Patterson v. McLean Credit Union, 109 S. Ct 2363 (1989): Have Victims of Racial Harassment Been Taken to the Bank?

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**Patterson v. McLean Credit Union**, 109 S. Ct. 2363 (1989): Have Victims of Racial Harassment Been Taken to the Bank?

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**I. INTRODUCTION**

The United States Supreme Court recently issued *Patterson v. McLean Credit Union*¹ which upheld *Runyon v. McCrary*² and the notion that Title 42 U.S.C. § 1981 is applicable to private contracts. However, this same opinion substantially limited the application of section 1981 to employment discrimination cases through a strict reading of the statute.

Title 42 U.S.C. § 1981 provides:


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 the 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 no other.3

The United States Supreme Court first interpreted section 1981 to prohibit race discrimination in the making and enforcement of private employment contracts in *Johnson v. Railway Express Agency, Inc.*4 Since *Johnson*, employment discrimination claims under section 1981 have become common-place.5 However, it has never been clear how far the protections of section 1981 extend in employment contract situations. *Johnson* did very little to define what type of employment conduct was actionable under section 1981.6 Furthermore, the Supreme Court only addressed the meaning of section of 1981 on four occasions between *Johnson* and *Patterson*.7 These opinions also did little to define the reach of section 1981.

The lack of a clear interpretation of section 1981 as it relates to employment discrimination has led to confusion among the lower federal courts. This confusion increased following the Supreme Court’s decision in *Goodman v. Lukens Steel Co.*8 The majority opinion in *Goodman* did not discuss the contractual rights protected by section 1981.9 However, the dissent by Justices Brennan, Marshall, and Blackmun indicated that some members of the Court favored a strict

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4. 421 U.S. 454 (1975). The Court held that

Title 42 U.S.C. § 1981 . . . on its face relates primarily to racial discrimination in the making and enforcing of contracts. Although this court has not specifically so held, it is well settled among the federal Courts of Appeals - and now we join them - that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. *Id.* at 459-60.

5. *See infra* note 98 and accompanying text. Fifty employment discrimination claims involving section 1981 have been finally adjudicated in the Eighth Circuit since January 1, 1985.

6. The issue in *Johnson* was whether the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission tolled the statute of limitations period for section 1981 claims. Therefore, it was unnecessary for the Court to define the types of actionable employment discrimination.


9. The Court was deciding the appropriate statute of limitations period for section 1981 actions, not the protections allowed under the statute.
interpretation of section 1981. This strict interpretation became a reality with the Supreme Court's decision in *Patterson v. McLean Credit Union*.

This note analyzes the holding in *Patterson*; provides a survey of the number and type of section 1981 claims in the Eighth Circuit since January 1, 1985; and finally examines how *Patterson* would have affected the three successful section 1981 claims in the Eighth Circuit.

II. FACTS OF PATTERSON

Brenda Patterson, a black woman, was employed by McLean Credit Union for approximately ten years as a teller and a file coordinator. In July 1982, McLean terminated Patterson, prompting her to file a claim for employment discrimination under section 1981. Patterson claimed that McLean "harassed her, failed to promote her to an intermediate accounting clerk position and terminated her, all because of her race." Patterson also filed a state law claim for intentional infliction of emotional distress based on this same conduct.

The district court ruled that racial harassment in the workplace is not actionable under section 1981. A jury then ruled against Patterson on her discriminatory discharge claim as well as on her claim that McLean had failed to promote her because of her race. Finally, the district court directed a verdict for McLean on the intentional inflic-
Patterson raised two issues in her appeal to the Fourth Circuit: first, that the district court erred in refusing to submit her racial harassment claim to the jury; second, that the jury instruction on her discriminatory failure to promote claim was erroneous. The court of appeals affirmed the district court’s decision on both issues.

The United States Supreme Court granted certiorari to decide whether racial harassment is actionable under section 1981, and whether the district court’s jury instruction on the promotion claim was correct. The Court then ordered the parties to brief and to argue whether Runyon v. McCrary should be overturned.

III. HOLDING IN PATTERSON

The United States Supreme Court upheld Runyon and reaffirmed that section 1981 "prohibits racial discrimination in the making and enforcement of private contracts." The Court based its decision on stare decisis grounds. Justice Brennan, in his separate opinion, agreed that Runyon should be upheld, but he felt the Court’s reasoning was incorrect. Instead, Brennan argued that the Court should have found Runyon correct as an initial matter and that Congress had ratified Runyon’s interpretation of section 1981 by not taking legislative action to overrule that interpretation.

