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Reverse Discrimination: Availability of the Civil Rights Act of 1866 to White Plaintiffs

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REVERSE DISCRIMINATION: AVAILABILITY OF THE CIVIL RIGHTS ACT OF 1866 TO WHITE PLAINTIFFS—*Hollander v. Sears, Roebuck & Co.*, 392 F. Supp. 90 (D. Conn. 1975).

As the federal judiciary continues to play a major role in the development of race relations in the United States, an intriguing question that has emerged in recent decisions has been that of reverse discrimination and the application of 42 U.S.C. § 1981[1] to white plaintiffs. The concept of reverse discrimination may be defined as a preference for minorities over qualified whites in order to achieve racial balance and equal opportunities in employment[2] and education.[3] The validity of preferential policies has been called into question in instances where federal district courts have issued orders[4] designed to enforce Title VII of the Civil Rights Act of 1964.[5] One of the latest concerns has become whether §1981 affords whites a cause of action for racial discrimination in employment.

Until 1969[6] the availability of §1981 to whites was largely overlooked. Apparently it was never felt that there was any need to protect whites against racial discrimination in employment or otherwise. However, with the advent of the modern civil rights movement and the effect of legislation enacted on behalf of minorities,[7] the possibility that whites could be subject to discrimination, because of their race, became a concern. The question of whether or not whites might have a cause of action for racial discrimination

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1. 42 U.S.C. §1981 (1970).

Equal Rights Under the Law.

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. (R.S. §1977.)

2. *See* Waters v. Local 21, Wisconsin Steel Workers, 502 F.2d 1309, 1319 (7th Cir. 1974), *citing* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968).

3. *See* De Funis v. Odegaard, 416 U.S. 312 (1974); Comment, *Reverse Discrimination*, 45 MISS. L.J. 467 (1974).

4. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); Rios v. Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974).

5. 42 U.S.C. §2000 *et seq.* (1964).

6. In 1969, two cases, Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969) and Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd in part*, 450 F.2d 1227 (8th Cir. 1971), allowed two white church groups to sue under 42 U.S.C. §§1981-83 and §1985 for violation of their civil rights by black activist groups in the St. Louis area. The violations took place primarily in the plaintiffs' places of worship. This leads to confusion over which rights were being violated, *i.e.*, first amendment religious rights or fourteenth amendment civil rights.

7. Primarily the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.* (1964), and the Economic Opportunity Act of 1964, 42 U.S.C. §2701 *et seq.* (1964).

under §1981 has been considered in many cases,[8] but generally by way of dicta, and rarely as a dispositive factor in the case. This unnecessary judicial theorizing has created much confusion in the handful of cases where the central issue was the standing of a white plaintiff to sue for racial discrimination.[9] One of the most recent courts to consider the question was the District Court for the District of Connecticut in *Hollander v. Sears, Roebuck & Co.*[10] *Hollander* directly questions the use of §1981 solely as a vehicle for vindication of minority civil rights.

I. Facts of the Case

Alan Roy Hollander, a white student at Wesleyan University in Connecticut, attempted to obtain a job interview with the defendant, Sears, which was recruiting for its "Summer Intern Program for Minority Students."The interview was denied because the plaintiff was white. Almost immediately the plaintiff sent letters of complaint to the Connecticut Commission on Human Rights and Opportunities and to the United States Equal Employment Opportunity Commission (EEOC). The Connecticut Commission dismissed

8. Although they should be accorded little or no precedential value certain cases have been cited as standing for both propositions at different times, *i.e.*, that whites do or do not have a cause of action under §1981. However, if any implications can be drawn from these cases, they should be read as follows.

Those implying that a white can sue: Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Agnew v. City of Compton, 239 F.2d 226, 230 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975); Abshire v. Chicago & E. Ill. R.R., 352 F. Supp. 601, 605 (N.D. Ill. 1972); Kurylas v. United States Dep't of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974).

Contra: Clifton v. Grishman, 381 F. Supp. 324 (E.D. Miss. 1974); N.O.W. v. Bank of California, 5 E.P.D. ¶8510 (N.D. Cal. 1973); League of Academic Women v. Regents of Univ. of Cal., 343 F. Supp. 636 (N.D. Cal. 1972). *See also* Marshal v. Plumbers Local 60, 343 F. Supp. 70 (E.D. La. 1972); Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972).

