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Employees' Retaliation Claims Under 42 U.S.C. Sec. 1981: Ramifications of the Civil Rights Act of 1991

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EMPLOYEES' RETALIATION CLAIMS UNDER 42 U.S.C. § 1981: RAMIFICATIONS OF THE CIVIL RIGHTS ACT OF 1991

I. INTRODUCTION

Prior to the United States Supreme Court's decision in *Patterson v. McLean Credit Union*,[1] lower courts consistently recognized employer liability under 42 U.S.C. § 1981[2] (§ 1981) for retaliation against employees. Section 1981 prohibited retaliation against employees for such actions as filing an Equal Employment Opportunity Commission (EEOC) charge,[3] complaining of harassment against an employer,[4] advocating the rights of racial minorities,[5] or filing a civil rights lawsuit.[6] Generally speaking, § 1981 was available to employees who suffered from acts of retaliation at the hands of their employers.[7]

In June 1989, the Supreme Court substantially narrowed employees' claims of retaliation under § 1981 when it decided *Patterson*. As a result of this decision, § 1981 was no longer available to employees unless the

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1. 491 U.S. 164 (1989).
2. 42 U.S.C.A. § 1981 (West 1981) (amended 1991).
3. Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982).
4. Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986).
5. Pinkard v. Pullman-Standard, a Div. of Pullman, Inc., 678 F.2d 1211 (Former 5th Cir.), *reh'g denied*, 685 F.2d 1383 (1982), *cert. denied*, 459 U.S. 1105 (1983); *see also* Price v. Federal Exp. Corp., 660 F. Supp. 1388 (D. Colo. 1987).
6. *Goff*, 678 F.2d at 597-98.
7. *See* Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989); Miller v. Fairchild Indus., 885 F.2d 498, 503 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); Choudhury v. Polytechnic Inst. of N.Y., 735 F.2d 38, 43 (2d Cir. 1984); Cox v. Consolidated Rail Corp., 557 F. Supp. 1261 (D.D.C. 1983).

Virtually all retaliation claims filed under § 1981 involved adverse treatment after hiring. *See, e.g.*, Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985); Brown v. United States, 692 F.2d 61 (8th Cir. 1982); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Gillespie v. First Interstate Bank, 717 F. Supp. 649 (E.D. Wis. 1989); Robinson v. Vitro Corp., 620 F. Supp. 1066 (D.C. Md. 1985) (termination of employment). *Cf.* Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982), *and rev'd on other grounds*, 733 F.2d 55 (8th Cir. 1984); Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr., 80 F.R.D. 254 (N.D. Ill. 1978); Price v. Federal Express Corp., 660 F. Supp. 1388 (D. Colo. 1987); Gresham v. Waffle House, Inc., 586 F. Supp. 1442 (D.C. Ga. 1984) (discrimination). A minority of the cases involved an employer's refusal to hire. *E.g.*, Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981).

retaliation by their employers affected the initial formation[8] or subsequent legal enforcement[9] of the employees' contracts. The narrowing of § 1981 seriously curtailed employees' ability to use the statute's remedies for retaliation suffered during the course of employment.[10]

The Civil Rights Act of 1991 (CRA 1991) legislatively overruled *Patterson*.[11] Congress enacted CRA 1991 in response to the Supreme Court's decision in *Patterson* and other employee retaliation cases. Congress attempted to "restor[e] the civil rights protections that were dramatically limited by [such] decisions."[12] By amending § 1981, CRA 1991 has expanded the scope of the statute's applicability to employment contracts.[13]

This Comment examines whether CRA 1991 will return courts to their pre-*Patterson* recognition of employees' retaliation claims under § 1981, including post-termination retaliation, or whether some new hybrid interpretation based solely on statutory language will result. Part II explores the lower courts' application of § 1981 to employees' retaliation claims prior to the Supreme Court's *Patterson* decision. Part III analyzes how *Patterson* narrowed the applicability of § 1981 as a remedy in employment situations. Part IV examines more specifically how the Supreme Court's decision reduced employers' liability for retaliation under § 1981. Part V presents an overview of the Civil Rights Act of 1991. Part VI examines the opposing arguments regarding how to construe the recently amended § 1981 in respect to retaliation claims. Finally, Part VII suggests how the courts should interpret § 1981's applicability to employees' retaliation claims since the passage of CRA 1991.

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8. Sherman v. Burke Contracting, 891 F.2d 1527, 1534 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990).

9. McKnight v. General Motors Corp., 908 F.2d 104, 112 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991), *and cert. denied*, 113 S.Ct. 1270 (1993).

10. The phrase "during the course of employment" refers to all aspects of the employment relation. *See, e.g.*, Valdez v. Mercy Hosp., 961 F.2d 1401 (8th Cir. 1992) (termination); Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991), *cert. denied*, 113 S. Ct. 207, *and reh'g denied*, 113 S. Ct. 644 (1992) (failure to promote); *Sherman*, 891 F.2d 1527 (discrimination).

11. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630.

12. *See id.* at 1.

13. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 89-92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 627-30.

II. BACKGROUND: PRE-*PATTERSON*

To fully understand the implications of the recently amended § 1981, the statute's history must first be explored. The Civil Rights Act of 1866 (CRA 1866) was the first comprehensive civil rights legislation passed by Congress; it was enacted to help enforce the 13th Amendment of the United States Constitution.[14] Section 1 of CRA 1866 was codified as 42 U.S.C. § 1981,[15] which states:

> Equal rights under the law
>
> 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.[16]

This statute, inter alia, afforded all persons the same right to make and enforce contracts as white citizens enjoyed.[17] In *Runyon v. McCrary*,[18] the Supreme Court held that the provisions of § 1981 applied to private contracts, including employment contracts.[19] Thus, a contract did not have to be available to all white citizens before it fell under § 1981; it could be between private parties.[20]

A. Section 1981's Applicability to Post-Formation Retaliation

Prior to the Supreme Court's *Patterson* decision, courts broadly interpreted[21] the "make and enforce contracts" provision in § 1981 to

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14. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 4 (1985).

15. H.R. REP. NO. 40(I) at 90, n.85.

16. Civil Rights Act of 1866, § 1, as amended, 42 U.S.C.A. § 1981 (West 1981) (amended 1991) (emphasis added).

17. *Id.*

18. 427 U.S. 160 (1976).

19. *Id.* at 168-69 (citing Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n., 410 U.S. 431 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).

