

SCOTUS Sets High Bar For Those Bringing Race Discrimination Cases

Insights

3.31.20

In a unanimous decision, the U.S. Supreme Court last week ensured that a high standard will be used when assessing whether claims of race discrimination under Section 1981 should advance past the early stages of litigation. This means that we should not see an increase in the number of claims brought against employers using one of the nation's oldest civil rights laws.

While the decision in *Comcast Corp. v. NAAAM* did not directly involve a workplace dispute, the impact of the ruling will spill into the employment law arena. It will ensure that race bias claims brought by workers and applicants will face proper scrutiny at all stages of a lawsuit, as frivolous claims will be weeded out through early court challenges before proceeding toward trial.

Underlying Dispute: Which Standard Should Apply?

Because the dispute that led to the decision was not employment-related, the facts of the case are largely irrelevant for our purposes. For the curious, however, the case arose when an African-American-owned television network (ESN) and an affiliated advocacy organization (NAAAM) brought a lawsuit against Comcast. They claimed that Comcast inappropriately rejected ESN's proposal to carry several television channels, motivated by racial bias. They filed their claim under a federal law located at 42 U.S.C. §1981 – also known as “Section 1981” – which prohibits private parties from refusing to enter into contracts because of race.

The federal trial court in California dismissed the lawsuit, saying that the complaint did not properly allege a valid claim under the statute. In other words, even if the allegations were true, there was not enough in the complaint that could even show that Comcast's refusal to carry the television channels was motivated by race such to trigger Section 1981 liability rather than by justifiable business reasons. But the 9th Circuit U.S. Court of Appeals reversed the decision and concluded that the lawsuit could go forward. At Comcast's request, the Supreme Court agreed to step in and make a final determination as to which standard should apply at the outset of Section 1981 claims. The two choices:

- **“But For” Causation:** Comcast wanted the court to apply a heightened standard which would only permit the claim to go forward if it could be proven that the company would not have turned down the business opportunity were it not for the network owner's race (“but for” race).
- **“Motivating Factor” Causation:** ESN and NAAAM wanted the court to apply a lower standard

which would allow the claim to proceed even if they could only prove that race was simply one “motivating factor” in the company’s decision.

What Is Section 1981?

Before turning our attention to the Supreme Court’s decision, it is helpful to understand the oft-misunderstood statute at issue. Section 1981 has its origins in the Civil Rights Act of 1866, predating Title VII by almost 100 years. It prohibits race discrimination in the making and enforcement of contracts, which has been interpreted to include employment relationships. It has some key distinctions from Title VII.

In two key ways, it is more restrictive in the types of claims that can be brought. While Title VII protects workers based on their color, national origin, sex (including pregnancy and possibly gender identity) and religion, Section 1981 only covers race discrimination claims. Moreover, whereas Title VII permits employees to bring “disparate impact” claims – those without an allegation of intentional discrimination but instead a theory that a company’s business practice has the ultimate effect of impacting those in a certain protected class – Section 1981 only outlaws intentional discrimination.

But in a few other aspects, it has a far broader reach than Title VII. Those wanting to bring Title VII claims must do so within 300 days (and sometimes even shorter, depending on whether the state in which the claim is brought has a state enforcement agency). Meanwhile, Section 1981 claims can be brought anytime up to four years after the alleged violation. Further, workers do not have to first exhaust any administration remedies at the EEOC or a state agency before pursuing a Section 1981 claim, another key distinction from Title VII.

Perhaps the most significant difference: Section 1981 contains no monetary damages cap. Those prevailing in a Title VII action are limited in the amount of compensatory and punitive damages they can recover, usually unable to be awarded more than \$300,000. Because no such limitation exists in Section 1981 claims, they are often seen as a more attractive vehicle for race discrimination claims.

Supreme Court: Heightened Standard Should Be Used At All Stages

In last week’s decision, the Supreme Court made it clear that a plaintiff must meet a high standard when pursuing a race discrimination case: that the adverse employment action would not have happened “but for” the racial discrimination.