9. For cases allowing a cause of action, see Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969); Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd in part*, 450 F.2d 1227 (8th Cir. 1971); WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973); Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969); Marlowe v. Fisher Body, 5 E.P.D. ¶7963 (E.D. Mich. 1972); Phillips v. Columbia Gas. Inc., 347 F. Supp. 533 (S.D. W. Va. 1972), *aff'd*, 474 F.2d 1342 (4th Cir. 1973); Baca v. Butz, 394 F. Supp. 888 (D.N. Mex. 1975); De Matteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir.), *aff'd on rehearing*, 520 F.2d 409 (1975); Speiss v. C. Itoh & Co., 44 U.S.L.W. 2379 (S.D. Tex. Jan. 29, 1976), *overruling* McDonald v. Santa Fe Trail Transp. Co., 513 F.2d 90 (5th Cir.), *cert. granted*, 44 U.S.L.W. 3263 (Nov. 3, 1975).

Contra: Perkins v. Banster, 190 F. Supp. 98 (D. Md., *aff'd*, 285 F.2d 426 (4th Cir. 1960); Balc v. United Steel Workers Union, 6 E.P.D. ¶8948 (W.D. Pa. 1973), *aff'd without opinion*, 503 F.2d 1398 (3d Cir. 1974); Van Hoomison v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973); and Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973).

10. 392 F. Supp. 90 (D. Conn. 1975).

the complaint, without a hearing,[11] and on appeal, the Court of Common Pleas sustained a plea in abatement[12] and dismissed the action. Hollander then filed suit in the United States District Court for the District of Connecticut. Subsequent to filing, notification was received from the EEOC to the effect that it would investigate the complaint, but due to the fact that the plaintiff had already filed suit the complaint was withdrawn and no further administrative disposition of the case was made.

At trial Sears moved to dismiss on three grounds, its main contention being that 42 U.S.C. §1981 does not provide a cause of action for whites who allege racial discrimination.[13] In denying the defendant's motion to dismiss, the court relied heavily on the legislative history of the Civil Rights Act of 1866.[14] The court held that, although the Act gives to "all persons . . . the same right . . . to make and enforce contracts . . . *as is enjoyed by white citizens*" (emphasis added),[15] its use could not be limited to blacks and other non-white minorities for vindication of protected civil rights.[16] Therefore, a white plaintiff who alleges racial discrimination in employment has standing to sue under 42 U.S.C. §1981.

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11. The complaint was dismissed on the basis of insufficient evidence of racial discrimination.

12. The plea in abatement was sustained on purely procedural grounds, *i.e.*, untimely and improper service on the defendant.

13. Sears' second contention was that the plaintiff was required to exhaust his administrative remedies before the EEOC prior to commencing the action under §1981. The court decided this claim had little merit on the basis of Gresham v. Chambers, 501 F.2d 687, 690-91 (2d Cir. 1974); 392 F. Supp. at 94. This is a rational decision since the original provisions of §1981 preceded the EEOC by 98 years, and no provision is made in the Equal Opportunity Act of 1964 which restricts independent action under §1981. *Accord*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973).

Sears' third contention was that the decisions of the Connecticut Commission and the Court of Common Pleas precluded further litigation under the doctrines of res judicata and collateral estoppel. The court held that because the commission proceedings were not of a judicial type in that no issues of fact were resolved and since the parties did not litigate the merits, they could not be given res judicata effect in a later suit in a United States district court. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). As to the proceedings in the Court of Common Pleas, *Hollander* held that no opportunity to litigate the merits was given the parties and it could not be held to bar the current action. *See* RESTATEMENT OF JUDGMENTS §49 (1942).

14. Act of April 9, 1866, §1, ch. 31, 14 Stat. 27, *re-enacted by* §16 of the Enforcement Act of 1870, Act of May 31, 1870, §16 ch. 114, 16 Stat. 140, 144, codified in §§1977 and 1978 of the REV. STAT. of 1874, (now 42 U.S.C. §§1981 and 1982).

15. 392 F. Supp. at 92.