20. *Id.*

21. The United States Supreme Court has set forth specific guidelines for courts to follow when construing a statute. A court must first begin with the language of the statute itself in order to interpret its meaning. Griffin v. Oceanic Contractors, 458 U.S. 564, 570-71 (1982). A section of the statute may not be interpreted in isolation; the text must be

include employees' post-formation retaliation claims against their employers.[22] The legislative history surrounding § 1981 clearly indicates that Congress did not want this statute to be interpreted narrowly.[23] The 39th Congress was aware of the disparate and discriminatory treatment toward employees that could occur regardless of a valid contractual agreement[24] and was intent upon remedying this problem.

When Congress addressed these problems in the course of passing CRA 1866, it was clearly concerned about the treatment of employees beyond the initial point of entering an employment contract.[25] Accordingly, when courts interpreted § 1981, they determined the statute was intended to cover post-formation conduct.[26] Such conduct included the act of retaliation against employees, although retaliation was not specifically mentioned in either the statute or its legislative history.

In *Goff v. Continental Oil Co.*,[27] the Fifth Circuit explained why post-formation retaliation was a cognizable claim under § 1981.[28] In this case, an employee alleged he was terminated in retaliation for filing a lawsuit against his employer for discriminatory conditions of employment and promotion.[29] Recognizing the plaintiff's claim under § 1981, the court expounded its reasoning for allowing claims of retaliation to be pursued under this statute:

> Were we to protect retaliatory conduct, we would in effect be discouraging the filing of meritorious civil rights suits and sanctioning further discrimination against those persons willing to

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considered as a whole by the courts. United States Nat'l Bank v. Independent Ins. Agents, 113 S. Ct. 2173, 2182 (1993). If, by the words of the statute, "the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). However, the courts must turn to legislative history for guidance in construing the statute if the statute is not clear and unambiguous on its face. *Id.* at 841-43.

22. *See* cases cited *supra* note 7.

23. *See* Cong. Globe, 39th Cong., 1st Sess. 77 (1866).

24. For example, employers in the confederate states were attempting to continue their use of whips to get laborers to work harder, and many of the employers not involved in corporal punishment were still passing down severe and unfair punishments for employees' minor infractions on the job. Patterson v. McLean Credit Union, 491 U.S. 164, 206-08 (1989) (Brennan, J., dissenting) (quoting Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 19-20 (1865)).

25. *Id.*

26. *See* cases cited *supra* notes 3-5, 7.

27. 678 F.2d 593 (5th Cir. 1982).

28. *Id.* at 598.

29. *Id.* at 594-95.

> risk their employer's vengeance by filing suits. Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute.[30]

The court's rationale did not depend on the statute's language. The Fifth Circuit reasoned that in order to give § 1981 force, retaliation claims must be found implicitly within the statute.[31] The objective of § 1981 would be defeated unless the courts implied retaliation as a cause of action under the statute.

B. Comparative Analysis: § 1981 and Title VII

Courts further supported their interpretation of § 1981 as including retaliation by comparing that statute with Title VII,[32] which expressly states that acts of retaliation by an employer are prohibited.[33] In *Benson v. Little Rock Hilton Inn*,[34] the Eighth Circuit determined that although § 1981 did not specifically prohibit an employer from retaliating against an employee for filing a claim against the employer, such retaliation claims could be brought under § 1981. Further, the court held such claims would be treated as if brought under Title VII.[35]

1. Section 1981—An Independent Statute

Section 1981 contained "substantive provisions which, if violated, [would] give rise to a cause of action independent of any other statutes, including Title VII."[36] Even though an employee's claim of retaliation was expressly covered under Title VII, the courts maintained the availability of § 1981 for such claims.[37]

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30. *Id.* at 598.

31. *Id.* at 598-99.

32. Title VII states in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any [individual] . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. § 2000e-3(a) (West 1994).

33. 42 U.S.C.A. § 2000e *et seq.* (West 1994). *See, e.g.*, Whitaker v. Carney, 778 F.2d 216 (5th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986).

34. 742 F.2d 414 (8th Cir. 1984).

35. *Id.* at 416.

36. Goff v. Continental Oil Co., 678 F.2d 593, 599 (5th Cir. 1982).

37. *See* Benson v. Little Rock Hilton Inn, 742 F.2d 414, 416-17 (8th Cir. 1984). *Accord* Connick v. Myers, 461 U.S. 138, 144-45 (1983); Greenwood v. Ross, 778 F.2d 455, 488 (8th Cir. 1985); *Goff*, 678 F.2d at 598; Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150 (8th Cir. 1981).

2. A Choice Between § 1981 and Title VII

Title VII was not intended to preclude the applicability of other laws to employment discrimination. In fact, "Congress . . . rejected an amendment to Title VII that would have rendered § 1981 unavailable as a remedy for employment discrimination. . . ."[38] Congress wanted plaintiffs to have options from which to choose when deciding what action to take against their employers.[39] Section 1981, while protecting similar rights as Title VII protected, was an alternative that did not involve as many technical requirements for filing a claim. The courts, giving effect to Congress's intent, made § 1981 available to employees against whom their employers had retaliated.[40]

3. Alternative Remedies Available

Although plaintiffs could choose either § 1981 or Title VII to support their claims of retaliation,[41] available remedies varied greatly. Section 1981 offered a broader range of remedies for employees; a plaintiff could receive both equitable and legal relief, which often included punitive damages.[42] Conversely, an employee who sued under Title VII could only receive affirmative job relief and back pay.[43] Furthermore, if a plaintiff did receive a back pay award under § 1981, he could recover pay beyond the two year limitation set forth in Title VII.[44]

4. Advantages Exclusive to § 1981

While both statutes served to remedy retaliation against employed persons, § 1981 offered specific advantages not available under Title VII. One of the most significant differences between the two statutes was that Title VII applied only to businesses with fifteen or more employ-

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38. Patterson v. McLean Credit Union, 491 U.S. 164, 209 (1989) (Brennan, J., dissenting). *See also* H.R. CONF. REP. NO. 899, 92d Cong. 2d Sess. 238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2179.

39. S. REP. NO. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5911.

40. *See* cases cited *supra* note 7.

41. *See Connick*, 461 U.S. at 144-45; *Greenwood*, 778 F.2d at 455; *Goff*, 678 F.2d at 598; *Sisco*, 655 F.2d at 150.

42. Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

43. Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974), *cert. granted*, 420 U.S. 989 (1975), *and rev'd on other grounds*, 424 U.S. 747 (1976); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

44. *Johnson*, 421 U.S. at 460.

ees,[45] while § 1981 was available as a remedy against all employers, regardless of size.[46] In addition, § 1981 had a different statute of limitations than Title VII.[47] Thus, courts determined it was in the best interest for victims of retaliation to have both statutes available as avenues of redress for such claims.[48]

C. *Minority View: Advocating the Preclusion of Retaliation Claims from § 1981*

Asserting that § 1981 should not be available as a remedy for retaliation, proponents of this position argued that only Title VII was a cognizable cause of action for such claims.[49] In *Setser v. Novack Inv. Co.*,[50] the appellees, charged with retaliating against an employee who filed a complaint of discrimination with the EEOC, maintained that the appellant could only file a claim under Title VII.[51] The appellees argued that applying § 1981 to retaliation claims would undermine the purpose of Title VII. Specifically, they contended that a claim of retaliation under § 1981 "would subvert the procedural mechanisms established within Title VII to address retaliatory claims."[52]

However, the court of appeals disagreed with the appellees and held the retaliation claim to be cognizable under § 1981.[53] The court observed that because both statutes were independent of one another, Title VII did not preclude plaintiffs from filing a retaliation claim against their employers under § 1981. Further, the court reiterated the belief shared throughout all jurisdictions that "to deny [an employee] a cause of action for retaliatory acts resulting from pursuing a claim under § 1981 would have the effect of giving 'impetus to the perpetuation of racial discrimination.'"[54] Until the *Patterson* decision, arguments

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45. H.R. REP. NO. 40(I) at 91.

46. Theodore Eisenberg and Stewart Schwab, *The Importance of § 1981*, 73 CORNELL L. REV. 596, 602 (1988).

47. Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987); *see also* Wilson v. Garcia, 471 U.S. 261, 266-68 (1985); Runyon v. McCrary, 427 U.S. 160, 180-82 (1976); *Johnson*, 421 U.S. at 462.

48. *See* Connick v. Myers, 461 U.S. 138, 144-45 (1983); Greenwood v. Ross, 778 F.2d 448, 455 (8th Cir. 1985); Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982); Sisco v. Alberici Constr. Co, 655 F.2d 146, 150 (8th Cir. 1981).

49. *E.g.*, Setser v. Novack Inv. Co., 638 F.2d 1137, 1146 (8th Cir. 1981).

50. 638 F.2d 1137 (8th Cir. 1981).

51. *Id.* at 1146.

52. *Id.*

53. *Id.* at 1147.

54. *Id.* at 1146 (quoting Garcia v. Rush-Presbyterian/Saint Luke's Medical Ctr., 80 F.R.D. 254, 266) (N.D. Ill. 1978); *cf.* Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir.

against the applicability of § 1981 to retaliation claims, such as the one set forth in *Setser*, were unsuccessful, and claims of post-formation retaliation were cognizable under the statute.

III. *PATTERSON V. MCLEAN CREDIT UNION*: THE SUPREME COURT'S NARROWING OF § 1981

In *Patterson*, a former employee brought a § 1981 suit against her employer for racial harassment, failure to promote, and discriminatory discharge.[55] The district court held for the employer. The court of appeals affirmed the lower court's decision, and the United States Supreme Court granted certiorari on several issues.[56] One of the issues addressed was whether racial harassment during the course of employment was actionable under § 1981.[57]

The Supreme Court stated that because § 1981 prohibited racial discrimination in the "making" and enforcement of contracts, it only applied in the initial formation or subsequent enforcement of such contracts,[58] and thus could not be extended to cover all aspects of contractual relations.[59] The Court relied on its previous decisions addressing the scope of CRA 1866[60] to determine that "[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights."[61] However, in both *Georgia v. Rachel* and *Jones v. Alfred H. Mayer Co.*, decisions cited in *Patterson*, the Supreme Court liberally construed CRA 1866 to encompass a broad range of civil rights.[62] Further, although the majority mentioned § 1981's legislative history in *Patterson*, it did not address any specific portion thereof, and the majority failed to take into account the history

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1977); Ragheb v. Blue Cross & Blue Shield, 467 F. Supp. 94, 95-96 (E.D. Mich. 1979); Fralin & Waldron, Inc. v. County of Henrico, Va., 474 F. Supp. 1315, 1322 (E.D. Va. 1979); Liotta v. National Forge Co., 473 F. Supp. 1139, 1145-46 (W.D. Pa. 1979), *rev'd in part on other grounds*, 629 F.2d 903 (1980), *and cert. denied*, 451 U.S. 970 (1981); National Org. for Women v. Sperry Rand Corp., 457 F. Supp. 1338, 1346 (D. Conn. 1978); Strozier v. General Motors Corp., 442 F. Supp. 475, 480 (N.D. Ga. 1977), *appeal dismissed*, 584 F.2d 755 (1978).

55. Patterson v. McLean Credit Union, 491 U.S. 164, 169-71 (1989).

56. *Id.* The court of appeals decision is reported in 805 F.2d 1143 (4th Cir. 1986).

57. *Id.* at 170. Although the Supreme Court addresses other issues, this is the only one pertinent to this Comment.

58. *Id.* at 176.

59. *Id.*

60. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Georgia v. Rachel, 384 U.S. 780 (1966).

61. *Patterson*, 491 U.S. at 176 (1989) (quoting *Georgia*, 384 U.S. at 791).

62. *See id.*, at 192-99 (Brennan, J., dissenting).

that speaks of interpreting this statute broadly.[63] Instead, the majority supported its decision by strictly interpreting the statutory language and giving § 1981 no force beyond its specific wording.

Thus, the Supreme Court held that the right to make a contract does not extend beyond the initial formation of the contract:

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.[64]

The right to enforce contracts was also limited in scope, and the Court concluded that this right "does not . . . extend beyond conduct by an employer that impairs an employee's ability to enforce through legal process his or her established contract rights."[65] In a 5-4 decision, the Supreme Court substantially narrowed the applicability of § 1981 as a remedy in harmful employment situations.

The majority of the Court felt that allowing § 1981 to cover post-formation conduct would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims."[66] However, as Justice Brennan noted in the dissent, the majority failed to consider both the advantages of § 1981 over Title VII and the benefits of a plaintiff having more than one avenue of redress when filing a claim.[67]

IV. THE SUPREME COURT'S *PATTERSON* DECISION: ITS EFFECT ON RETALIATION CLAIMS

Retaliation was never mentioned in the *Patterson* decision. However, once the Supreme Court concluded that § 1981 would no longer apply to post-formation conduct, it was logical for lower courts to conclude that § 1981 would no longer apply to retaliation either.[68]

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63. *Id.* at 206-09 (Brennan, J., dissenting).
64. *Id.* at 177.
65. *Id.* at 177-78.
66. *Id.* at 180.
67. *Id.* at 209-12 (Brennan, J., dissenting).
68. Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1053 (7th Cir. 1991); *accord* Penn v. Rockwell Int'l Corp., 756 F. Supp. 1040 (S.D. Ohio 1990).

