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by: Colin E. Flora
Associate Civil Litigation Attorney

Does § 1981 Provide a Private Right of Action Against State Actors? On First Impression, 7th Cir. Says No

Today's discussion comes from Judge John D. Tinder addressing a case of first impression in the Seventh Circuit: whether 42 U.S.C. §1981 provides a private right of action against state actors. This is not a never before addressed issue among federal circuit courts, but was novel to the Seventh Circuit. The resulting opinion further bolsters a majority of circuits (now 7) against the Ninth Circuit.

An interesting note is that the panel producing this opinion was the aforementioned Judge Tinder, the oft-discussed Judge Richard A. Posner, and, by designation, Southern District of Indiana Judge William T. Lawrence. On occasion, district judges from within the circuit will be designated to sit on the circuit panel to aid in deciding an appeal. The purpose of such designation is to help the already taxed appellate court. As is, the Seventh Circuit, owing to continued political gridlock on filling judicial vacancies, has a seat that has sat vacant for more than four years. With the announcement that Judge Tinder will be retiring in early 2015, the reality of two vacancies seems inevitable. Simply put, we may well be seeing an increase in district judges sitting by designation in the near future.

Returning to our discussion, today we examine *Campbell v. Forest Preserve District of Cook County, Illinois*. The plaintiff, David Campbell, was a former

employee of the Forest Preserve District of Cook County (FPD), The FPD is an Illinois governmental agency. He was terminated after "a security camera recorded him having sex with a coworker in the office[.]" Two and a half years later, Campbell sued the FPD. "[H]is original complaint [included] two constitutional claims under 42 U.S.C. § 1983 and one statutory claim under 42 U.S.C. § 1981." The constitutional claims alleged a denial of "progressive discipline in violation of his right to due process and that he was fired because of his race in violation of his right to equal protection of the laws." The § 1981 claim alleged violation of the statute's prohibition of racial discrimination in contracts. After the FPD sought summary judgment, Campbell abandoned his § 1983 claims–presumably as time-barred under Illinois's two-year limitation on personal injury torts–but continued to pursue his § 1981 claim.

The distinction between § 1983 and § 1981 that you must understand is this: § 1983 is the mechanism for enforcing constitutional and statutory rights against state actors–i.e., the government. Section 1981, though conceivably able to be violated by the government, provides a remedy against private actors–individuals and businesses–for, among other things, discriminating against someone in contracts on the basis of race. This case stems from the overlap of the two statutes because the defendant is a state actor. The primary hurdle for Campbell is a 1989 Supreme Court case: *Jett v. Dallas Independent School District*. *Jett* held that claims against state actors for violation of § 1981 must go through § 1983. This means, just as the constitutional claims under § 1983 were time-barred, if § 1981 must be enforced in this context through § 1983, then so too would the § 1981 claim be time-barred. In order to try and overcome this hurdle, Campbell argued that "*Jett* was superseded by the Civil Rights Act of 1991 and that . . . § 1981 provides a remedy against state actors independent of § 1983." If Campbell were correct, then, he argues, the claim would have a four-year statute of limitations under 28 U.S.C. § 1658. The trial court disagreed with Campbell and found that *Jett* was still good law, requiring the dismissal of Campbell's case.

In addressing the impact of the Civil Rights Act on *Jett*, the court started by looking at the history of statutes of limitations for §§ 1981 & 1983.

> Prior to 1990, Congress had not adopted a statute of limitations for federal claims. Thus, courts were instructed to borrow the most analogous state statutes of limitations, both for § 1983 claims against state actors and for § 1981 claims against private actors. Later, the Supreme Court clarified that such claims were governed by the forum state's personal-injury statute of limitations. In Illinois, that statute of limitations is two years.

> [I]n . . . 1990, Congress adopted a four-year statute of limitations for federal claims. 28 U.S.C. § 1658. However, this applies only to civil actions "arising under an Act of Congress enacted after the date of the enactment of this section." The Supreme Court has interpreted § 1658 to apply only "if the plaintiff's claim against the defendant was made possible by a post–1990 enactment," and to leave "in place the 'borrowed' limitations periods for pre-existing causes of action."