16. One of the questions which inevitably arises is exactly what rights are protected by the statute. In the legislative debates Senator Trumbull variously described them as "the great fundamental rights of life, liberty and the pursuit of happiness, and the rights to travel. . . ."; "the rights of citizens"; and "those rights which we derive from nature and . . . those rights which we derive from government." CONG. GLOBE, 39th Cong., 1st Sess. 475, 477 (1866). It was not thought that the list encompassed in the statute was all inclusive.

II. Legislative History of the Civil Rights Act of 1866

In discussing the legislative history of §1981[17] it is important to note that at the time of the debates—filled with all the shock and emotion of a recently ended Civil War—the primary concern of Congress was to allow blacks to enforce their civil rights. Since Congress did not feel that whites would need any protection against racial discrimination, none of the debates centered on that point. Thus, while the bill was phrased in terms of purporting to give all persons security in their civil rights, the primary concern was with the newly freed blacks.[18]

The *Hollander* court cites several passages from the legislative history,[19] particularly the remarks of Senator Trumbull of Illinois, the floor manager of the bill, in which the intention was expressed that the bill would apply equally to all citizens in protecting their civil rights. This is the better interpretation of the purpose underlying the statute and its use. Indeed the equal protection clause of the fourteenth amendment would seem to demand it.[20] Although the legislative history does not precisely address itself to the question of whether or not whites could sue under the statute, the clear implication of the legislative history and the dictates of the fourteenth amendment is that they can.

The current dilemma of those courts which deny the use of the statute to whites is caused by the insertion, in the House of Representatives, of the phrase "as is enjoyed by white citizens."[21] It was pointed out in *Hollander*[22] that there was very little debate in the House on the amendment itself. When the bill was later received by the Senate for consideration there was a short exchange between Senators Wilson and Van Winkle on the House amendment.[23] Although of short duration it was highly relevant. A reading of the remarks yields the district impression that the purpose of the bill

17. A Bill to Protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication, Cong. Globe, 39th Cong., 1st Sess., 129, 184, 211, 421, 471, 497, 552, 569, 594, 1365, 1376, 1413, 1438, 1679, 1755, 1809 (1866).

18. It is also worthy to note that the bill was not debated in the sense of being all inclusive for non-whites. The only other groups of non-whites which were to be included in the bill's coverage were certain tribes of civilized American Indians.

19. 392 F. Supp. at 92-94.

20. When originally enacted, the Act was passed pursuant to the thirteenth amendment. Due to doubts that the enabling clause conferred powers as broad as those assumed by Congress, it was re-enacted in 1870 after the ratification of the fourteenth amendment and has been generally linked to the fourteenth amendment ever since.

21. Cong. Globe, 39th Cong., 1st Sess. 1115 (1866) (remarks of Senator Wilson).

22. 392 F. Supp. at 93.

23. *Id.*

was not altered by the House amendment and that the insertion was superfluous. *Hollander* correctly relies on the construction of the amendment enunciated in *Georgia v. Rachel*,[24] that "that phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected."[25] Its effect was not meant to restrict the application of the statute only to non-whites.

III. Analysis of Prior Case Law

It is not merely enough, however, to rely on the legislative history, since it is highly doubtful that Congress in 1866 would have envisioned the complexities of today's society. The case law may appear at first to be of very little assistance, since the question of whites suing for racial discrimination in employment rarely has arisen. However, actual authority for the holding in *Hollander* and for the legislative construction it espouses can be found in two cases which are highly relevant to the question decided although not cited in the court's decision.

In *Kentucky v. Powers*,[26] a case not dealing with a white plaintiff, but decided under §1981, there is dictum to the effect that:

> [§1981] so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons. The persons on whom it confers rights are "all persons within the jurisdiction of the United States." It is only when it comes to define the rights which the section confers that they are referred to as such "as is enjoyed by white citizens."[27]

The *Powers* court referred to *Strauder v. West Virginia*,[28] a case generally ignored in recent decisions, which has a major impact on the question of whites suing under §1981 and the fourteenth amendment. Speaking for the majority Justice Strong held:

> That the West Virginia statute respecting juries . . . is such a discrimination ought not to be doubted. *Nor would it be if the persons excluded by it were white men.* If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the

24. 384 U.S. 780, 791 (1966). This case gives an excellent review of the legislative debates.