For example, in *Hill v. Goodyear Tire & Rubber, Inc.*,[69] a Tenth Circuit case decided after *Patterson*, an employee filed a claim of retaliatory discharge under § 1981 against his employer after he was terminated for complaining to management about racial harassment on the job.[70] The court of appeals held that although the plaintiff's actions were laudable, they were not protected by § 1981 because his complaint did not involve the initial formation or subsequent legal enforcement of the contract.[71] Claims of retaliation made under § 1981 that related to conduct affecting the terms and conditions of employment were no longer cognizable under the statute.[72]

Because *Patterson* was applied retroactively,[73] most pending claims involving employers' post-formation conduct, both at the district level and on appeal, were found to be outside the scope of § 1981.[74] After the Supreme Court's decision, the only way an employee could bring suit under § 1981 for retaliation was if the retaliation involved the initial formation or legal enforcement of the contract.[75] For example, § 1981

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69. 918 F.2d 877 (10th Cir. 1990).

70. *Id.* at 880. *See also* Alexander v. New York Medical College, 721 F. Supp. 587, 588 (S.D.N.Y. 1989); Williams v. National R.R. Passenger Corp., 716 F. Supp. 49, 51-52 (D.D.C. 1989) *cert. denied*, 500 U.S. 953 (1991); *contra* Coleman v. Dow Chem. Co., 747 F. Supp. 146, 156 (D. Conn. 1990); Fowler v. McCrory Corp., 727 F. Supp. 228, 231 (D. Md. 1989) (implicitly overruled by the Fourth Circuit's holding in Williams v. First Union Nat'l Bank, 920 F.2d 232, 234-35 (4th Cir. 1990)).

71. *Hill*, 918 F.2d at 880.

72. *Id.; see also* Harris v. Presbyterian/Saint Luke's Medical Ctr., 758 F. Supp. 636 (D. Colo. 1991).

73. Judicial decisions are usually applied retroactively, even to cases pending appeal. *See* Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974); EEOC v. Vucitech, 842 F.2d 936, 941 (7th Cir. 1988).

74. *E.g.*, Lytle v. Household Mfg., 494 U.S. 545 (1990); Harvis v. Roadway Express, 973 F.2d 490, 493 (6th Cir. 1992); Hill v. Goodyear Tire & Rubber, 918 F.2d 877, 880 (10th Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 110 (7th Cir. 1990); Carroll v. General Accident Ins. Co., 891 F.2d 1174, 1175 n.1 (5th Cir. 1990).

75. *See generally* Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991); Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973 (10th Cir. 1991); Williams v. First Union Nat'l Bank, 920 F.2d 232 (4th Cir. 1990), *cert. denied*, 500 U.S. 953 (1991); *Hill*, 918 F.2d at 880; Carter v. South Cent. Bell, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991), *aff'd sub nom.*, Allen v. South Cent. Bell, 976 F.2d 730 (5th Cir. 1992), *and cert. denied*, 113 S.Ct. 1582 (1993); *McKnight*, 908 F.2d at 108; Sherman v. Burke Contracting, 891 F.2d 1527, 1535 (11th Cir. 1990); Turner v. City of Beaumont, 835 F. Supp. 916 (E.D. Tex. 1993); Williamson v. Union Pac. R.R., 813 F. Supp. 732 (D. Colo. 1992); Saunders v. George Washington Univ., 768 F. Supp. 854 (D.D.C. 1991); Robinson v. N & C Constr. Co., 767 F. Supp. 843 (N.D. Ohio 1991); Dash v. Equitable Life Assurance Soc'y, 753 F. Supp. 1062 (E.D.N.Y. 1990); Frazier v. First Union Nat'l Bank, 747 F. Supp. 1540 (W.D.N.C. 1990); Smith v. Continental Ins. Corp., 747 F. Supp. 275 (D.N.J. 1990); Butler v. RMS Technologies, 741 F. Supp. 1008 (D. Mass. 1990); Kozam v. Emerson Elec. Co., 739 F.

would apply to cases in which an employer failed to promote an employee to a position requiring a new relationship and contract between the employer and employee,[76] or for obstructing an employee from filing a charge with the EEOC or gaining access to the legal system,[77] but this statute would not apply to cases involving wrongful demotion,[78] retaliation for civil rights advocacy,[79] retaliatory discharge,[80] discriminatory working conditions in retaliation for filing a charge with the EEOC,[81] or disciplinary procedures in general.[82]

A. Arguments in Support of the Supreme Court's Decision

In *Carter v. South Cent. Bell*,[83] the Fifth Circuit Court of Appeals discussed three basic arguments supporting the exclusion of retaliation claims from § 1981.[84] First, the court stated that § 1981 was not necessary for protecting employees from retaliation throughout the course of their contractual relations because Title VII already extended employees such protection.[85] Title VII prohibited retaliation by employers, and was an adequate remedy for plaintiffs.[86] Second, the court determined § 1981 was not applicable in situations where an employee filed a complaint against his employer, because such action did not impair an employee's right to enforce his employment contract.[87] Third, because discriminatory discharge was generally not available under § 1981, the court concluded that retaliatory discharge was not available either.[88]

In *Carter*, three employees of the South Central Bell Telephone Company (SCB) claimed they were racially discriminated against by

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Supp. 307 (N.D. Miss. 1990); Francheschi v. Edo Corp., 736 F. Supp. 438 (E.D.N.Y. 1990); Jackson v. GTE Directories Serv. Corp., 734 F. Supp. 258 (N.D. Tex. 1990).

76. *McKnight*, 908 F.2d at 109.

77. Overby v. Chevron, 884 F.2d 470 (9th Cir. 1989).

78. Jordan v. U.S. West Direct Co., 716 F. Supp. 1366, 1368 (D. Colo. 1989).

79. *Hill*, 918 F.2d at 880.

80. *E.g.*, Williams v. First Union Nat'l Bank, 920 F.2d 232, 234 (4th Cir. 1990); Carter v. South Cent. Bell, 912 F.2d 832, 840 (5th Cir. 1990).

81. *See Williams*, 920 F.2d at 234; *Sherman*, 891 F.2d at 1535.

82. Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991) (citing McKnight v. General Motors Corp., 908 F.2d 104, 108-09 (7th Cir. 1990)).

83. 912 F.2d 832 (5th Cir. 1990).