The Court also held that racial harassment occurring during employment is not actionable under section 1981 because it occurs after

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17. The district court held that "the employer's conduct did not rise to the level of outrageousness required to state a claim for intentional infliction of emotional distress under applicable standards of North Carolina law." *Id.*

18. The district court instructed the jury "that in order to prevail on her § 1981 claim of discriminatory failure to promote, she must show that she was better qualified than the white employee who she alleges was promoted in her stead." *Id.*

19. On the racial harassment claim the court of appeals held that

- claims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection. Instances of racial harassment, on the other hand, may implicate the terms and conditions of employment under Title VII ... and of course may be probative of the discriminatory intent required to be shown in a § 1981 action ... but, standing alone, racial harassment does not abridge the right to "make" and "enforce" contracts - including personal service contracts - conferred by § 1981.

Patterson v. McLean Credit Union, 805 F.2d 1143, 1145-46 (4th Cir. 1986).


23. See infra notes 34-42 and accompanying text for a discussion of the Court’s decision to uphold Runyon.


25. *Id.*

26. *Id.* at 2379-88 (Brennan, J., concurring in part and dissenting in part).
the formation of the employment contract. According to Patterson, section 1981's right to make contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." 27 Justice Brennan dissented from this part of the opinion arguing that the legislative history of section 1981 indicates that the statute should not be interpreted so narrowly. 28 Brennan would hold that racial harassment which is "severe or pervasive" enough to show that the contract was not entered into in a racially neutral manner is actionable under section 1981. 29

The second right protected by section 1981 is the same right to enforce contracts. The Court held that this protection simply extends to "a right of access to legal process, that will address and resolve contract-law claims without regard to race." 30 This narrow interpretation also fails to provide relief to victims of racial harassment.

The Court justified the narrow interpretation of section 1981 by saying that racial harassment is actionable under Title VII. 31 Yet, Justice Brennan's dissent points out the differences between section 1981 and Title VII and argues that the two protections can coexist. 32

Finally, the Court held that discriminatory promotion claims are actionable under section 1981 if the promotion would have created a sufficient change in position to involve the opportunity to enter into a new contract. Justices Brennan and Stevens in their dissents state that all promotion claims should be actionable if the employee can prove he or she was better qualified than the white employee who was promoted. 33

IV. ANALYSIS OF PATTERSON

A. Section 1981 Extends to Private Contracts

In Runyon the Supreme Court held that 42 U.S.C. § 1981 prohibited private schools from excluding qualified children solely on the basis of race. 34 The Runyon opinion solidified the notion that section 1981 "prohibits racial discrimination in the making and enforcement of private contracts." 35 However, it appeared that this settled rule was in jeopardy when the Court in Patterson, on its own initiative, ordered the parties to argue whether Runyon should be overturned. This almost unprecedented move by the Court created substantial contro-

27. Id. at 2372 (Brennan, J., concurring in part and dissenting in part).
28. Id. at 2388 (Brennan, J., concurring in part and dissenting in part).
29. Id. at 2389 (Brennan, J., concurring in part and dissenting in part).
30. Id. at 2373.
31. Id. at 2374-75.
32. Id. at 2391 (Brennan, J., concurring in part and dissenting in part).
33. Id. at 2398 (Brennan, J., concurring in part and dissenting in part).
35. Id.
versy among legal scholars and civil rights activists. While this Note does not focus extensively on the reasons for upholding Runyon, a brief discussion of the decision to uphold Runyon is important. Patterson held that Runyon should not be overturned and that "§ 1981 prohibits racial discrimination in the making and enforcement of private contracts." The Court based its decision on stare decisis grounds after finding that there was no special justification for overruling Runyon because the decision has not been undermined by subsequent developments in the law, the holding is not unworkable or confusing, and the holding in Runyon is still consistent with the sense of prevailing justice in this country.

Justice Brennan noted in his dissent that the Court's decision "to adhere to the principle of stare decisis . . . could readily and would better have been made before the Court decided to put Runyon and its progeny into question by ordering reargument in this case." Furthermore, Brennan felt that the Court's decision "glosses over . . . two very obvious reasons for refusing to overrule this interpretation of § 1981: that Runyon was correctly decided, and that in any event Congress has ratified our construction of the statute." Again, these justifications have been extensively considered and this Note will not discuss them further. The important consideration is that Runyon was not overruled and that private contracts are protected by section 1981.

36. Justice Brennan summed up the concerns when he stated:

*Runyon* is entirely consonant with our society's deep commitment to the eradication of discrimination based on a person's race or the color of her skin. . . . In the past, this Court has overruled decisions antagonistic to our Nation's commitment to the ideal of a society in which a person's opportunities do not depend on her race . . . and I find it disturbing that the Court has in this case chosen to reconsider, without any request from the parties, a statutory construction so in harmony with that ideal.