25. *Id.*

26. 139 F. 452 (C.C.E.D. Ky. 1905).

27. *Id.* at 495.

28. 100 U.S. 303 (1879).

> administration of justice, we apprehend *no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws.* (emphasis added)[29]

In addition step, Justice Strong said that the act under consideration[30] plainly referred to §§1977 and 1978,[31] which enumerated "the rights and immunities intended to be guaranteed by the constitution. . . ."[32] Justice Strong concluded stating that, "[t]his act puts in the form of a statute what had been substantially ordained by the constitutional amendment."[33]

Although both *Strauder* and *Powers* provide only dicta, the nearness of the dates of their decision to the date of enactment of the Civil Rights Act of 1866 would make them persuasive authority for the decision announced in *Hollander*. Indeed, it would be incongruous in the light of the fourteenth amendment to say that minorities may sue for racial discrimination and at the same time to deny that right to whites.[34]

The court in *Hollander* also relied on several current cases. In *Gannon v. Action*[35] and *Central Presbyterian Church v. Black Liberation Front*,[36] two white religious groups filed suit against several black activist groups. Both courts followed *Jones v. Alfred H. Mayer Co.*,[37] where the Supreme Court held that whites could obtain relief under 42 U.S.C. §1982[38] for discrimination with regard to real property rights. Speaking for the majority, Justice Stewart noted the extensive sweep of both §§1981 and 1982,[39] and felt that any distinc-

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29. *Id.* at 308.

30. 18 REV. STAT. 641 (1878) (concerned removal of civil rights cases).

31. Sections 1 and 2 of the Civil Rights Act of 1866, from which the present §1981 derives.

32. 100 U.S. at 312. It should be noted that United States v. Reese, 92 U.S. 214, 217 (1875) held that "rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress."

33. 100 U.S. at 312.

34. If the question were purely one of standing, then there can be no doubt that whites have standing to sue, if the initial premise is correct that, by its language, §1981 confers on "all persons within the United States . . . the same rights[s]." The jurisdictional statute, 28 U.S.C. §1343(4) (1957), plainly gives the district courts original jurisdiction of any civil action authorized by law to be commenced by *any* person.

35. 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd in part*, 450 F.2d 1227 (8th Cir. 1971).

36. 303 F. Supp. 894 (E.D. Mo. 1969); *see* note 6 *supra*.

37. 392 U.S. 409 (1968); *see* note 6 *supra*.

38. 42 U.S.C. §1982 (1970). The section is as follows:

Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

39. 392 U.S. at 437.

tions between the two sections would be purely artificial.[40] Applying this reasoning, both *Gannon* and *Central Presbyterian* held that relief was available to the white plaintiffs under §1981. This would seem to be the correct position if the view is taken that §1982 is merely an extension to real property of the rights contained in §1981. It should be noted that *Gannon* and *Central Presbyterian* have been criticized.[41]

Another recent decision, *WRMA Broadcasting, Inc. v. Hawthorne*[42] is a clear example of reverse discrimination. In that case black radio station employees had attempted to have a white station manager removed solely because he was white. In allowing the plaintiff's suit under §1981 the *WRMA* court pinned its authority on the enabling clause of the thirteenth amendment.[43] The reasoning behind this conclusion is that the original provisions of §1981 were passed pursuant to the thirteenth amendment, although later re-enacted after the ratification of the fourteenth amendment.[44] Thus Congress had power under the enabling clause of the thirteenth amendment "to pass all laws necessary and proper for abolishing all badges and incidents of slavery. . . ."[45] In *WRMA* the court noted that one badge and incident of slavery was a "lack of equality between the races of power to contract."[46] Since Congress chose to use statutory language covering all persons in their civil rights, whites could benefit as well as blacks from the passage of the laws. Based on that reasoning the court concluded that it is "entirely consonant with the purpose of Section 1981 that whites discriminated against for *racial reasons* should have standing under Section 1981. . . ."[47]

Although there is a difference of opinion as to whether the thirteenth or fourteenth amendment underlies §1981, both *Hollander* and *WRMA* are technically correct in their interpretations. But, in using the thirteenth amendment, difficulties may be encountered in deciding exactly what constitutes a badge and incident of slavery. However, this is not a valid reason for discounting *WRMA* as a precedent since it merely finds another doctrinal under-

40. *See Central Presbyterian*, 303 F. Supp. at 899; *Gannon*, 303 F. Supp. at 1244; *Jones*, 392 U.S. at 437.