84. *Id.* at 840.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 840-41.

their employer.[89] One plaintiff filed a charge with the EEOC while still employed at SCB, alleging he was terminated in retaliation for his actions.[90] The Fifth Circuit Court of Appeals held that he was given the right to file a charge with the EEOC by the Civil Rights statutes, not by his employment contract,[91] and thus his claim under § 1981 was not cognizable.[92]

Further, in *Overby v. Chevron U.S.A., Inc.*,[93] the Ninth Circuit held that because section 704(a) of Title VII[94] specifically prohibited retaliatory discharge, there was no need "to twist the interpretation of another statute (§ 1981) to cover the same conduct."[95] The courts determined that § 1981 was not applicable because filing a charge with the EEOC did not impair an employee's right to enforce his employment contract,[96] and again because Title VII already covered retaliation.

Moreover, the Fifth Circuit held that because discriminatory discharge was generally not available under § 1981,[97] neither was retaliatory discharge.[98] Were the court of appeals to determine

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89. *Id.* at 834-36.

90. *Id.*

91. *Id.* at 840; *see also* McKnight v. General Motors Corp., 908 F.2d 104, 112 (7th Cir. 1990); Sherman v. Burke Contracting, 891 F.2d 1522, 1535 (11th Cir. 1990). *Compare* Goodman v. Lukens Steel Co., 482 U.S. 650, 659-60 (1987) (unions violated § 1981 when they refused to oppose the employer's racially discriminatory employment practices, in violation of their contractual collective bargaining agreement).

92. In a similar case, where an employee claimed he was terminated in retaliation for advocating his civil rights, the Fourth Circuit held that retaliatory conduct neither prevented an employee from filing a charge with the EEOC, nor obstructed his access to the legal process, because such action was not a contract right. Hill v. Goodyear Tire & Rubber, 918 F.2d 877, 880 (10th Cir. 1990); *accord* Revis v. Slocomb Indus., 765 F. Supp. 1212 (D. Del. 1991).

93. 884 F.2d 470 (9th Cir. 1989).

94. Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (1994).

95. *Overby*, 884 F.2d at 473 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989)).

96. *See* Carter v. South Cent. Bell, 912 F.2d 832, 840 (5th Cir. 1990).

97. *Id.*; *cf.* Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973, 976 (10th Cir. 1991) (citing Williams v. First Union Nat'l Bank, 920 F.2d 232, 234 (4th Cir. 1990); Prather v. Dayton Power & Light Co., 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); Patterson v. Intercoast Management of Hartford, 918 F.2d 12, 14 (2d Cir. 1990), *cert. denied*, 500 U.S. 906 (1991); Thompkins v. Dekalb County Hosp. Auth., 916 F.2d 600, 601 (11th Cir. 1990); Gonzalez v. Home Ins. Co., 909 F.2d 716, 722 (2nd Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 109-10 (7th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, 899 F.2d 845, 849; Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807-08 (5th Cir. 1990); Walker v. South Cent. Bell Tel. Co., 904 F.2d 275, 276-77 (5th Cir. 1990); Carroll v. General Accident Ins., Co., 891 F.2d 1174 (5th Cir. 1990).

98. *Carter*, 912 F.2d at 840.

otherwise, it "would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or 'merely' to discriminate?"[99] The court felt making such a distinction would be pointless.[100] Since termination harms the employee regardless of the employer's motive, the court determined there was no need to differentiate between discriminatory and retaliatory discharge.[101] As retaliatory discharge was no longer covered by § 1981, such claims had to be brought under Title VII.[102]

B. An Attempt to Narrow the Supreme Court's Holding

Several arguments were made in an effort to narrow the Supreme Court's holding in *Patterson.* In *McKnight v. General Motors Corp.*,[103] where the court of appeals held that an employee's claim of discriminatory discharge was no longer cognizable under § 1981, the dissent stated that the "right to continue to work, in the face of racially discriminatory termination[,]" was still protected by § 1981.[104] The dissent argued that termination of an employment contract should not be considered post-formation conduct, as the Supreme Court described it, for two reasons. First, the dissent argued that in *Patterson* the Supreme Court was concerned mainly with employer conduct occurring after the formation of a contract but before its termination.[105] As its primary focus was on racial harassment of an employed person, the Court did not expressly state that discriminatory termination of an employee would no longer be covered by § 1981.[106] Second, because one aspect of terminating a contract is the refusal to enter into another contract for the future, the dissent concluded that § 1981 should apply to discriminatory termination because it prevented the right to make contracts.[107]

Although the dissent in *McKnight* discussed discriminatory discharge, the same arguments may be made for retaliation. In *Jordan v. U.S. West Direct Co.*,[108] the district court determined that *Patterson* did not

99. *Id.* at 840-41.
100. *Id.*
101. *Id.* at 841.
102. *Id.*
103. 908 F.2d 104 (7th Cir. 1990).
104. *Id.* at 117 (Fairchild, J., dissenting).
105. *Id.*
106. *Id.*
107. *Id.* at 118.
108. 716 F. Supp. 1366 (D. Colo. 1989).

preclude a plaintiff's claim of retaliatory discharge under § 1981.[109] The court stated that the right to enforce contracts prohibited employers from retaliating against an employee who filed a lawsuit against his employer.[110] Courts generally have not distinguished between retaliatory and discriminatory discharge when determining whether § 1981 is applicable to an employee's claim, as the harm caused by either type of termination is the same.[111]

Although valid arguments for interpreting § 1981 as encompassing retaliation have been posed, decisions such as *Jordan* have been very rare and oftentimes overruled.[112] After the *Patterson* decision, courts generally determined that retaliation was no longer covered by § 1981.

V. CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991, which took effect November 21, 1991, has two main purposes. The Act strengthens civil rights protections already in existence and restores the protections that were substantially limited by recent Supreme Court decisions.[113] Section 101 of CRA 1991 was codified as the recently amended 42 U.S.C. § 1981, which, together with the former § 1981, states in pertinent part:

> (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, ...
>
> (b) Definition
>
> 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.[114]

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109. *Id.* at 1368-70.

110. *Id.* at 1368-69.

111. *See, e.g.*, Carter v. South Cent. Bell Tel. Co., 912 F.2d 832, 840-41 (5th Cir. 1990).

112. *See, e.g.*, Lytle v. Household Mfg., 494 U.S. 545 (1990); Harvis v. Roadway Express, 973 F.2d 490, 493 (6th Cir. 1992); Hill v. Goodyear Tire & Rubber, 918 F.2d 877, 880 (10th Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 110 (7th Cir. 1990); Carroll v. General Accident Ins. Co., 891 F.2d 1174, 1175, n.1 (5th Cir. 1990).

