St. Mary's Law Journal

Volume 21 | Number 2 Article 8

1-1-1990

42 U.S.C. 1981 Does Not Provide a Remedy for Racial Harassment during Employment.

Jeffrey A. Lacy

CIVIL RIGHTS—Racial Harassment—42 U.S.C. § 1981 Does Not Provide a Remedy for Racial Harassment During Employment.

Patterson v. McLean Credit Union,
__ U.S. __, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

In 1982, Brenda Patterson, a black woman, was laid off from her job as a teller and file coordinator for McLean Credit Union.[1] She had been employed for ten years[2] under a contract in which she could be terminated at will by her employer.[3] Following her discharge, Patterson filed suit in the United States District Court for the Middle District of North Carolina, contending that McLean Credit Union had harassed her because of her race and, therefore, had violated 42 U.S.C. § 1981.[4] The district court held that the racial harassment claim was not actionable under section 1981 and refused to submit the issue to the jury.[5] The United States Court of Appeals for the Fourth Circuit upheld the finding of the district court and declared that racial harassment in the course of employment could not be filed under section 1981 because the harassment did not interfere with Patterson's right

1. Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2368-69, 105 L. Ed. 2d 132, 146 (1989).

2. *Id.* at __, 109 S. Ct. at 2369, 105 L. Ed. 2d at 146.

3. *See id.* at __, 109 S. Ct. at 2396, 105 L. Ed. 2d at 179 (Stevens, J., concurring in part and dissenting in part)(Patterson referred to as at-will employee). An "at will" employee works under an "at will" contract, which can be terminated at any time by either party. R. COVINGTON & A. GOLDMAN, LEGISLATION PROTECTING THE INDIVIDUAL EMPLOYEE 53 (1982).

4. *Patterson*, __ U.S. at __, 109 S. Ct. at 2369, 105 L. Ed. 2d at 146. Patterson also alleged discriminatory failure to promote and discriminatory discharge in violation of section 1981 and brought a state law claim for intentional infliction of emotional distress. *Id.* In support of her racial harassment claim, Patterson alleged that her supervisor stared at her for long periods of time and assigned her too many tasks to perform. *Id.* at __, 109 S. Ct. at 2373, 105 L. Ed. 2d at 151. Patterson stated that she was forced to sweep and dust while white employees were not required to do this type of work. *Id.* at __, 109 S. Ct. at 2373, 105 L. Ed. 2d at 152. Additionally, Patterson testified that her supervisor once declared that blacks were slower workers than whites, and he openly criticized her in meetings while neglecting to criticize white employees. *Id.*

5. Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2369, 105 L. Ed. 2d 132, 146 (1989). The district court, however, did submit the discriminatory discharge and discriminatory failure to promote claims to the jury. *Id.* The court ruled in favor of McLean Credit Union on both claims. Additionally, the court issued a directed verdict for McLean Credit Union on Patterson's claim for intentional infliction of emotional distress, ruling that the employer's conduct was not sufficiently outrageous to support a judgment. *Id.*

to enter into or execute the employment contract.[6] The court of appeals also noted the availability of Title VII of the Civil Rights Act of 1964 (Title VII)[7] as a remedy for claims of racial harassment.[8] The United States Supreme Court granted certiorari to determine whether Patterson's allegation of racial harassment could be adjudicated under 42 U.S.C. § 1981.[9] Held—*Affirmed*. 42 U.S.C. § 1981 does not provide a remedy for racial harassment during employment.[10]

Congress enacted 42 U.S.C. § 1981, originally part of the Civil Rights Act of 1866,[11] under the enforcement powers provided in the thirteenth and

---

6. *See* Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986)(section 1981's narrow restrictions do not address claim of racial harassment), *aff'd in part, vacated in part*, __ U.S. __, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). According to the court of appeals, the broad language of Title VII provides an appropriate remedy for allegations of racial harassment. *Id.*

7. 42 U.S.C. §§ 2000e to e-17 (1982). This statute prohibits discrimination in employment due to "race, color, religion, sex, or national origin." *Id.* § 2000e-2(a). Under the broad language of the statute, it is illegal for an employer of fifteen or more employees to discriminate in the "compensation, terms, conditions, or privileges of employment." *Id.* § 2000e-2(a)(1). The statute established the Equal Employment Opportunity Commission (EEOC) to coordinate the execution of Title VII's prohibitions on employment discrimination. *Id.* § 2000e-4(g). An aggrieved employee has 180 days after the alleged discriminatory act in which to file a complaint, although this period can be extended at the court's discretion. *Id.* § 2000e-5(e). Once filed, the complaint is investigated and attempts are made by the EEOC to reconcile the problem with the employer. *Id.* § 2000e-5(b). If no conciliation agreement can be reached, the EEOC is allowed to bring a civil suit against the employer under Title VII. *Id.* § 2000e-5(f). An employer held liable under Title VII may be required to rehire the employee with backpay for up to two years and provide other equitable relief as determined by the court. *Id.* § 2000e-5(g). Additionally, reasonable attorney fees can be recovered by the successful party. *Id.* § 2000e-5(k). For an overview of Title VII and its provisions, see generally Comment, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223, 1228-30 (1970). For an explanation of the procedures under Title VII, see generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 769-1082 (1976).