41. *See* Ripp v. Dobbs Houses, Inc., 366 F. Supp. 204, 211, n. 2 (N.D. Ala. 1973); note 6 *supra*.

42. 365 F. Supp. 577 (M.D. Ala. 1973).

43. *Id.* at 581.

44. *See* note 20 *supra*; Strauder v. West Virginia, 100 U.S. 303 (1879).

45. WRMA Broadcasting, Inc. v. Hawthorne, 365 F. Supp. at 581.

46. *Id.*

47. *Id.*

pinning for the proposition that §1981 affords a cause of action for whites. As long as it is restricted to that proposition, the decision is entirely valid.

It is more desirable that, in the future, §1981 is considered under the fourteenth amendment since this amendment is much broader in its coverage and would have wider application in allowing all persons to vindicate infringements of their civil rights. Use of the fourteenth amendment will avoid any narrow, technical distinctions, and will leave no doubt that violations of civil rights by individuals, as well as by state governments, will be corrected.

Those cases which deny a cause of action to whites do so on doubtful reasoning or on technicalities. In several instances the decisions stated that §1981 did not afford relief to whites, however, no allegation of racial discrimination was made. In *Balc v. United Steelworkers*,[48] a white employee's claims against the union and his employer were dismissed. The court stated that "[t]here is no jurisdiction to maintain the suit under the Civil Rights Act of 1866, 42 U.S.C. §1981, there being no allegation of racial discrimination against one who is not a white citizen."[49] The court in *Perkins v. Banster*[50] was also misled by the inclusion of the phrase "as is enjoyed by white citizens" in §1981. The passage from *Perkins* relied on by the defendant Sears[51] states that "[s]ince the plaintiff, obviously and admittedly, is a white person, Section 1981 serves no basis for jurisdiction in this case."[52] In *Ripp v. Dobbs Houses*,[53] the basic claim was freedom of association. At the time of the decision it was doubtful that freedom of association was a right protected by the statute. Therefore, that issue was dispositive of the case. Any further comments, which amount to a mere recital of the faulty *Perkins* reasoning, cannot be considered a sound precedent. Other cases holding that whites do not have a cause of action under §1981 suffer from similar infirmities.[54]

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48. 6 E.P.D. ¶8948 (W.D. Pa. 1973), *aff'd without opinion*, 503 F.2d 1398 (3d Cir. 1974).

49. *Id.* at 6038.

50. 190 F. Supp. 98 (D. Md.), *aff'd*, 285 F.2d 426 (4th Cir. 1960).

51. Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint at 5.

52. 190 F. Supp. at 99. One of the prime reasons for denial of the plaintiff's cause of action was that no state action was alleged. It was not until 1968 that Jones v. Alfred H. Mayer Co. settled the question that no state action is necessary under 42 U.S.C. §§1981-82 (1970).

53. 366 F. Supp. at 205 (N.D. Ala. 1973).

54. *See* note 9 *supra* (second paragraph).

IV. FURTHER CONSIDERATIONS

Although the decision of the court was correct on the question of the standing of white plaintiffs under §1981, there are several issues which the court appears not to have taken into account. None of these issues would have had an adverse impact on the court's main holding, but due to their importance and the possible effects of the court's decision, they should be noted. First, it is not obvious that denial of an interview rather than the loss of existing employment, constitutes a violation of an individual's protected right to make and enforce contracts. Second, there is the question of whether an offer of employment identical to that offered to minorities under a special program is a defense to a civil rights suit under §1981.[55] And third, whether an adequate defense to a charge of racial discrimination is set out by the fact that Sears listed its program as an affirmative action program, pursuant to Executive Order 11,246.[56] As will be shown later, none of the answers to these questions compromise the outcome in *Hollander* but they do serve to show some of the possible problems that will be encountered in the next few years and the apparent impact that *Hollander* will have.