113. H.R. REP. NO. 40(II) at 1.

114. 42 U.S.C.A. § 1981 (West 1994). This statute in its entirety states:

> Equal rights under the law
>
> (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

Absent clear Congressional intent to the contrary, statutes that affect substantive rights and liabilities are presumed to apply prospectively.[115] Thus, the Civil Rights Act of 1991, affecting such rights and liabilities, and silent regarding retroactivity, has been applied prospectively.[116] Since CRA 1991 does not apply to cases in which the conduct complained of occurred before the Act was passed,[117] there have been very few decisions involving claims of retaliation in which the amended § 1981 has applied. Thus, the courts have had little opportunity to construe the statute and to determine whether claims of retaliation are now cognizable under § 1981, and if so, to what extent.

VI. INTERPRETING § 1981, CIVIL RIGHTS ACT OF 1991

Two arguments may be posed concerning how to construe § 1981 with regard to retaliation claims. To determine the more practical and feasible interpretation of § 1981, each position must be considered in turn.

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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.

Id.

115. *See generally* Bennett v. New Jersey, 470 U.S. 632, 639 (1985); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1390 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991); Gibbons v. Pan Am. Petroleum Corp., 262 F.2d 852, 855 (10th Cir. 1958).

116. Rivers v. Roadway Express, 114 S. Ct. 1510, 1518 (1994); *see also* Baynes v. AT&T Technologies, 976 F.2d 1370, 1373 (11th Cir. 1992); Smith v. Colorado Interstate Gas Co., 794 F. Supp. 1035, 1038-39 (D. Colo. 1992).

117. *See* Hopkins v. Seagate, 30 F.3d 104, 105 (10th Cir. 1994); Postema v. National League of Professional Baseball Clubs, 998 F.2d 60, 61-62 (2d Cir. 1993); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 229-30 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 1641 (1994); Valdez v. Mercy Hosp., 961 F.2d 1401, 1404 (8th Cir. 1992); Ryan v. Ampco Auto Parks, 61 FEP 435, 536 (S.D. Tex. 1992).

The Civil Rights Act of 1991 did not apply retroactively to pending claims either. *See, e.g.*, Goldsmith v. City of Atmore, 996 F.2d 1155, 1159 (11th Cir. 1993); Harvis v. Roadway Express, 973 F.2d 490, 495-96 (6th Cir. 1992).

A. *Argument for a Return to the Pre-Patterson Interpretation of § 1981*

Based on the language of the amended statute and its legislative history, courts should interpret the amended § 1981 as a return to their pre-*Patterson* recognition of employees' retaliation claims. Subsection b of the statute specifically expands the Supreme Court's construction of the right to make and enforce contracts under the *Patterson* decision. Instead of applying only to the initial formation or legal enforcement of contracts, § 1981 now extends to "the making, performance, modification, and termination of contracts," and to "all benefits, privileges, terms, and conditions of the contractual relationship."[118] By expanding the scope of § 1981, Congress clearly intended to extend employers' liability throughout their relationships with employees.

Although the statute is clear on its face, it is ambiguous as to the scope of benefits, privileges, terms, and conditions of employment it protects. Specifically, the statute does not state whether retaliation claims are to be included, as they were before the *Patterson* decision. An argument, as set forth in *Goff v. Continental Oil Co.*,[119] could be made that the objective of § 1981 would clearly be defeated unless protection from retaliation is implied.[120] However, before it may be implied that retaliation is covered by § 1981, under the rules of statutory construction the courts must turn to the legislative history to determine § 1981's scope of coverage.[121]

In its House Report, the Committee on Education and Labor declared that subsection b of the statute is intended to prohibit all forms of racial discrimination that may occur throughout contractual relations.[122] The Committee went on to state that "the list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, . . . this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring."[123] Thus retaliation, at all stages of the contractual relation, is clearly covered by the amended § 1981. Even those members of the House of Representatives who offered dissenting

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118. 42 U.S.C.A. § 1981 (West 1994).
119. 678 F.2d 593 (5th Cir. 1982).
120. *Id.* at 598.
121. *See supra* note 21.
122. H.R. REP. NO. 40(I) at 90.
123. *Id.* at 92.

views regarding § 1981 agreed the statute needed to be amended to ensure that victims of employer retaliation would have an avenue of redress available to them throughout their contractual relationships.[124]

The legislative history further explains why the Supreme Court's *Patterson* decision had to be overruled. First of all, § 1981 "has emerged as one of our nation's most important employment discrimination laws."[125] When the Supreme Court substantially narrowed the availability of § 1981 to employees' claims of discrimination, including retaliation, it had a disastrous effect on employees. In 1990 alone, more than 200 claims filed under § 1981 were dismissed because of *Patterson*,[126] and numerous cases initially decided in favor of the plaintiff were reversed or vacated.[127] Further, equivalent remedies could not be awarded under any other statute.[128] As the Committee on Education and Labor explained:

> After the *Patterson* decision, victims of harassment, retaliation, and other intentional race discrimination [could] not obtain compensatory or punitive damages under section 1981, and thus lack[ed] any means of obtaining relief under federal law for the harms they ha[d] sustained. As a result, no adequate deterrent remain[ed] against those highly offensive forms of discrimination.[129]

Aware of these problems, the legislature had to rectify the situation by overruling *Patterson* and returning § 1981 to its pre-*Patterson* level of effectiveness in remedying employment discrimination. Consequently, the courts should determine that § 1981 is once again available to employees who have suffered from acts of retaliation by their employers.

Further, this statute is not limited to retaliation that occurs during the terms of the contract itself. Retaliation that occurs directly after termination of the contract or between two parties that are not involved in a direct contractual relationship is also covered by § 1981.[130]

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124. H.R. REP. NO. 40(II) at 75.

125. H.R. REP. NO. 40(I) at 90.

126. H.R. REP. NO. 40(II) at 36.

127. H.R. REP. NO. 40(I) at 91. *See, e.g.*, Lytle v. Household Mfg., 494 U.S. 545 (1990); Harvis v. Roadway Express, 973 F.2d 490, 493 (6th Cir. 1992); McKnight v. General Motors Corp., 908 F.2d 104, 110 (7th Cir. 1990); Carroll v. General Accident Ins. Co. of Am., 891 F.2d 1174, 1175 (5th Cir. 1990).

128. H.R. REP. NO. 40(I) at 90-92.

129. *Id.* at 92-93 (citations omitted).