8. *See Patterson*, 805 F.2d at 1145-46 (Title VII's broad language better fit to determine racial harassment allegation).

9. __ U.S. __, 108 S. Ct. 65, 98 L. Ed. 2d 29 (1987). The Supreme Court also granted certiorari to determine if the district court's jury instruction on the promotion claim was proper and to reconsider the Court's earlier holding that section 1981 was applicable to private conduct, as set forth in *Runyon v. McCrary*, 427 U.S. 160 (1976). Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2369, 105 L. Ed. 2d 132, 146-47 (1989).

10. *Id.* at __, 109 S. Ct. at 2369, 105 L. Ed. 2d at 147.

11. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. The language of this statute was similar to the present codifications of both 42 U.S.C. § 1981 and 42 U.S.C. § 1982 and provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory of the United

fourteenth amendments.[12] In its early decisions, the United States Supreme Court narrowly interpreted the Act by emphasizing that congressional authority to restrict discriminatory conduct did not extend to private acts of discrimination.[13] For many years, this narrow view was predominant as the

---

States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.; *see also* Reiss, *Requiem For an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961, 971 n.46 (1977)(shows similarities between Civil Rights Act of 1866 and sections 1981 and 1982).

12. The Supreme Court has disagreed as to whether section 1981 was passed under the authority of the thirteenth or fourteenth amendments. *Compare* Runyon v. McCrary, 427 U.S. 160, 170 (1976)(thirteenth amendment gave Congress power to prohibit private discriminatory conduct under section 1981) *with Runyon*, 427 U.S. at 204 (White, J., dissenting)(section 1981 established under fourteenth amendment's equal protection requirement).

One view is that section 1981 was enacted under the enforcement powers of the thirteenth amendment. *See Runyon*, 427 U.S. at 170. The thirteenth amendment gives Congress the authority to pass legislation prohibiting "slavery and involuntary servitude." U.S. CONST. amend. XIII. Under this interpretation, section 1981 was derived from both section 18 of the Voting Rights Act of 1870, which was a reenactment of section one of the Civil Rights Act of 1866, and section 16 of the Voting Rights Act of 1870, which contained language similar to section 1981. *See Runyon*, 427 U.S. at 170 n.8 (section 1981 established from both statutes). Therefore, because the Civil Rights Act of 1866 was enacted under the authority of the thirteenth amendment and section 1981 was partly derived from the Civil Rights Act of 1866, section 1981 can be applied to reach private conduct. *Id.*

The other view is that section 1981 was passed pursuant to the fourteenth amendment and, therefore, does not apply to acts by private individuals. *See Runyon*, 427 U.S. at 205 (section 1981 not passed to prevent private individuals from refusing to contract with other individuals). The fourteenth amendment provides that all persons within the United States are entitled to "privileges and immunities" enjoyed by others, "due process of law," and "equal protection of the laws." U.S. CONST. amend. XIV, § 1. Under this fourteenth amendment interpretation, section 1981 was derived only from section 16 of the Voting Rights Act of 1870 because section 18, the reenactment of section 1 of the Civil Rights Act of 1866, was excluded when the federal statutes were recodified in the Revised Code of 1874. *See Runyon*, 427 U.S. at 197 n.6 (White, J., dissenting)(section 1977 of the Revised Code of 1874, now codified as section 1981, derived from section 16 of the Voting Rights Act of 1970). Therefore, because the Voting Rights Act of 1870 was enacted under the power of the fourteenth amendment, section 1981 cannot be interpreted to regulate private conduct. *Id.* at 202. For a discussion of both arguments, see generally Reiss, *Requiem For an "Independent Remedy": The Civil Rights Act of 1866 and 1871 as Remedies For Employment Discrimination*, 50 S. CAL. L. REV. 961, 971-72 n.48 (1977).

13. *See, e.g.*, Hodges v. United States, 203 U.S. 1, 9 (1906) (states responsible for preventing discriminatory interference by private individuals); The Civil Rights Cases, 109 U.S. 3, 25 (1883)(statute forbidding racial discrimination in public accommodations struck down because Congress had no authority to restrict private actions under fourteenth amendment); Virginia v. Rives, 100 U.S. 313, 318 (1879)(civil rights statutes refer to state action and not acts of private

Court continued to require governmental discrimination before enforcing the Civil Rights Act of 1866.[14]

In *Jones v. Alfred H. Mayer, Co.*,[15] the Supreme Court expanded this requirement of governmental discrimination to include private discrimination by holding that 42 U.S.C. § 1982 was applicable to private conduct.[16] Section 1982 requires that all citizens be treated equally in property transactions.[17] Because section 1982 and section 1981 were both enacted as part of the Civil Rights Act of 1866, courts analogized the *Jones* decision to section 1981 and held that section 1981 also prohibited private discrimination.[18]

Section 1981 provides that all citizens, regardless of color, have a right to

---

individuals); *see also* Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961, 973 (1977)(section 1981 given narrow construction throughout most of its existence); Comment, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1034-35 (1972) (notes crippling effect of early civil rights decisions on application of section 1981).