The ruling from the Court was not wholly unexpected following the November 13, 2019 oral arguments. While most presumed that the highly anticipated arguments would be a contentious battle of legal standards, they turned out to be little more than an academic exercise. In fact, by the end of oral arguments, all parties agreed that a plaintiff must eventually prove that the plaintiff’s race was the but-for cause of the adverse action in order to ultimately succeed on their claim.

Thus, the Court was really left with one decision: whether this same “but for” standard should be applied when analyzing whether a plaintiff’s complaint has sufficiently alleged facts to proceed on a race discrimination case at its very initial stages, or should it be enough the plaintiff has alleged that race was just a motivating factor in the adverse action. Ultimately, and somewhat unsurprisingly, the

Court held that the same “but for” standard would need to apply to the allegations in the plaintiff’s complaint.

In doing so, the Supreme Court overturned the 9th Circuit’s ruling that plaintiffs “needed only to plausibly allege that discriminatory intent was a factor in Comcast’s refusal to contract, and not necessarily the but-for cause of that decision.” This means that it will not be enough for a plaintiff to claim that race was a factor in the adverse action that forms the basis of their complaint. Instead, they must allege facts to support their claim that the adverse action would not have happened but for their race. In vacating the order from the 9th Circuit and remanding the case for further proceedings to determine the sufficiency of ESN’s pleadings, the Court made its opinion as to the applicable legal standard clear:

“Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred “but for” the defendant’s unlawful conduct. The plaintiffs before us suggest that 42 U. S. C. §1981 departs from this traditional arrangement. But looking to this particular statute’s text and history, we see no evidence of an exception. [...] To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right.”

Notably, the Court rejected ESN’s argument that Title VII’s more lenient “motivating factor” causation test should apply. The Court found the two statutes wholly distinct and without “a shred of evidence that Congress meant them to incorporate the same causation standard.” In short, while the Court declined to rule on whether ESN’s operative complaint was sufficiently pled, it made it abundantly clear that all applicable case law and statutory history supported a “but-for” standard.

What This Decision Means: Employers Won’t See Flood Of New §1981 Claims

Prior to the Court’s ruling, employers were concerned that a lowered standard at the initial pleading stage would result in opportunistic plaintiffs’ attorneys increasing the number of Section 1981 claims – knowing their claims would withstand initial scrutiny and likely survive early motions practice. But luckily for employers, the Court made it clear that employees cannot, at the pleading stage, merely allege that their race was considered, or a motivating factor, in the basis for their lawsuit. By requiring plaintiffs to plead facts showing that race was the sole – but-for – cause of the adverse action, we were spared a potential flood of new complaints.

However, the decision isn’t necessarily a watershed ruling that will reduce the number of race bias claims we see on a day-to-day basis. While, in theory, the Court’s ruling makes it harder for employees to bring race discrimination claims under Section 1981, it may not drastically change the status quo. As noted by the Court, horribly deficient allegations are uncommon at the initial pleading stage. Instead, this ruling may forestall frivolous claims from ever being filed and may also serve to knock out the kinds of complaints that go out of their way to, in essence, refute their own allegations by providing additional, non-race related reasons for the adverse action.

Moreover, lower federal courts are likely to give plaintiffs multiple opportunities to fix any such deficient pleadings to state allegations that meet the but-for standard. As implied by Justice Kagan and Kavanaugh, courts often take the position that it should not be too hard for plaintiffs to initially bring race claims.

In the appropriate cases, the Court's ruling will provide employers with a tool to challenge deficient complaints at the pleading stage, thereby disposing of weak race discrimination claims early. However, you should act be thoughtful in when and how to deploy this new standard. Before you spend time, money, and resources in early motions practice, it may be of benefit to first engage in discovery and actual litigation of the merits of the claims before taking a shot at disposing of the case. You should adjust your expectations and your litigation strategy accordingly.

We will continue to monitor developments related to this new standard and provide updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People



Tyler T. Rasmussen

Partner

949.798.2163

Email

Service Focus

Employment Discrimination and Harassment

Litigation and Trials