130. *See generally* Zaklama v. Mt. Sinai Medical Ctr., 842 F.2d 291 (11th Cir. 1988); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972) (post-termination relations); Kolb v. Department of Mental Retardation and Developmental

1. Post-Termination Retaliation

Section 1981 protects employees in their "enjoyment of all benefits . . . of the contractual relationship."[131] The term "contractual relationship" clearly refers to employment relationships.[132] Such benefits do not end simply because the employment contract terminates. As lower courts noted prior to the Supreme Court's *Patterson* decision, some of the benefits of a contractual relationship occur specifically after termination, such as the post-employment benefit of an employer providing fair and nondiscriminatory job references.[133] The benefit of receiving job references is clearly part of the contractual relation between an employer and former employee; and while the giving of discriminatory references in retaliation against an employee opposing unlawful conduct during the course of his employment violates § 1981, it also deprives an employee of his or her right to enjoy all benefits of the contractual relationship.

In addition, in *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*,[134] the Fifth Circuit determined that the risk of retaliation is "far from being 'remote and speculative' with respect to former employees[,]" for several reasons.[135] First, the court found that when applying for a job, employers always require names of previous employers as references.[136] Potential employers are not likely to hire an applicant once they receive poor evaluations or hear that the applicant filed a complaint against a previous employer. Second, the court determined that an employee may be retaliated against if a new employer learned of the employee complaining of discrimination or filing a charge against a former employer.[137] Third, the Fifth Circuit reasoned that if an

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Disabilities, Cleveland Developmental Ctr., 721 F. Supp. 885 (N.D. Ohio 1989) (no direct contractual relationship).

131. 42 U.S.C.A. § 1981 (West 1994).

132. *See* cases cited *supra* note 7.

133. *Zaklama*, 842 F.2d at 294. In this case, the court reasoned that:

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. (quoting Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973)). Although the court is discussing Title VII, this same argument applies to § 1981. *Id.* at 295.

134. 459 F.2d 303 (5th Cir. 1972).

135. *Id.* at 306.

136. *Id.*

137. *Id.*

employee ever needed to return to the former employer against whom he had filed a complaint of discrimination, that employee would risk retaliation to the same extent as a present employee who had filed such a claim.[138] Thus, the court concluded that "[t]here is no ground for affording any less protection to [a] defendant's former employees than to its present employees."[139]

Prior to the *Patterson* decision, § 1981 had been interpreted to apply to post-contractual retaliation.[140] More specifically, § 1981 prohibited acts of retaliation made by an employer against a former employee. With the passage of CRA 1991, and the return of § 1981 to its pre-*Patterson* role as an effective avenue of redress against retaliation, courts must once again interpret the statute to cover post-termination retaliation. By expanding the scope of § 1981, Congress clearly prohibited employers from discriminatorily interfering with an employee's contractual relations, either present or future.[141]

2. Indirect Employment Relationship

A direct employment relationship is not required for such interference to fall under § 1981.[142] Nothing in the language of either former § 1981 or the newly amended version states that the statute applies only if the parties are in a direct employment relationship. In fact, the language of both versions suggests just the opposite.[143] An individual may not escape liability merely because he is not a direct employer of the plaintiff.

So long as a person has the ability to affect an employee's position with an employer, that person should be liable under § 1981 for any discriminatory interference with that employee's contractual relationship, including employment opportunities.[144] For example, in *Sibley Memorial Hospital v. Wilson*,[145] a hospital refused to refer a self-employed

138. *Id.*
139. *Id.*
140. *See* cases cited *supra* note 130.
141. H.R. REP. No. 40(I) at 92.
142. Kolb v. Department of Mental Retardation and Development Disabilities, Cleveland Developmental Ctr., 842 F.2d 885, 891-92 (N.D. Ohio 1989) (quoting Coley v. M & M Mars, Inc., 461 F. Supp. 1073, 1076 (M.D. Ga. 1978)). *Accord* Faraca v. Clements, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975).
143. See Zaklama v. Mt. Sinai Medical Ctr., 842 F.2d 291, 295 (11th Cir. 1988) (citing Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1022 (9th Cir. 1983)).
144. *Id.*
145. 488 F.2d 1338 (D.C. Cir. 1973).

male nurse to female patients.[146] Despite the lack of a direct employment relationship, the nurse successfully stated a claim of discrimination under Title VII.[147] The court determined that parties other than a plaintiff's actual or potential employer could be liable under Title VII if they control the plaintiff's access to employment and deny that access based on unlawful criteria.[148] Although *Sibley* involved a Title VII claim, the Ninth Circuit determined that § 1981 was equally broad and covered such discrimination as well.[149] Thus, if a party who has control over another's access to employment retaliates against him, that party should be held liable under § 1981.

Not only does the legislative history speak of § 1981 covering acts of retaliation made throughout a contractual relationship, but at least one published opinion has already interpreted the statute as Congress intended.[150] In *Wilborn v. Primary Care Specialists*,[151] the district court interpreted the amended § 1981 as covering retaliation throughout all aspects of the contractual relationship. Specifically, the court determined that in light of CRA 1991, any retaliatory action taken against an employee for filing a claim of racial discrimination is covered by § 1981.[152] The court explained:

> Congress passed the Civil Rights Act of 1991, . . . which was specifically intended to legislatively overrule *Patterson*. (citations omitted)
>
> Significantly, Congress noted that *Patterson* had been "interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981," and the legislative history explicitly states that the Act "would restore rights to sue for such retaliatory conduct." (citations omitted)
>
> Prior to *Patterson*, all circuits that specifically addressed the issue held that retaliation by an employer following an employee's filing of a race discrimination claim—or otherwise protesting

146. *Id.*

147. *Id.* at 1341. *See also* EEOC v. Metzger, 824 F. Supp. 1 (D.D.C. 1993) (employer persuaded former employee's new employer to fire employee).

148. *Sibley*, 488 F.2d at 1341-42.

149. *Gomez*, 698 F.2d at 1022.

150. *See* Wilborn v. Primary Care Specialists, 866 F. Supp. 364 (N.D. Ill. 1994). *See also* Williams v. Carrier Corp., 889 F. Supp. 1528, 1529-30 (D. Ga. 1995); Lewis v. American Foreign Serv. Ass'n, 846 F. Supp. 77 (D.D.C. 1993).

151. 866 F. Supp. 364 (N.D. Ill. 1994)

152. *Id.* at 369.

> discriminatory employment conditions—[was] actionable under section 1981. (citations omitted)[153]

The court then determined that, based on pre-*Patterson* decisions, retaliatory discharge is actionable under § 1981.[154] This court's determination makes clear that § 1981 should now cover the same claims of retaliation as it did prior to the Supreme Court's decision. As the court stated, any retaliatory action taken by an employer is actionable under § 1981,[155] both during and after the employment relationship.