14. *See, e.g.*, Hurd v. Hodge, 334 U.S. 24, 31 (1948)(necessary to show governmental action in order to bring suit under provisions of Civil Rights Act of 1866); Corrigan v. Buckley, 271 U.S. 323, 330-31 (1926)(Civil Rights Act of 1866 does not prohibit private individual from including racially restrictive covenant in contract); Buchanan v. Warley, 245 U.S. 60, 79 (1917)(fourteenth amendment and civil rights statutes give black man right to purchase property without discriminatory interferences from state legislation); *see also* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 8.2 (1980)(Court for extensive time period applied section 1981 only if state action involved).

15. 392 U.S. 409 (1968).

16. *See id.* at 423-24 (Congress clearly intended to prevent private as well as governmental interference under section 1 of Civil Rights Act of 1866). In *Jones*, a black man was denied the opportunity to buy a house because of his race. *Id.* at 412. He filed suit under 42 U.S.C. § 1982 against a private real estate company which refused to sell him the house. The Supreme Court held that section 1982 prohibits private as well as public discrimination in the selling or renting of property. *Id.* at 423-24. For an analysis in support of the *Jones* decision, see generally Kinsy, Jones v. Alfred H. Mayer Co.: *An Historic Step Forward*, 22 VAND. L. REV. 475, 476 (1969). For an analysis criticizing the *Jones* decision, see generally Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 82-87 (1968).

17. *See* 42 U.S.C. § 1982 (1982). Section 1982 provides: "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." *Id.*; *see also* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (original language of 42 U.S.C. § 1982).

18. *See* Tillman v. Wheaton-Haven Recr. Ass'n., 410 U.S. 431, 440 (1973)(both section 1981 and section 1982 originated in Civil Rights Act of 1866 and should be similarly construed); *see also* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 482 (7th Cir.)(section 1981 and section 1982 both derived from Civil Rights Act of 1866 so both reach private discrimination), *cert. denied*, 400 U.S. 911 (1970); Young v. International Tel. & Tel. Co., 438 F.2d 757, 760 (3d Cir. 1971)(under *Jones*, section 1981 also applicable to private discrimination); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 57 (1972)(section 1981 was originally part of Civil Rights Act of 1866). *See generally* UNITED STATES DEPARTMENT OF

"make and enforce contracts."[19] Lower federal courts have interpreted section 1981, based on the *Jones* decision, as prohibiting racial discrimination in private employment contracts.[20] The Supreme Court recognized this approach in *Johnson v. Railway Express Agency*,[21] by acknowledging that private employment discrimination could be actionable under section 1981.[22] Significantly, the Court also stated that section 1981 provided a remedy for employment discrimination, separate and distinct from Title VII.[23]

In *Runyon v. McCrary*,[24] the Supreme Court expanded the scope of sec-

---

JUSTICE, REDEFINING DISCRIMINATION: DISPARATE TREATMENT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 26-27 (1987)(details history of section 1981).

19. 42 U.S.C. § 1981 (1982). Section 1981 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.

Id.

20. *See, e.g.*, Macklin v. Spector Freight Sys., 478 F.2d 979, 993 (D.C. Cir. 1973)(section 1981 applies to private acts of discrimination by union organization and employers); Payne v. Ford Motor Co., 461 F.2d 1107, 1107 (8th Cir. 1972)(*Brady* established section 1981 reaches discriminatory conduct in private business sector); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972)(private employee can bring section 1981 action against private employer for discriminatory employment practices); Young v. International Tel. & Tel. Co., 438 F.2d 757, 760 (3d Cir. 1971)(Congress intended section 1981 to apply to discriminatory private acts in employment context); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1098 (5th Cir. 1970)(*Jones* decision revitalized section 1981 to prohibit private discrimination in employment contracts), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 483 (7th Cir.)(section 1981 forbids racial discrimination by employers and unions), *cert. denied*, 400 U.S. 911 (1970). *See generally* Note, *Civil Rights: Section 1981 Right to Contract as a Bar to Racial Discrimination in Private Schools*, 31 ARK. L. REV. 314, 318 (1977)(majority of lower federal court cases involving section 1981 after *Jones* decision concerned employment discrimination).

21. 421 U.S. 454 (1975).

