Legal Update Article

Supreme Court: § 1981 Suits Require Plaintiffs to Show Bias is 'But For' Cause of Injury

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Resolving a split among the federal circuit courts on the issue, the U.S. Supreme Court has decided that a plaintiff bringing suit under 42 U.S.C. § 1981 bears the burden of showing that the plaintiff's race was a "but for" cause of his its injury, and that this burden exists throughout the life of the case, including at the pleading stage. *Comcast Corp. v. National Assn. of African American-Owned Media*, No. 18-1171 (Mar. 23, 2020).

Section 1981 grants all persons the right to make and enforce contracts regardless of race.

Background

This case arose from African American-owned television network Entertainment Studios Network's (ESN) failed efforts to have cable television provider Comcast carry its channels. After Comcast refused to carry ESN's programming, citing a lack of demand, bandwidth constraints, and a preference for programming not offered by ESN, ESN filed suit alleging that Comcast had violated § 1981, which guarantees "[a]ll persons … the same right … to make and enforce contracts … as is enjoyed by white citizens."

Comcast sought to dismiss ESN's complaint, arguing that ESN had failed to state a claim as a matter of law, because it had failed to plead that race was the "but for" cause of Comcast's decision not to contract with ESN. The district court dismissed ESN's complaint with prejudice, holding ESN had failed to plausibly plead that, but for racial animus, Comcast would have contracted with ESN.

ESN appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. ESN argued that while a showing of "but for" causation may be needed to prevail at trial, a § 1981 plaintiff need only plead that race was a "motivating factor" to survive a motion to dismiss.

The Ninth Circuit agreed and reversed the district court's ruling, holding that ESN needed only to plead facts plausibly showing that race played "some role" in Comcast's decision-making process, and under that standard, ESN had pleaded a viable claim.

Supreme Court Decision

Justice Neil Gorsuch, writing for a nearly unanimous Court (Justice Ruth Bader Ginsburg filed an opinion concurring in part and concurring in the judgment), ruled that there is no textual or historical basis for extending the "motivating factor" standard used in discrimination cases brought under Title VII of the Civil Rights Act to § 1981 cases, even at the pleading stage.

Beginning with a review of "textbook tort law," the Court explained that the "but for" common law causation test supplies the "default" standard where Congress has not expressly provided a standard within the statute. The Court also noted that, since the essential elements of a claim remain throughout the life of a lawsuit, a plaintiff must plausibly allege at the outset what must be proven at the end.

Although the text of § 1981 does not expressly discuss causation, the Court explained it suggests the focus of the statute "fits naturally with the ordinary rule that a plaintiff must prove but-for causation." The Court also added that neighboring sections of the statute require a showing that the defendant's challenged actions were taken "on account of" or "by reason of" race. Further, the Court added, nothing in the text of § 1981 or its neighboring sections suggests that the but for causation standard should be less strict at the pleading stage.

The Court also noted that precedent confirms that it has repeatedly analyzed § 1981 claims using language associated with "but for" causation.

Beyond the text, the Court also found the legislative history of the statute confirmed that § 1981 claims require a showing of "but for" causation. For instance, when the statute was drafted, the common law treated the showing of "but for" causation as a prerequisite to a tort suit. Moreover, when Congress amended Title VII in 1991, adding the motivating factor test, it also amended § 1981, without adopting the motivating factor test in the latter statute, indicating the omission was intentional.

Finally, the Court held that nothing in Congress' 1991 amendments to the statute defining the term "make and enforce contracts" to include "making," which ESN contended suggests that the statute protects contractual processes as well as outcomes, supports the application of a motivating factor causation test to § 1981 claims. Explaining that ESN's argument regarding whether the 1991 amendments extend statutory coverage to the contractual process "misses the point," the Court refrained from ruling on whether § 1981 protects both contractual outcomes and processes.

Concurrence

Justice Ginsburg wrote a concurrence joining the Court's opinion, while noting her previously expressed objections to a strict "but for" causation standard for discrimination cases. In her opinion, Justice Ginsburg also stated that the 1991 amendments to § 1981 should extend the statute to cover both contractual outcomes and processes.

Implications

Following the Supreme Court decision, it is clear that plaintiffs will need to show but for causation at every stage of a lawsuit, including the pleading stage. While plaintiffs can assert race claims under Title VII, with its more plaintiff favorable motivating factor test, § 1981 has several advantages for plaintiffs over Title VII. Section 1981 has no requirement that an employer have a minimum of 15 employees. In addition, unlike Title VII, § 1981 provides for individual liability, a more generous statute of limitations, and uncapped damages. Employers can rely on the Court's decision to challenge § 1981 claims at the early stages of litigation, and perhaps obtain a dismissal that will eliminate an otherwise challenging racial discrimination statute.

Jackson Lewis attorneys are available to answer questions about the Court's decision.