatory discrimination under Title VII and section 1981. U.S. West submitted two motions to dismiss, contending in the first that Jordan's Title VII claim asserting retaliatory demotion could not survive because he had failed to exhaust his administrative remedies. In response, Jordan asserted that he was retaliated against because he spoke out against discrimination and instigated an internal investigation of U.S. West. According to Jordan, his "Discrimination Statement" filed with the Colorado Civil Rights Commission set forth sufficient information to indicate that the internal Equal Employment Opportunity investigator intentionally misrepresented Jordan and others in her investigation of Jordan's discrimination charges.

The court was not convinced that Jordan's failure to exhaust his administrative remedies with the Colorado Civil Rights Commission ne-

---

did not contend that the alleged discriminatory discharge involved impairment of her right to "make" or "enforce" contracts. It stated that, in light of *Patterson*, plaintiff's claim of racially discriminatory discharge is no longer cognizable under § 1981.); *see also* Thompson v. Johnson & Johnson Mgmt. Infor. Ctr., 725 F. Supp. 826 (D.N.J. 1989); International City Mgmt. Ass'n Retirement Corp. v. Watkins, 726 F. Supp. 1 (D.D.C. 1989); Guerrero v. Preston Trucking Co., No. 87-C-3036 (N.D. Ill. Dec.21, 1989); Crader v. Concordia College, 724 F. Supp. 558 (N.D. Ill. 1989); James v. Dropsie College, No. 89-4429 (E.D. Pa. Nov. 22, 1989); Dumas v. Phillips College of New Orleans, Inc., No. 89-0526 (E.D. La. Nov. 21, 1989); Owens v. Foot Locker, No. 88-8279 (E.D. Pa. Nov. 15, 1989); Matthews v. Northern Telecom, Inc., No. 88-0583 (S.D.N.Y. Nov. 1, 1989); Eklof v. Bramalea Ltd., No. 89-5312 (E.D. Pa. Oct. 27, 1989); Carroll v. General Motors Corp., No. 88-2532-0 (D. Kan. Oct. 27, 1989); Williams v. Edsal Mfg. Co., No. 88-C-10341 (N.D. Ill. Oct. 25, 1989); Brown v. Avon Products, Inc., No. 88-C-4459 (N.D. Ill. Oct. 4, 1989); Gonzalez v. National R.R. Passenger Corp., No. 87-2264 (E.D. Pa. Sept. 19, 1989); Jones v. Alltech Assoc., Inc., No. 85-C-10345 (N.D. Ill. Sept. 5, 1989); Copperidge v. Terminal Freight Handling Co., No. 89-2198 (W.D. Tenn. July 27, 1989); Jackson v. Commonwealth Edison, No. 87-C-4449 (N.D. Ill. July 6, 1989).

63. 716 F. Supp. 1366 (D. Colo. 1989).

cessitated dismissal of the Title VII claim. The court reasoned that because the two related charges of discrimination and retaliation were so closely intertwined, the failure to exhaust the discrimination charge was not fatal to Jordan's proceeding with his federal court retaliation charge.

In its second motion, U.S. West contended that *Patterson* precluded Jordan's utilization of section 1981 as a means to address allegedly discriminatory conduct which occurred after the formation of his contract and which did not interfere with his right to enforce the contractual obligations. Specifically, U.S. West sought to use *Patterson* to dismiss two of Jordan's claims: his claim of purposeful discrimination arising from his demotion to a nonmanagerial position on February 16, 1987, and his assertion of retaliatory demotion.

Judge Carrigan held in U.S. West's favor with regard to Jordan's allegations of harassment, including the purposeful discriminatory demotion claim. In dismissing this claim, the court distinguished Jordan's situation from those instances alluded to in *Patterson* in which a failure to promote might rise to an actionable level of discriminatory conduct under section 1981. In considering Jordan's situation, the court reasoned that because this was a case of a "wrongful demotion, as opposed to a failure to promote, there is no refusal by the employer to enter into a new contract with the employee. Wrongful demotion allegations thus are included in racial harassment at the workplace."[64] As such, Jordan's discriminatory demotion claim clearly fell outside the purview of the "making" or "formation" of the employment contract.

With regard to U.S. West's motion to dismiss Jordan's allegations of retaliatory discrimination, Judge Carrigan was not convinced that *Patterson* mandated preclusion. In *Patterson*, the majority declared:

> The second of these guarantees, "the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens," embraces protection of a legal process, that will address and resolve contract law claims without regard to race. In this respect, it prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race . . . . [65]

In concluding that Jordan's retaliation charges fell within the coverage afforded by the right to "enforce" contracts contained in section 1981, Judge Carrigan reasoned that:

> The *right to enforce contracts* extends to private efforts to obstruct nonjudicial methods of adjudicating disputes involving discrimination. Plaintiff alleges that he was retaliated against because he complained of discrimination and instigated an investigation regarding his charges. These allegations fall within the coverage afforded by the right to enforce contracts contained in section 1981.[66]

64. *Id.* at 1368.

65. *Patterson*, 109 S. Ct. at 2373.

66. *Jordan*, 716 F. Supp. at 1368-69 (emphasis in original).