22. *See id.* at 459-60 (Court joined trend already well established in lower federal courts by stating private employment discrimination prohibited by section 1981). In *Johnson*, Willie Johnson, Jr., a black man, filed a discrimination charge with the EEOC against his employer and two unions associated with the employer. *Id.* at 455. The EEOC issued a report several months later but did not give a final decision supporting Johnson until almost three years later. By the time he received notification of his right to sue under Title VII of the Civil Rights Act of 1964 and amended his complaint to include a section 1981 claim, more than three years had elapsed. *Id.* at 456. The Supreme Court was asked to determine whether the filing of the complaint under Title VII tolled the applicable statute of limitations on Johnson's section 1981 discrimination claim filed more than three years after the initial complaint. *Id.* at 457. The Court held that the Title VII action did not suspend the running of the statute of limitations as to the section 1981 claim and could find no adequate justification for Johnson's failure to preserve both claims. *Id.* at 466.

23. *See id.* at 462 (Title VII and section 1981 are "separate, distinct, and independent").

24. 427 U.S. 160 (1976).

tion 1981 beyond employment discrimination to include racial discrimination in private schools.[25] The *Runyon* Court found that a private school which refused admission to qualified black students was actually refusing to contract with them because of their race and, thus, violating the provisions of section 1981.[26] Subsequent court decisions have expanded *Runyon's* holding by applying section 1981 to private racial discrimination in various contractual settings.[27]

More than a decade after the *Runyon* decision, the Supreme Court in *Patterson v. McLean Credit Union*,[28] established that there were limits to section 1981's applicability in private racial discrimination claims.[29] Specifically, the Court held that while section 1981 prohibits discriminatory conduct while entering into or enforcing a contract, it does not extend to incidents of racial harassment occurring after the contract is formed.[30] The Court reasoned that the language of the statute did not establish section 1981 as a

---

25. *See id.* at 172 (discrimination in school's admission policy violated section 1981). In *Runyon*, two black children were not allowed to enroll in private schools in Virginia because the schools were not integrated. *Id.* at 163-64. The children, through their parents, filed suit under section 1981 seeking declaratory and injunctive relief as well as damages. *Id.* at 164. Both the district court and the appellate court found that the failure to admit the students violated section 1981. *Id.* at 165-66. *See generally* Livingston & Marcossan, *The Court at the Crossroads: Runyon, Section 1981, and the Meaning of Precedent*, 37 EMORY L.J. 949, 956-57 (1988)(examines *Runyon* decision and its significance in relation to earlier decisions involving section 1981); Note, *Civil Rights: Section 1981 Right to Contract as a Bar to Racial Discrimination in Private Schools*, 31 ARK. L. REV. 314, 319 (1977)(*Runyon* established section 1981 as general remedy for discrimination associated with contract rights).

26. *See Runyon*, 427 U.S. at 172 (Court referred to school's actions as "classic" violation of section 1981's right to "make and enforce contracts"). The Court noted that a contractual relationship existed because the school would have received money in return for teaching the students. *Id.*

27. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 664-65 (1987)(union violated both Title VII and section 1981 by not acting on behalf of discharged employees); St. Francis College v. Al Khazrazi, 481 U.S. 604, 613 (1987)(Court held Iranian professor denied tenure could bring suit for discrimination under section 1981); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 286-87 (1976)(section 1981 acts to protect white employees just as it protects black employees from racial discrimination); Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69, 70-71 (4th Cir. 1987)(hotel bar violated section 1981 by ejecting persons not ordering drinks); Hall v. Bio-Medical Application, Inc., 671 F.2d 300, 302 (8th Cir. 1982)(black person refused medical services potentially has cause of action against medical facility).

28. __ U.S. __, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

29. *See id.* at __, 109 S. Ct. at 2372, 105 L. Ed. 2d at 150 (Court noted most prominent part of section 1981 is its limited scope).

30. *Id.* at __, 109 S. Ct. at 2373, 105 L. Ed. 2d at 151 (section 1981 facially guarantees only right "to make and enforce contracts"). The Court distinguished between discrimination occurring during the formation of a contract, which would be covered by section 1981, and discrimination arising after employment has begun, which would not be covered under the statute. *Id.* Furthermore, the Court noted that the right to enforce a contract extends only to

broad remedy for all discriminatory acts associated with contracts.[31] Furthermore, the Court noted that Congress had provided a comprehensive remedy for employment discrimination when it enacted Title VII.[32] According to the Court, permitting a racial harassment claim under section 1981 would frustrate Title VII's efforts to resolve employment conflicts administratively rather than through lawsuits.[33] As a result, the Court limited the applicability of section 1981 to incidents occurring prior to executing the contract or during efforts to enforce an existing contract.[34]

Though the Court limited the applicability of section 1981, it recognized the possibility that a cause of action can arise under section 1981 when a promotion claim is involved.[35] According to the Court, section 1981 is available only if the opportunity for a new contractual relationship was de-

