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**Cracker Barrel v. Humphries: Supreme Court to answer question of whether
retaliation claims are allowable under Section 1981 of the Civil Rights Act**

When the Supreme Court accepted review of the 2007 Seventh Circuit decision in *Humphries v. CBOCS* (Cracker Barrel), 474 F.3d 387 (2007), a retaliatory discharge action filed under Section 1981 of the Civil Rights Act, the stage was set for a potentially major shift in employment discrimination law and specifically, employees access the court system to remedy alleged retaliatory actions by employers.

Background

For the first two and a half years of his tenure as manager of a Cracker Barrel restaurant in Bradley, Illinois, Hedrick Humphries, an African-American, received excellent performance reviews, merit raises and bonuses. However, in the summer of 2001, a new General Manager, Steve Cardin, became Humphries superior. Humphries claims Cardin routinely made racially derogatory statements directed at African-Americans and other minority groups. After receiving several disciplinary reports from Cardin within the first month of Cardin's presence, Humphries complained about the comments and the disciplinary action taken against him to Cardin's superior, district manager Christensen, however, no action was taken by the company.

Subsequently, in September 2001, Joe Stinnet, one of Humphries' co-associate managers fired an African-American food server for allegedly failing to appear for a shift. Humphries believed this to be unfair treatment because a similarly situated Caucasian food server had missed numerous shifts but was not fired. Humphries complained to Christensen and his new superior, Ken Dowd (Cardin had since been moved to another restaurant) about the termination and again about the comments previously made by Cardin. Shortly thereafter, Humphries was fired after Stinnet claimed that Humphries left the store safe unlocked overnight. Humphries filed discrimination and retaliation claims under Title VII and Section 1981.

Cracker Barrel responded to the Title VII claim with a motion to dismiss arguing that the plaintiff violated the statute of limitations by failing to file the claim within 90 days of receiving his right to sue letter from the EEOC. The trial court granted the defendant's motion and the plaintiff did not challenge that finding. Therefore, only the Section 1981 allegation remained.

Following discovery, Cracker Barrel filed a motion for summary judgment arguing that the plaintiff could not establish his prima facie burden of showing that a similarly situated individual in a non-protected class was treated more favorably. The trial court sustained the motion in its entirety and the plaintiff appealed. On appeal Cracker Barrel argued for the first time in the litigation that even if plaintiff established a prima facie of retaliation, a recent case from the Seventh Circuit, *Hart v. Transit Mgt. of*

Racine, 426 F.3d 863 (7th Cir. 2005), completely precluded retaliation claims under Section 1981 of the Civil Rights Act.

The Civil Rights Act of 1866

The Civil Rights Act of 1866, from which Section 1981 was later codified, provides that “all persons in the United States shall have the same right...to make and enforce contracts...” 42 U.S.C. §1981. While the relationship between an employer and employee is considered a contract within the construct of Section 1981, the language “make and enforce” has resulted in significant debate over what adverse actions are covered by the provision.

The debate started in earnest in 1969, when the Supreme Court had the opportunity to rule on the scope of Section 1982. In *Sullivan v. Little Hunting Park*, the Court found that pursuant to the broad protective nature of the Civil Rights Act an individual who was retaliated against for complaining about discrimination directed at someone else could bring an action under the statute. While “retaliation” was not specifically addressed by the Court, in the years following the decision “the general consensus among the circuits was that (based on the ruling regarding Section 1982) Section 1981 also broadly prohibited discrimination in all facets of the employment relationship including “post-formation” adverse acts such as retaliation.”¹

This expansive view was unanimously jettisoned by the Supreme Court twenty years later in the 1989 decision, *Patterson v. McLean Credit Union*.² In *Patterson*, the Court held that the protections of Section 1981 only prohibited discrimination in the entering into a contract with someone or only offering it upon discriminatory terms. The Court specifically indicated that the protection did not extend to problems which may arise later from the conditions of employment or continuing employment. In other words, Section 1981 did not protect against post-formation discriminatory conduct including breach of terms of the contract or imposition of discriminatory working conditions and racial harassment. *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

While this decision is also silent as to retaliation, several circuit courts including the Seventh, interpreted the Court’s use of “post-formation” as including acts of retaliation and concluded that *Patterson* stood for the proposition that retaliation claims were not allowed under Section 1981. Whether the *Patterson* Court intended this result is not clear, however, it certainly displeased Congress. In direct response to the circuit courts’ interpretation of *Patterson*, Congress passed the Civil Rights Act of 1991. Specifically, Congress added sub-section (b) to Section 1981 which made clear that Section 1981 was to be read broadly to include all aspects of the contractual relationship between parties, including post-formation conduct. Ironically however, Congress did not add the term “retaliation” as a prohibited act.

¹ *Humphries*, 474 F.3d at 394.

² It should be noted that Justice Stevens did dissent in part while also concurring in part with the majority.