Judge Carrigan's decision represents a minority view among the federal courts that have addressed the issue of retaliatory discharge.[67] For instance, the Ninth Circuit Court of Appeals found that a plaintiff's retaliatory discharge claim was post-formation conduct not actionable under section 1981.[68] The Ninth Circuit explained that the plaintiff's right to make a contract was not implicated, nor did he allege that the defendant obstructed his access to courts or to any other dispute resolution process.[69] Most of the other courts dealing with the retaliatory discharge issue have found that, because such behavior is specifically proscribed by section 704(a) of Title VII,[70] it is unnecessary "to twist the interpretation of another statute (section 1981) to cover the same conduct."[71]

Apparently, Judge Carrigan was not convinced that such a pinched view of *Patterson* was required under the particular circumstances of Jordan's discharge.[72] Instead, Judge Carrigan interpreted U.S. West's conduct as a direct effort to "impede" Jordan's right to enforce his contract in violation of section 1981. This interpretation is consistent with *Patterson* if section 1981 is construed not as an absolute proscription of discrimination in all instances of retaliation, but rather to include only those forms of *direct* obstructive behavior that discriminate against an employee's right to enforce a contract.[73]

IV. CONCLUSION

The confusion surrounding the *Patterson* case, in which the Supreme Court held that federal law prohibiting racial discrimination in private contracts does not apply to "conduct which occurs after the formation of a contract," is readily apparent in Colorado's Tenth Circuit. Based on

67. A partial list of recent cases that have construed *Patterson* to preclude § 1981 claims for retaliatory discharge includes Alexander v. New York Medical College, 721 F. Supp. 587 (S.D.N.Y. 1989); Williams v. National R.R. Passenger Corp., 716 F. Supp. 49 (D.D.C. 1989); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989); Kolb v. Ohio, 721 F. Supp. 885 (N.D. Ohio 1989). For a case supporting Judge Carrigan's view see English v. General Dev. Corp., 717 F. Supp. 628 (N.D. Ill. 1989).

68. Overby v. Chevron USA, Inc., 884 F.2d 470 (9th Cir. 1989).

69. *Id.* at 473.

70. 42 U.S.C. § 2000e-3(a) (1982).

71. *Overby*, 884 F.2d at 473 (quoting *Patterson*, 109 S. Ct. at 2375).

72. However, in another case whose fact pattern did not involve conduct directly infringing on a plaintiff's right to "enforce" an employment contract, Judge Carrigan granted summary judgment for defendants on a § 1981 claim because the plaintiff had asserted the claim as a result of being fired. "While it might be argued that the § 1981 right to non-discriminatory procedures to 'enforce' a contract is hollow if there is no § 1981 protection against termination of the contract because of ethnicity or race, the Supreme Court's rationale is inconsistent with such reasoning. Because employment termination clearly constitutes post-formation conduct *not impinging on procedures to enforce the contract*, the plaintiff's claim cannot stand post-*Patterson*." Trujillo v. Grand Junction Regional Center, No. 88-C-1423, slip op. at 7 (D. Colo. 1990) (emphasis in original).

73. It should be noted, however, that Judge Carrigan invited the parties to bring to his attention any pertinent case authority that would shed light on his *Patterson* interpretation: "I would not look with disfavor on either party asking for reconsideration as long as that request is supported by pertinent case law." Jordan v. U.S. West Direct Co., 716 F. Supp. 1366, 1369 (D. Colo. 1989).

the facts in *Padilla*, it appears that Judge Arraj misconstrued the *Patterson* command when he found that discriminatory discharge is directly related to contract formation, thus falling within the rubric of section 1981 protection. In all likelihood, the Tenth Circuit Court of Appeals will follow other recent opinions, including Judge Babcock's decision in *Rivera*, and will overturn the *Padilla* decision.[74] The clear weight of post-*Patterson* authority holds that an employee's claim of discriminatory termination in violation of section 1981 is no longer actionable.

Conversely, Judge Carrigan's holding in *Jordan* that a section 1981 retaliatory discrimination claim can stand post-*Patterson* appears to be correctly decided based on the narrow circumstances of the case. That is, when retaliation clearly impinges on an employee's ability to enforce the employment contract, then section 1981 can still be utilized.

Decisions such as *Padilla* and *Jordan* are indicative of the difficulties confronting the lower federal courts which are caught in the ground swell of criticism surrounding the *Patterson* decision. Even Justice Kennedy was sensitive to the impending fire storm of debate, writing at the end of his opinion in the *Patterson* case: "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination."[75] From some perspectives, Justice Kennedy's remarks were merely a restatement of the obvious. Others, hearing a defensive tone in Justice Kennedy's words, prepared to brave the treacherous and shifting shoals of post-*Patterson* employment discrimination law, to hold Congress, if not the Court, to its promise.

Harvey L. Cohen

74. In the only post-*Patterson* decision issued by the Tenth Circuit Court of Appeals, Judge Ebel decided that the district court properly dismissed the plaintiff's claim under § 1981. In reaching that decision, the court stated that "[s]ection 1981's contract clause protects only the right to enter into and enforce contracts." Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989) (citing Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989)). While this decision is not dispositive of the issues on appeal in *Padilla*, it appears to be a harbinger of things to come.

75. *Patterson*, 109 S. Ct. at 2379.