---

"conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.*

Regarding Patterson's allegation of discriminatory failure to promote, the Supreme Court held that although Patterson was required to prove discriminatory intent in McLean Credit Union's failure to promote her, she was not necessarily required to prove that she was better qualified. *Id.* at __, 109 S. Ct. at 2377-78, 105 L. Ed. 2d at 156-57. Thus, the district court's jury instruction requiring proof of superior qualifications was found to have been in error. *Id.*

31. *See id.* at __, 109 S. Ct. at 2372, 105 L. Ed. 2d at 150 (section 1981 does not proscribe racial discrimination in all contractual contexts). The majority asserted that the language of section 1981 establishes the statute as a very limited prohibition on discriminatory conduct in making and enforcing contracts. *Id. But see* Runyon v. McCrary, 427 U.S. 160, 170-71 (1976)(Court asserts any time person's ability to contract is restricted because of race, cause of action exists under section 1981); *see also* Commentary, *Civil Rights—42 U.S.C. § 1981: Keeping a Compromised Promise of Equality to Blacks*, 29 U. FLA. L. REV. 318, 324 (1977) (federal law prohibits discrimination in all contractual situations); Note, *Civil Rights: Section 1981 Right to Contract as a Bar to Racial Discrimination in Private Schools*, 31 U. ARK. L. REV. 314, 318 (1977)(private contract rights completely affected by section 1981).

32. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2374, 105 L. Ed. 2d 132, 153 (1989)(Court emphasized racial harassment directly covered by Title VII). The Court explained its position by stating that Title VII is applicable because it forbids discrimination in the "terms, conditions or privileges of employment" (quoting 42 U.S.C. § 2000e-2(a)(1)). *Id.*

33. *See id.* at __, 109 S. Ct. at 2375, 105 L. Ed. 2d at 153 (clear and elaborate provisions of Title VII would be impaired by allowing section 1981 action). The Court reasoned that if a plaintiff is allowed to bring an action under section 1981, he will often ignore the procedures required under Title VII and, thus, render Title VII ineffective. *Id.* Therefore, by not allowing the racial harassment claim to be brought under section 1981, the Court asserts that it will "preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." *Id.*

34. *Id.* at __, 109 S. Ct. at 2372-73, 105 L. Ed. 2d at 150-51. The Court, however, stated that its decision did not mark a retreat from established congressional policies prohibiting discrimination. *Id.* at __, 109 S. Ct. at 2379, 105 L. Ed. 2d at 158. The Court emphasized that because the Constitution does not directly discuss private discrimination, the Court could only interpret the statutory language adopted by Congress. *Id.*

35. *See id.* at __, 109 S. Ct. at 2377, 105 L. Ed. 2d at 156 (whether promotion claim actionable under section 1981 dependent on nature of contractual change).

nied because of discriminatory conduct.[36] However, McLean Credit Union never argued that Patterson's promotion claim was not actionable under section 1981, and therefore, the Court did not further elaborate on this issue.[37]

In dissent, Justice Brennan argued that racial harassment in the course of employment was actionable under the provisions of section 1981.[38] He criticized the majority's narrow reading of the statute[39] and noted that both legislative history and precedent supported a broader interpretation.[40] In addition, he proposed that the test to determine whether a racial harassment claim is actionable under section 1981 should be whether the racial harassment was so severe as to preclude an assertion that the contract was made without regard to race.[41] Justice Brennan also disputed the contention that Title VII provided an adequate remedy for racial harassment claims by emphasizing the differences in procedure and coverage in Title VII and section 1981.[42]

---

36. *Id.* The Court stated: "Only where the promotion rises to the level of an opportunity for a new and distinct relation between employee and employer is such a claim actionable under section 1981." *Id.*

37. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2377, 105 L. Ed. 2d 132, 156 (1989)(no need to discuss applicability of promotion claim to section 1981 because not challenged by McLean Credit Union).

38. *Id.* at __, 109 S. Ct. at 2388, 105 L. Ed. 2d at 169 (Brennan, J., concurring in part and dissenting in part).

39. *Id.* at __, 109 S. Ct. at 2379, 105 L. Ed. 2d at 159 (Brennan, J., concurring in part and dissenting in part)(Court gave section 1981 "needlessly cramped interpretation").

40. *Id.* at __, 109 S. Ct. at 2383, 105 L. Ed. 2d at 169-70 (Brennan, J., concurring in part and dissenting in part). Justice Brennan explained that section 1981 developed out of the Civil Rights Act of 1866 which was passed under the authority of the thirteenth amendment. *Id.* Justice Brennan asserted that the Court had already addressed section 1981's application to private employment in several earlier Supreme Court decisions, including *Jones v. Alfred H. Mayer Co.*, *Johnson v. Railway Express Agency*, and *Runyon v. McCrary*. *Id.* Justice Brennan emphasized that these decisions, and especially the *Runyon* holding, provided a detailed and comprehensive explanation of section 1981's applicability to acts of private discrimination. *Id.* at __, 109 S. Ct. at 2383-84, 105 L. Ed. 2d at 163-64.

41. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2389, 105 L. Ed. 2d 132, 171 (1989)(Brennan, J., concurring in part and dissenting in part)(Court should look at severity of discriminatory act). According to Justice Brennan, if the harassment was "sufficiently severe and pervasive," the action could be brought under section 1981 because the harassment would render the working environment of the white and black workers dissimilar and demonstrate that the black employee did not have the same right to make a contract as the white employee. *Id.*

42. *Id.* at __, 109 S. Ct. at 2390-91, 105 L. Ed. 2d at 172-73 (Brennan, J., concurring in part and dissenting in part)(Title VII and section 1981 are independent and substantially different remedies for discriminatory conduct). Justice Brennan asserted that section 1981 was a broader statute than Title VII because it extended "not just to employment contracts, but to all contracts." *Id.* Additionally, he distinguished the statutes by noting that section 1981 was not limited to cases involving an employer with at least fifteen employees. *Id.* at __, 109 S. Ct. at 2391, 105 L. Ed. 2d at 173. Other differences include the ability to recover backpay under

In a separate dissent, Justice Stevens disagreed with the majority's restrictive construction of section 1981.[43] He argued that the "ongoing" nature of a contract, specifically an at-will employee's contract, can be modified by the conduct of the parties resulting in a restructured contract.[44]

Although *Patterson* establishes a clear and concise rule for managing racial harassment claims,[45] the Court's approach to section 1981 unduly restricts an employee's right to redress discriminatory conduct during employment.[46] By distinguishing between pre-contractual and post-contractual discriminatory conduct,[47] the Court practically eliminates a recognized cause of action for on-the-job discrimination.[48] The effect of the majority's

---

section 1981, the ability to recover compensatory and punitive damages under section 1981, the right to a jury trial under section 1981, the different statute of limitations requirements under the two statutes, and the emphasis on conciliation under Title VII. *Id.*

43. *Id.* at __, 109 S. Ct. at 2395, 105 L. Ed. 2d at 178 (Stevens, J., concurring in part and dissenting in part)(criticizes majority's willingness to ignore precedent and restrict contractual rights). Justice Stevens declared: "The court's emphasis on the literal language of section 1981 might be appropriate if it were building a new foundation, but it is not a satisfactory method of adding to the existing structure." *Id.* at __, 109 S. Ct. at 2396, 105 L. Ed. 2d. at 180. He also noted that when the employer racially harassed Patterson, he forced upon her a new contractual term different than that enjoyed by white employees. *Id.* at __, 109 S. Ct. at 2396, 105 L. Ed. 2d at 179.

44. *Id.* at __, 109 S. Ct. at 2396, 105 L. Ed. 2d at 179 (Stevens, J., concurring in part and dissenting in part)(contract between at-will employee and employer is ever-changing). Justice Stevens stated that when an employer places additional obligations on an at-will employee, the employer is actually making a new contract with that employee. *Id.* Every incident of racial harassment changed Patterson's obligations under the contract. As a result, section 1981 was violated because she was not given the same right as a white employee in regard to contractual rights. *Id.*

45. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2377 n.6, 105 L. Ed. 2d 132, 156 n.6 (1989)(principle established in *Patterson* is "straightforward" and easy for lower courts to apply).

46. *See id.* at __, 109 S. Ct. at 2391, 105 L. Ed. 2d at 173 (Brennan, J., concurring in part and dissenting in part)(Court's narrow interpretation of section 1981 may effectively eliminate employee's opportunity to redress discriminatory activity if not covered by section 1981).

47. *See id.* at __, 109 S. Ct. at 2374, 105 L. Ed. 2d at 152 (Court held discriminatory conduct occurring before contract made can be reached by section 1981, but conduct occurring after contract established cannot be reached by statute).

48. *Compare* Wilmington v. J.I. Case Co., 793 F.2d 909, 909 (8th Cir. 1986)(welder permitted to recover damages under section 1981 because employer subjected him to different "terms and conditions" of employment than white employees) *with* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2374, 105 L. Ed. 2d 132, 152 (1989)(racial harassment relates to "terms and conditions" of employment and actionable only under Title VII). Other lower federal courts have also been unable to find the distinction between pre-contractual and post-contractual discrimination asserted by the majority. *See, e.g.*, Hunter v. Allis-Chalmers, 797 F.2d 1417, 1421 (7th Cir. 1986)(section 1981 required company to take reasonable steps to restrict acts of racial harassment by employees while on job); Ramsey v. American Air Filter Co., 772 F.2d 1303, 1314 (7th Cir. 1985)(black employee awarded damages under section 1981 because treated differently during employment than other employees);

holding allows an individual, subjected to discrimination prior to a contract's consummation, to retain a section 1981 cause of action while it denies the same cause of action to an employee subjected to discrimination after entering into a contract.[49] The Court makes this distinction even though the employer in both situations has discriminated against a person because of his color.[50]