In *Hollander*, the denial was of an interview rather than the loss of existing employment. However, a denial of a job, solely due to a job applicant's race, should not require a different result than a denial of an interview for the same reasons. This is especially true in modern society where a person is rarely hired sight unseen or without some sort of screening or interviewing process. Thus, the failure to consider this point does not present any difficulties in relying on the decision. However, it will be left for the courts to decide what the true meaning of the right to make and enforce contracts is under §1981, and what such a contract would entail. Surely an interview, if required by an employer, is part and parcel of an "employment contract" such that a denial would constitute

55. More properly, the question is whether the plaintiff has stated a claim on which relief can be granted under 28 U.S.C. Fed. R. Civ. P. 12(b)(6) (1971).

56. 3 C.F.R. 339 (1965), *as amended*, Exec. Order 11,375, 3 C.F.R. 320 (1967), 42 U.S.C. §2000-e (Supp. V, 1970). Section 202 reads in pertinent part:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. *The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.* Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. (emphasis added.)

discrimination if motivated by racial bias.[57]

The second point that the *Hollander* court failed to take into account is the fact that after the plaintiff was denied an interview by the defendant for its minority program, Sears did offer him other employment. It does not appear, from the memoranda filed in the case, however, that the employment offered was similar in any respect to that which was denied. The defendant merely identified it as "regular summer employment."[58] If the employment offered was indeed similar, and the plaintiff refused it, can he then be said to state a claim on which relief can be granted under Federal Rule of Civil Procedure 12(b)(6)? There is a question whether any injury has been sustained, and a valid argument for dismissal can be made. The only analogous situation is presented by *Faraca v. Clements*.[59] In *Faraca*, the plaintiff, a white male, applied for the position of Cottage Program Administrator at the Georgia Retardation Center. The job would have required Faraca and his wife to live in with a certain number of children as surrogate parents. Due to the fact that Faraca's wife was black, he was denied the job. He was instead offered a lesser position which he refused. In his suit under §1981 for racial discrimination in employment, the court by implication denied the proposition that the other employment had to be accepted.

It can be seen that discriminatory practices in the past have included the practice of placing minorities in menial jobs and keeping them in such positions. Thus, the denial of an executive position and the subsequent tender of a lesser position should not be a defense to a suit under §1981, where the applicant had the qualifications for the executive position, and it can be established that the denial and tender were due to racial bias. The same would be true of whites under the statute. If Hollander was refused an interview for a managerial training program and was offered "regular summer employment" as a clerk, or in some other similar capacity which did not give the same training as in the managerial program, then the court's decision should not be disturbed. If Hollander was offered an interview for a similar program conducted for whites, then it is

57. *See* Faraca v. Clements, 506 F.2d 956, 958 (5th Cir. 1975) where the court stated that "if 1981 did not afford protection prior to execution, the remedy it sought to create could be thwarted in many instances by the expedient of refusing to contract with blacks." *Accord*, Waters v. Wisconsin Steelworks of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

58. Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint at 2.

59. 506 F.2d 956 (5th Cir. 1975).

doubtful that the plaintiff would be able to show at trial that any injury was sustained.

The final issue untouched in *Hollander* was the fact that the program in which the plaintiff was attempting to gain entry was an affirmative action program voluntarily instituted by Sears pursuant to Executive Order 11, 246. According to the defendant, Sears, such a program is intended:

> . . . to insure, through positive action of an employer, that its current practices and procedures are designed to effectuate and promote employment retention and *advancement of certain protected classes of employees.* Such a program requires more than passive abstention from discriminatory activity, but is rather an active effort to correct minority under-representation where it may exist and to implement suitable new practices to encourage full equal employment opportunity for minorities. (footnotes omitted and emphasis added)[60]

Thus, according to the purposes listed by Sears, an affirmative action program would be a positive effort, designed to create preferences in favor of minorities. This position, however, is not easily sustained. A plain reading of the Executive Order limits its purpose to insuring that applicants are treated without regard to classifications such as race or color[61] which have been held to be suspect. Affirmative action should not in any way be construed to mean that an employer must take affirmative action to hire and employ a certain percentage of minority workers. The total effect of the order should be to remove race as a qualification of employment. This reasoning has support from Title VII, one section of which, 42 U.S.C. §2000e-2(j) (1970),[62] provides a similar limit.