In light of § 1981's statutory language, legislative history, and supporting case law, courts should return to their original broad recognition of claims of retaliation under this statute.

B. Argument for a Hybrid Interpretation of § 1981

Under subsection b of the statute, the definition of "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."[156] Congress's intent is clearly and unambiguously expressed by the words of the statute, and there is no need to consider the legislative history of § 1981 when interpreting § 1981.[157]

The language of § 1981 does not mention retaliation. It could be argued that retaliation is not covered at all by the statute,[158] but a stronger and more feasible argument is that it is covered only to a limited extent. Because retaliation has always been considered a type of discrimination as defined under § 1981,[159] it will undoubtedly

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153. *Id.* (citing H.R. REP. NO. 40(I) at 92, n.92).

154. *Id.*

155. *Id.* at 369-70.

156. 42 U.S.C.A. § 1981 (West 1994).

157. *See supra* note 21.

158. The following argument could be made: Although Congress legislatively overruled *Patterson*, it did not say the Supreme Court's interpretation was wrong because the Court chose to look at the wording of the statute. Congress could have just put retaliation in the language of the statute if it had wanted retaliation claims to be cognizable under § 1981.

However, this is an extremely harsh interpretation of § 1981. Congress did its best to completely overrule *Patterson* in § 1981's legislative history, and specifically mentions retaliation in its list of claims that are covered by subsection b of the statute. *See* H.R. REP. NO. 40(I) at 92.

159. *See generally* Carter v. South Cent. Bell, 912 F.2d 832, 840 (5th Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 107-09 (7th Cir. 1990); Hunter v. Allis Chalmers Corp., Engine Div., 797 F.2d 1417, 1421-22 (7th Cir. 1986); Benson v. Little Rock Hilton Inn, 742 F.2d 414, 416 (8th Cir. 1984); Brown v. United States, 692 F.2d 61, 62 (8th Cir. 1982); Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150 (8th Cir. 1981); Wilborn v. Primary

continue to be so considered, particularly since the statute does not state an intent to the contrary.

The Supreme Court's interpretation of § 1981 as it applies to retaliation claims has little viability since Congress amended the statute. Although courts after the *Patterson* decision determined that retaliation claims were cognizable under § 1981, such claims could only be filed if they involved acts occurring during the initial formation of the contract or subsequent legal enforcement thereof.[160] In CRA 1991, Congress expanded the Supreme Court's interpretation of § 1981 by developing an extensive list of situations in which a claim of retaliation will now be cognizable.[161] As there is clearly no intent to the contrary, this list should be read as exclusive, not illustrative.

1. Post-Termination Retaliation

The statute protects employees in their "enjoyment of all benefits . . . and conditions *of the contractual relationship*."[162] As Congress made perfectly clear, the retaliatory acts must occur during a contractual relationship.[163] In listing the circumstances where § 1981 is applicable, the statute does not mention post-contractual conduct.[164] Since post-contractual conduct is not covered by this statute, it follows that post-employment conduct is not covered either. The development of such an extensive list clearly indicates that Congress intentionally left post-contractual conduct out of the amended statute. Thus, whereas claims of retaliatory acts occurring during the course of a contractual relation are cognizable under § 1981, no post-employment retaliation claims should be recognized under this statute.

2. Indirect Employment Relations

Further, simply because § 1981 does not explicitly state that the contractual relation must be directly between an employer and employee, courts may not assume there need be no direct relationship. Generally, courts have frowned upon making such negative implications

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Care Specialists, 866 F. Supp. 364, 369 (N.D. Ill. 1994); Carpenter v. Gulf States Mfrs., 764 F. Supp. 427 (N.D. Miss. 1991).

160. *E.g.*, Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991); Hill v. Goodyear Tire & Rubber, 918 F.2d 877, 880 (10th Cir. 1990); *Carter*, 912 F.2d at 840-41; *McKnight*, 908 F.2d at 108.

161. 42 U.S.C.A. § 1981, subsection b (West 1994).

162. *Id.* (emphasis added).

163. *Id.*

164. *Id.*

when interpreting a statute.[165] Although retaliation claims are now actionable under § 1981, they should be limited to retaliation that occurs during the contractual relationship. Included in the contractual relationship are only such aspects listed in the statute. Retaliation that occurs after termination of an employee or between parties with an indirect employment relationship should not fall within the scope of § 1981.

VII. CONCLUSION: HOW THE COURTS SHOULD INTERPRET § 1981

After considering both arguments, it is clear that courts should return to their original broad recognition of retaliation claims under § 1981. By simply reading § 1981's language, courts will not be able to determine the intended scope of the statute, and they will have to turn to its legislative history.[166] Once the history is considered, it becomes apparent that Congress legislatively overruled the *Patterson* decision and retaliation claims are now cognizable under § 1981 to the same extent as they were prior to the Supreme Court's decision. Also, the legislative overruling of *Patterson* and the expanded scope given to § 1981 will serve equity best[167] if interpreted as a return to the courts' pre-*Patterson* construction of the statute. Thus, not only should retaliation claims against employers now be actionable under § 1981, but they should be viable claims when raised for conduct that occurs at any point throughout the contractual relation, including post-termination retaliation. Lastly, retaliation claims against a person who is not in a direct employment relationship with the plaintiff should also be encompassed by § 1981.

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165. *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 200 (1989) (Brennan, J., dissenting). "[T]he absence of legislative correction is by no means in all cases determinative, for where our prior interpretation of a statute was plainly a mistake, we are reluctant to 'place on the shoulders of Congress the burden of the Court's own error.'" *Id.* (quoting Monell v. Department of Social Servs. of New York, 436 U.S. 658, 695 (1978)).

However, the Supreme Court goes on to state that "[w]here our prior interpretation of congressional intent was plausible, . . . we have often taken Congress'[s] subsequent inaction as probative to varying degrees, depending upon the circumstances, of its acquiescence." *Id.*

Since the lower courts before *Patterson* recognized claims of retaliation under § 1981 even when there was no direct contractual relationship between the parties, *see, e.g.*, Kolb v. Department of Mental Retardation and Developmental Disabilities, Cleveland Developmental Ctr., 842 F.2d 291, 291-92 (11th Cir. 1988), it appears that Congress's failure to address this issue is probative of the fact that Congress did not want to limit § 1981's applicability to only direct contractual relationships. *See id.*

166. *See supra* note 21.

167. *See supra* notes 45-48, 54 and accompanying text.

Through the passage of the Civil Rights Act of 1991, § 1981 has been reinstated as one of the most important employment discrimination laws, and must be interpreted as such.

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