Additionally, the majority's assertion that Title VII is better suited to resolve harassment claims[51] overlooks the fact that Title VII is incapable of replacing the broad remedial measures afforded by section 1981.[52] Because Title VII actions can only be brought against employers with fifteen or more employees,[53] almost fifteen percent of the nation's workforce is outside the reach of the statute[54] and is left without a remedy for discriminatory acts in

---

Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974)(section 1981 violated if employer requires more of employee because of his race); *see also* Comment, *Developments in the Law — Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 104 (1980)(discriminatory activity by employers prohibited by section 1981 whether it occurs "before, during or after" employment). *But see* Page v. U.S. Indus., 726 F.2d 1038, 1041 n.2 (5th Cir. 1984)(action can be brought under section 1981 only if based on grounds different than Title VII suit would be).

49. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2374, 105 L. Ed. 2d 132, 152 (1989)(discriminatory conduct while initiating contract actionable under section 1981 but discriminatory acts after employment begins creates no section 1981 rights).

50. *See id.* at __, 109 S. Ct. at 2396, 105 L. Ed. 2d at 179 (Stevens, J., concurring in part and dissenting in part)(level of guilt is same for employer who discriminates regardless of when discrimination takes place).

51. *See id.* at. __, 109 S. Ct. at 2374, 105 L. Ed. 2d at 152 (Title VII proper remedy because on-the-job racial harassment is discriminatory "condition" expressly covered by statute); *see also* Hishon v. King & Spalding, 467 U.S. 71, 75 (1984)(contractual relationship in employment situation makes Title VII proper remedy); EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384 (D. Minn. 1980)(Title VII provides well-established remedy for racial harassment).

52. *See* Johnson v. Railway Express Agency, 421 U.S. 455, 460 (1975)(quoting H.R. REP. NO. 238, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2154)(section 1981 and Title VII "augment each other and are not mutually exclusive"); *see also* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 471-72 (1980)(section 1981 extends to areas not covered by Title VII); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 58 (1972)(Title VII broad in types of discrimination it prohibits but limited in number of people it protects).

53. *See* 42 U.S.C. § 2000e(b) (1981)(requires minimum of 15 employees working for 20 weeks before employer can be liable for employment discrimination under Title VII); *see also* Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1228 (D.C. Cir. 1984)(claim of discrimination against employer of less than 15 employees proper under section 1981 but not under Title VII); Fike v. Gold Kist, Inc., 514 F. Supp. 722, 725 (D.C. Ala. 1981)(corporation did not have 15 employees and was not "employer" under Title VII).

54. *See* Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 (1988)(statistical analysis showing significance of section 1981, especially in areas not covered by Title VII). According to the EEOC, the Title VII requirement of 15 employees precludes over 10 million people and 86 percent of all businesses from its protection. *Id.*

the course of employment.[55] Under the majority's holding, section 1981 remedies, including the right to backpay beyond two years,[56] the right to a jury trial,[57] and the right to recover all common law damages suffered[58] are not available to victims of racial harassment because they are not included in the text of Title VII.[59] Additionally, the Court's assignment of racial harassment claims to Title VII requires adherence to the detailed and often protracted administrative procedures associated with the statute.[60] Because of the length of time required to receive potential relief through the administrative process,[61] Title VII's remedial measures are relatively useless to employees whose jobs are short-term or who face the immediate threat of being fired.[62]

Though the majority specifically states that *Runyon v. McCrary* is not overruled,[63] by its refusal to apply section 1981 in post-contractual situa-

---

55. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2391, 105 L. Ed. 2d 132, 173 (1989)(Brennan, J., concurring in part and dissenting in part)(asserts that most important difference in two statutes is Title VII neglects almost 15 percent of workers while section 1981 covers them all).

56. *See, e.g.*, Johnson v. Railway Express Agency, 421 U.S. 455, 461 (1975)(recovery of backpay under section 1981 not limited to two years as required by Title VII); Hunter v. Allis-Chalmers, 797 F.2d 1417, 1417 (7th Cir. 1986)(black employee harassed and discharged awarded three years of backpay under section 1981); McGinnis v. Ingram Equip. Co., 685 F. Supp. 224, 228 (N.D. Ala. 1988)(employee subjected to severe discrimination by employer awarded three years backpay in section 1981 action).

57. Saad v. Burns Int'l Sec. Servs., 456 F. Supp. 33, 37 (D.D.C. 1978)(section 1981 gives right to jury trial because both legal and equitable relief available to plaintiff); *accord* Wilmington v. J.I. Case Co., 793 F.2d 909, 909-10 (8th Cir. 1986)(jury awards damages to black welder under section 1981); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1227 (D.C. Cir. 1984)(in jury trial, compensatory damages awarded to victim of section 1981 violations).