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60. Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint at 1.

61. *See* note 57 *supra*.

62. The section is as follows:

Preferential treatment not to be granted on account of existing number of percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total training program, in comparison with the total number of percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

In the recent case of *Rios v. Enterprise Association of Steamfitters*[63] the permissible scope of the use of quotas or goals under Title VII was raised. In construing §2000e-2(j), the majority agreed that this section barred the use of quotas, but that hiring goals could be established for employers and unions.[64] This distinction is quite artificial, as pointed out by Judge Hays in his stinging dissent.[65] Citing extensively from the legislative history of the Civil Rights Act of 1964,[66] Hays questioned the ability of the federal district courts to impose quotas or goals when ordering relief in race discrimination suits.[67]

If 42 U.S.C. §2000e-2(j) would bar preferential treatment under Title VII as discriminatory, then it is difficult to see how it can possibly be sanctioned under the Executive Order or under §1981. If a minority preference is discrimination under one enactment, it should be discrimination under all. Certainly in a suit for racial discrimination under §1981 relief may be ordered for anyone who can show injury due to a discriminatory hiring practice, but an order imposing a percentage minority hiring goal which includes persons who show no injury, and which displaces other qualified applicants, would assuredly give rise to charges of racial discrimination under §1981 and the equal protection clause of the fourteenth amendment. Thus the *Hollander* court is correct in its decision that a white denied a job interview solely because of his race has standing to sue under §1981.[68] In essence, under all branches of the

63. 501 F.2d 622 (2d Cir. 1974).

64. *Id.* at 629.

65. *Id.* at 634, 637. *See also* Comment, *Remedial Racial Quotas and the Scope of Relief Under Title VII: Rios v. Enterprise Association Steamfitters Local 638*, 60 IOWA L. REV. 693 (1975).

66. 501 F.2d at 636.

67. The most striking passage cited by the dissent in *Rios* is a statement by Senator Williams, one of the floor managers of the bill, that "to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill." 501 F.2d at 635; 110 CONG. REC. 8921 (1964). Unfortunately, Judge Hays was also of the opinion that affirmative action programs and §1981 were not hampered by §2000e-2(j). Thus preferential relief could be granted in suits under the former provisions but not the latter. 501 F.2d at 638. The dissent implies that this type of relief should be limited to suits brought by persons seeking public employment. *See* Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); *Rios, supra* at 629, n. 5. But even if preferential relief is thus narrowed, it is still subject to fatal attack on fourteenth amendment grounds as discriminatory. See 2 CCH EMPLOYMENT PRACTICES GUIDE [1973-1975 Transfer Binder] ¶6452 (EEOC 1975) where the EEOC held that the exclusion of a white applicant was not justified by an affirmative action program.

68. Still to be resolved at trial, however, is the question of whether any injury was sustained. It must be kept in mind that if Hollander refused exactly the same employment that he would have obtained had he been selected for the defendant's program then relief should not be appropriate.

tripartite approach ensuring racial equality, all that is required is "the removal of artificial, arbitrary and unnecessary barriers to employment when such barriers operate to invidiously discriminate on the basis of racial or other impermissible classification[s]."[69]

V. CONCLUSION

The *Hollander* decision has taken a long step in implementing the broad sweep of the fourteenth amendment. It should result in a searching examination of the problem of racial equality in the federal courts and Congress. Although at first glance it would appear to thwart recent congressional activity in this area, it merely carries the policy of full equality one step further. Congress may still make provisions to insure that employers do not discriminate on the basis of race. As long as all are treated equally the impact of *Hollander* will not be devastating, and forms of relief can still be fashioned for those plaintiffs who can show that they have been denied employment solely due to their race.

B. C. Petroziello

69. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971). *See also* Carter v. Gallagher, 452 F.2d 315, 324 (8th Cir. 1971) which decided that preferential relief granted under Title VII of the Civil Rights Act of 1964 is violative of the fourteenth amendment.