Following the 1991 amendment and despite the continued absence of the term “retaliation” from Section 1981, several of the circuit courts interpreted the statute to allow for retaliation claims. Additionally, in 2005 the Supreme Court issued its decision in *Jackson v. Birmingham Board of Education*, a case where the coach of a girl’s high school basketball team complained of unequal funding between the boys and girls programs and was thereafter removed from his coaching position. In a 5-4 decision, the Court, relying heavily on *Sullivan*, ruled that while the plain language of Title IX did not specifically refer to “retaliation” retaliation is another form of intentional discrimination. It is a form of discrimination because the complainant is being subjected to differential treatment. *Jackson*, 125 S.Ct. at 173. Importantly, the Court observed that if employers were permitted to retaliate freely, individuals who witnessed discrimination would be loathe to report. In other words, the prohibition against discrimination contained in the act necessarily subsumes acts of retaliation.

Having found the reasoning of *Sullivan*, the Civil Rights Act of 1991 and *Jackson* persuasive, the Seventh Circuit turned to its ruling in *Hart v. Transit Management of Racine*, where it had ruled that a white worker did not have standing to bring a Section 1981 retaliation case where the underlying discrimination was directed at a minority co-worker and not plaintiff. In response to the seeming contradiction with Supreme Court precedent, the Seventh Circuit simply reversed itself.

Arguments Presented to the Supreme Court

The issue on appeal to the US Supreme Court focuses on whether retaliation claims are cognizable under Section 1981. Cracker Barrel argues that the Court should hold that Section 1981 does not recognize a cause of action based on retaliation because: (1) the plain language of the statute does not provide for a cause of action based on retaliation; (2) in amending Section 1981 with the Civil Rights Act of 1991, Congress had the opportunity, but specifically chose not to add retaliation as a cause of action under Section 1981; (3) proper statutory construction does not allow for the Court to infer a new cause of action from the plain language of the statute; (4) the Seventh Circuit misapplied *Sullivan* and *Jackson*; and (5) a cause of action is already available to aggrieved employees through Title VII and a ruling in favor of Humphries would eviscerate the intent and remedy provided by Title VII.³

In response, Humphries argues that Section 1981 not only provides for equal rights in making and enforcing contractual relationships, but also prohibits conduct (such as retaliation) that impairs the rights granted under the statute. Humphries responds to Cracker Barrel’s argument that the language of Section 1981 is devoid of reference to “retaliation” by taking the position that specific reference is unnecessary because retaliation is simply another form of race-based discrimination. Lastly, plaintiff responds to Cracker Barrel’s contention that a remedy for retaliation already exists in Title VII by arguing that Congress intended Title VII to supplement existing employment discrimination laws, and not replace them.⁴

³ Brief of Petitioner at 3.

⁴ Brief of Respondent at 10.

Factor Which May Affect/Predict the Court's Decision

At first glance it seems logical that the Supreme Court would simply apply the same rationale to *Humphries* as it did to *Jackson* and find that while Section 1981, as amended by the Civil Rights Act of 1991, makes no specific mention of retaliation, the prohibition against discrimination contained in the act necessarily subsumes acts of retaliation. However, the changes in the composition of the Court since *Jackson* (e.g. Justice O'Connor being replaced by Justice Alito) could result in the Court changing course from *Jackson* and acting to decrease employee access to the courts by removing retaliation claims from Section 1981 actions.

Conclusion

Of obvious interest is what affect the Supreme Court's ruling could have on the EPL marketplace. There are numerous advantages to filing under Section 1981 which make it a more attractive avenue for individuals seeking redress for alleged discriminatory retaliation. Unlike Title VII, plaintiffs' bringing claims pursuant to Section 1981 do not need to first seek resolution of the dispute with the EEOC, but can go straight to court. Additionally, Title VII caps the amount of non-economic damages a claimant can recover, such as emotional distress and punitive damages.⁵ Under Section 1981 there are no such limitations. Importantly, Section 1981 applies to all employers regardless of size, whereas Title VII applies only to employers with 15 employees or more. Lastly, plaintiffs have a much longer time period within which to bring Section 1981 claims than is afforded under Title VII.⁶

If the Seventh Circuit is affirmed by the Supreme Court, due to the lengthy statute of limitations and un-capped damages under Section 1981, there will be less predictability regarding potential claims the costs associated in resolving such claims. However, if the Seventh Circuit is reversed, employers and their insurance carriers may be able to take some comfort in the expeditious reporting cycle and capped damages afforded under Title VII. Thus, the Court's decision has the potential to not only increase or decrease the number of retaliation claims, but also the cost of resolving such claims. However, it could be several months before the Supreme Court makes a definitive ruling in this case.

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⁵ The cap ranges from \$50,000 to \$300,000 depending on the size of the employer.

⁶ Generally speaking the statute of limitations applicable to Section 1981 cases is four years, whereas under Title VII the claim must be brought within 180 days of when the discrimination occurs, unless the charge is also covered by a state agency, such as in Illinois where the time period is extended to 300 days. *Marlow v. Bottarelli*, 938 F.2d 807 (7th Cir. 1991)