58. *See Johnson*, 421 U.S. 455, 461 (1975)(plaintiff under section 1981 may receive equitable and legal relief, which includes compensatory and punitive damages); *see also* Ramsey v. American Air Filter Co., 772 F.2d 1303, 1305-06 (7th Cir. 1985)(black employee recovered compensatory damages for mental distress, humiliation, and lost wages as well as punitive damages in section 1981 action against employer); Block v. R.H. Macy & Co., 712 F.2d 1241, 1242 (8th Cir. 1983)(discharged employee recovered compensatory as well as punitive damages).

59. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2391, 105 L. Ed. 2d 132, 173 (1989)(Brennan, J., concurring in part and dissenting in part)(differences in coverage between section 1981 and Title VII show employees will have few remedies).

60. *See id.* at __, 109 S. Ct. at 2374-75, 105 L. Ed. 2d at 153-54 (only after exhaustion of all administrative remedies can employee obtain right to file suit).

61. *See* 42 U.S.C. § 2000e-5(b) (1982)(after charge filed by employee, EEOC has 120 days to determine if reasonable cause exists).

62. *See* H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 89 (1985)(detailed administrative procedures of Title VII and related delays cause problems for those whose opportunity to work is brief or in jeopardy).

63. Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2369, 105 L. Ed. 2d 132, 145 (1989)(Brennan, J., concurring in part and dissenting in part).

tions, its decision in *Patterson* renders the *Runyon* holding virtually ineffective.[64] Congress could amend section 1981 or Title VII to make the *Patterson* majority's decision nonbinding,[65] but a legislative amendment takes time and involves the balancing of competing interests.[66] Furthermore, congressional modification of a Supreme Court ruling requires a broad consensus of public support.[67] Such widespread support is unlikely in this case because the *Patterson* majority's reaffirmation of the *Runyon* principles[68] has disguised the restrictive nature of its holding.[69]

By interpreting section 1981 narrowly, the Supreme Court has created a simple but inadequate framework for dealing with discriminatory conduct in employment. The Court's dichotomy between pre-contractual and post-contractual conduct places too much emphasis on the stage of the contractual process in determining what type of remedy is available to the aggrieved individual. Perhaps more importantly, the *Patterson* holding significantly reduces the relief available to victims of discrimination during employment. The Court's willingness to simply refer employment discrimination problems to Title VII ignores the fact that Title VII coverage does not extend to a substantial number of employees and does not contain many of the remedies formerly available under section 1981. Legislative changes in section 1981 or Title VII may provide a long-term solution, but such statutory modifications are not easily achieved and require strong public support. Until a more

---

64. *See* L. Tribe, Remarks at U.S. Law Week's Constitutional Law Conference (Sept. 8-9, 1989)(synopsis printed in 58 U.S.L.W. 2200)(asserts *Patterson* decision "drained the life" from *Runyon* holding).

65. *See* Amell v. United States, 384 U.S. 158, 166 (1966)(mistaken interpretation of congressional intent by Supreme Court can be remedied by legislation with clearer language).

66. *See* L. Tribe, Remarks at U.S. Law Week's Constitutional Law Conference (Sept. 8-9, 1989)(synopsis printed in 58 U.S.L.W. 2200)(congressional override of *Patterson* holding will require time and "bargaining chips"); Strickland, *Congress, the Supreme Court and Public Policy: Activism, Restraint, and Interplay*, 18 AM. U.L. REV. 267, 298 (1969)(enactment of legislation is slow and difficult process).

67. *See Congressional Reversal of Supreme Court Decisions: 1945-57*, 71 HARV. L. REV. 1324, 1336 (1958)(reversal of Supreme Court decisions by congressional legislation generally occurs only if those involved almost unanimously support rejection of the holding).

68. *See* Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2370, 105 L. Ed. 2d 132, 147 (1989)(Court states section 1981 still prohibits private racial discrimination in making and enforcing contracts).

69. *See* L. Tribe, Remarks at U.S. Law Week's Constitutional Law Conference (Sept. 8-9, 1989)(synopsis printed at 58 U.S.L.W. 2200)(majority's reaffirmation of *Runyon* hides importance of decision). Professor Tribe compares this technique to the "neutron bomb" approach suggested by Professor Schroeder of Duke University, where buildings are left standing but all the people in them are killed. *Id.* This ambiguous interpretation was also recognized by Justice Brennan in the opening sentence of his opinion in *Patterson*: "What the Court declines to snatch away with one hand, it takes with the other." Patterson v. McLean Credit Union, __ U.S. __, 109 S. Ct. 2363, 2379, 105 L. Ed. 2d 132, 159 (1989)(Brennan, J., concurring in part and dissenting in part).

realistic approach to the complex issue of racial discrimination during employment is developed, the Supreme Court's restrictive interpretation of section 1981 will make racial harassment cases much easier to decide, but to the detriment of employees.

Jeffrey A. Lacy