After 1990, almost no meaningful changes have been made to § 1983, which means that § 1983 claims are still, with minor nuance, governed by the forum state's statute of limitations for personal injury. However, the Civil Rights Act of 1991 changed portions of § 1981–specifically, "making possible . . . claims based on conduct that occurred after the formation of a contract, such as wrongful-termination[.]" As a result, these new claims as against private actors are brought within the scope of § 1658 and have a four-year limitations period. If the court finds that the Civil Rights Act of 1991 altered § 1981 claims against state actors, such that it is a claim independent of § 1983, then so too would the four-year period apply to § 1981 claims against state actors–such as Campbell's claims.

Because the analysis turns entirely on whether a post-1990 enactment made a claim possible that had not existed before, the court turned to the full history of § 1981. The statute began as § 1 of the Civil Rights Act of 1866. For our readers not conversant in U.S. history, 1866 is the year immediately following cessation of hostilities in the Civil War. The section was amended in part in 1870 but made no substantive changes until 1991. Prior to 1991, § 1981 read:

> 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 no other.

Even though the text of the statute had not meaningfully changed in over a century, there were meaningful changes in judicial interpretation. By the 1976 decision *Runyon v. McCrary*, "it was well established that § 1981 prohibits racial discrimination in the making and enforcement of private as well as public contracts." It was further established that § 1981 provided a "remedy against discrimination in private employment on the basis of race."

> However, in the late 1980s, the Court limited the scope of § 1981 in the context of private employment. In *Patterson v. McLean Credit Union*, the Court was confronted with the question whether racial harassment in the workplace was actionable under § 1981. In addition, after oral argument, the Court asked the parties to brief the question whether *Runyon*'s interpretation of § 1981 (i.e., that it applies to private contracts) should be reconsidered.

Although the Supreme Court did not overrule *Runyon*, it did so only because it failed to find "[ ]sufficient justification to depart from the doctrine of *stare decisis*." This is in stark contrast from agreeing with *Runyon*. The Supreme Court also "imposed a significant limitation on the types of discriminatory acts that were prohibited by § 1981, holding that it 'covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.'" One week later, the Supreme Court decided *Jett*.

Justice Sandra Day O'Connor authored the lead opinion in *Jett*. Because less than a majority of the justices signed on to her opinion, it is denominated a plurality opinion. Nevertheless, the Justice O'Connor opinion was joined by three other justices and Justice Antonin Scalia agreed in result with an extremely terse concurring opinion. Though a plurality opinion does not bear the standard of binding precedent, the O'Connor and Scalia opinions agreed on one specific issue that, combined, forms binding precedent: that § 1981 does not create a private right of action against a state actor.

This brings us to the impact of the Civil Rights Act of 1991. The Act rewrote § 1981 moving the original text into subsection (a) and grafting on two additional subsections. Section 1981 now provides:

> (a) Statement of equal rights
>
> 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.
>
> (b) "Make and enforce contracts" defined

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The recognized purpose of subsection (b) was to supersede *Patterson*. The impact of (c) is the more complicated issue that gives rise to Campbell's case.

Prior to Campbell's case, the Ninth Circuit was faced with the same issue in *Federation of African American Contractors v. City of Oakland*. The Ninth Circuit decided that subsection (c) did supersede *Jett* and, therefore, that § 1981 does provide a private right of action against state actors–with a four-year statute of limitations, of course. The Seventh Circuit rejected the *Federation of African American Contractors* decision as "flawed in two respects." First, the court, looking to the legislative history of the Act determined that the purpose of (c) was to codify the rule of *Runyon*–prohibiting racial discrimination in contracting–thereby resolving the skeptical view toward *Runyon* taken in *Patterson*. Second, the Ninth Circuit disregarded the guidance of *Jett* that "whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." Congress had provided that scope in § 1983, and absent any express statement by Congress to the contrary, so it should remain.

This decision sees the Seventh Circuit join the Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits in rejecting *Federation of African American Contractors* and finding no private right of action against state actors in § 1981.

Join us again next time for further discussion of developments in the law.

Sources

- *Campbell v. Forest Pres. Dist. of Cook Cnty., Ill.*, --- F.3d ---, No. 13-3147, 2014 WL 1924479 (7th Cir. May 15, 2014) (Tinder, J.).

- *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (O'Connor, J.).

- *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (Stewart, J.).

- *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (Kennedy, J.).

- *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996).

- 28 U.S.C. § 1658.

- 42 U.S.C. § 1981.

- 42 U.S.C. § 1983.