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42 U.S.C. § 1981 - A Powerful History Anchors an Unbridled Remedy

By: Jarrett Northup, Esq.

When the allegations were laid out by the potential client, I was stunned. His supervisor called him the company's "token minority". He was commonly referred to in the most racist of terms and was frequently the subject matter of lynching discussions. He was assigned to menial work while Caucasians with no experience were hired as supervisors. Witnesses' affidavits bore out his credibility.

In a landscape of federal and state caps on damages and unsatisfactory administrative remedies, the egregious discrimination at issue needed to be atoned for despite limited economic damages. What law could provide a full measure of accountability for such awful conduct?

Born from the political strife which tore our country apart in the 1860's, 42 U.S.C. § 1981 is an underappreciated federal prohibition upon and remedy from intentional racial discrimination in many private settings, including the workplace. It has taken an incredible amount of time to reach its potential. Its tense origins trace back to the contentious Civil Rights Bill of 1866.

In the aftermath of the Civil War, President Lincoln's Republicans managed to creatively corral enough Democratic votes to finally pass the 13th Amendment through the House of Representatives. The formal abolition of slavery was enshrined into the Constitution following Ratification in December of 1865. The passage of the 13th Amendment was quickly met with a blizzard of crafty lawyering in the southern states. Known today as the "Black Codes", legislation specifically targeting former slaves made a mockery of the 13th Amendment by leveraging the economic weakness of the freedmen and exploiting the Amendment's permission of forced servitude as a means of criminal punishment. The "Codes" were accompanied by un-checked private adherence to past discriminatory practices and intimidation. The practical reality facing former slaves was grim despite the enactment of the 13th Amendment: they remained economically subjugated to the plantation owners and legally powerless to contract or buy property.

In response to the impotency of the 13th Amendment, and with an eye to the electorate's expanded southern population, Congressional Republicans crafted a bill to implement the promises of the 13th Amendment. The Civil Rights Bill of 1866 was passed as "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." The Act provided civil and criminal jurisdiction to the federal District Courts to enforce the right of all citizens of "every race and color, without regard to any previous condition of slavery of involuntary servitude" to "make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase lease, sell, hold and convey real 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 notwithstanding."

The Act was vetoed by President Andrew Johnson in March of 1866. In a lengthy letter to the Senate, the President set forth his laissez-faire political objections to the Act:

> The white race and black race of the South have hitherto lived together under the relation of master and slave—capital owning labor. Now that relation is changed; and as to ownership, capital and labor are divorced. They stand now, each master of itself. In this new relation, one being necessary to the other, there will be a new adjustment, which both are deeply interested in making harmonious. Each has equal power in settling the terms; and, if left to the laws that regulate capital and labor, it is confidently believed that they will satisfactorily work out the problem. Capital, it is true, has more intelligence; but labor is never ignorant as not to understand its own interests, not to know its own value, and not to see that capital must pay that value. This bill frustrates this adjustment.

Fortunately, Congress quickly overrode the President's veto. Unfortunately, the United States Supreme Court neutered the enforceability of the 1866 Civil Rights in a series of five consolidated appeals referred to as *The Civil Rights Cases* 109 U.S. 3 (1883). *The Civil Rights Cases* struck down the extensive nongovernmental discrimination prohibitions contained in the subsequent 1875 Civil Rights Act and, in powerful dicta, limited the enforcement of the 1866 Act to incidents of State interference with fundamental rights.

And so our client's remedy sat for eighty years, a check upon legislative powers only, until it was reexamined by the Supreme Court in the 1968 case of *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968). The *Jones* Court resurrected the Act's apparent original intent – it was held to prohibit private discriminatory conduct such as the refusal to sell property to black citizens. Its potency increased with *Runyon v. McCrary* 427 U.S. 160 (1976) (Section 1981 prohibits private discrimination against black applicants to a white-only private school).

Then, for our client's purposes, Section 1981 derailed in *Patterson v. McLean Credit Union* 491 U.S. 164 (1989) when the Court ruled that Section 1981 did not apply to racial discrimination occurring after an employee was hired.

Congress quickly responded to *Patterson*'s narrow interpretation. It retained and amended Section 1981 as part of the Civil Rights Act of 1991. Congress defined "Make and enforce contracts" in an expansive manner superseding the holding of *Patterson.* More than a century after being gutted by *The Civil Rights Cases*, Section 1981 was achieving its purpose. It has since become well-settled law that Section 1981 applies to intentional discrimination in contractual or at-will employment relationships, including retaliation for reporting racial discrimination. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) and *Lauture v. Int'l Bus. Mach. Corp.*, 216 F.3d 258, 261 (2d Cir. 2000).

Section 1981 cases are not limited to the employment context – the reach of Section 1981 (and its companion section 1982) creeps into many areas of private commercial conduct. A Section 1981 case provides many benefits not available in other potential remedies. Section 1981 does not require pre-suit pursuit of an administrative remedy as is the case with the more common Title VII actions. Section 1981 claims are subject to a four year federal statute of limitations. *Jones v. R.R. Donnelly & Sons*, Co. 541 U.S. 369 (2004). Unlike Title VII, Section 1981 applies to employers with less than 15 employees. It can apply to state action and also encompasses claims for individual liability. *Whidbee v. Gararelli Food Specialties, Inc.* 223 F.3d 62, 75 (2d Cir. 2000).

And here's my client's favorite part: Section 1981 claims are not hamstrung by any federal or state statutory cap on compensatory or punitive damages. See 42 U.S.C. 1981a (b)(4). Section 1981 turns the tables on the most egregious examples of racial discrimination. It doesn't

just remedy - it vindicates and punishes. If you have the opportunity to use it, pause to consider the powerful history behind the action…it took nearly a century and a half to accomplish its original intent.