39. *Id.* at 2370-71.

40. *Id.* at 2380 (Brennan, J., concurring in part and dissenting in part).

41. *Id.* (Brennan, J., concurring in part and dissenting in part).

42. See supra note 37.
The Patterson Court construed section 1981 very narrowly. The Court stated that section 1981 "forbid[s] discrimination in the 'mak[ing] and enforce[ment]' of contracts alone." A similarly restrictive definition was then given to the words "making" and "enforcement."

The right to make contracts, according to Patterson, "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." This interpretation if applied literally should eliminate many section 1981 claims. All racial harassment claims based on conduct that occurred after the formation of the contract should be eliminated by the Court's interpretation of the statute. Subsequent decisions of the majority of lower federal courts have demonstrated such a result.

A literal reading of the statute would also appear to eliminate all discriminatory discharge claims because a discharge by its very definition must occur after the formation of the contract. The Fifth, Ninth, Eleventh, and most recently Seventh Circuit Courts of Appeals have all endorsed this literal reading, thus barring discriminatory discharge claims under section 1981. Additionally, the United States District Court for the District of Nebraska was one of the first courts to hold that section 1981 no longer applied to discriminatory discharge claims. In Young v. Control Data Corp., the plaintiff filed two claims after the defendant terminated her employment. The first involved alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, and the second claim alleged that the defendant violated section 1981 by disciplining her during her employment.
and later discharging her, all because of her race.\textsuperscript{53}

After the Supreme Court issued \textit{Patterson}, the defendant filed a motion for summary judgment based on the Court's interpretation of section 1981. The district court granted the motion, holding that the plaintiff's section 1981 claim was based on conduct that occurred after the formation of the contract and that based on \textit{Patterson} the statute "does not extend to conduct by the employer after the contract relation has been established."\textsuperscript{54}

As the previous discussion demonstrates, the majority of the federal courts have read \textit{Patterson} literally and held that discriminatory discharge no longer fits within the language of section 1981. However, the Eighth Circuit Court of Appeals recently became the first circuit to hold that discriminatory discharge claims are still actionable under section 1981. In \textit{Hicks v. Brown Group, Inc.},\textsuperscript{55} the court established that \textit{Patterson} only addressed racial harassment and "did not address whether discriminatory discharge is actionable under either the right to make or the right to enforce contracts."\textsuperscript{56} The court went on to conclude that "discriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very essence of the right to make employment contracts."\textsuperscript{57} The court then concluded that "in order to give meaning to the right to make contracts free from discrimination, the right to be free from discriminatory discharge must be implied."\textsuperscript{58}

\textit{Hicks} was obviously an attempt to avoid the harsh results of \textit{Patterson}. However, the plain language of section 1981 and \textit{Patterson} make it apparent that the Eighth Circuit extended the application of section 1981 beyond that intended by the Supreme Court. This fact becomes even more obvious when the other cases interpreting \textit{Patter-
son are analyzed. The district court’s opinion in Young is the correct interpretation of Patterson. However, the federal district courts in the Eighth Circuit, including the court which issued Young, will be forced to abandon that case in favor of Hicks.

C. The Same Right to Enforce Contract

Based on section 1981 all employees also have “the same right... to... enforce contracts... as is enjoyed by white citizens.” Patterson held that this right “embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race.” The court also stated that “the right to enforce contracts does not extend beyond conduct by an employer which impairs an employee’s ability to enforce through legal process his or her established contract rights.” This narrow interpretation indicates that the statute will only be applicable in limited situations. The example given by the Court is that “certain private entities such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent members in disputes over the terms of binding obligations that run from employer to the employee, are subject to liability under § 1981 for racial discrimination.” Such liability would arise in situations where the labor union refuses to file a grievance for a minority employee or if the labor union refuses to enforce other terms of a labor contract because of the person’s race.

The Court’s interpretation of the “same right to enforce” language does not provide any hope for employees bringing discriminatory discharge and racial harassment claims. However, this language has been interpreted by one court to allow section 1981 retaliatory discharge claims. In Jordan v. U.S. West Direct Co., the defendant filed a motion for summary judgment based on Patterson. The defendant argued that because of Patterson, section 1981 no longer provided a remedy for post-formation racial harassment, discriminatory demotion and retaliatory discharge claims.

The district court held that Patterson does bar racial harassment and discriminatory demotion claims. However, the court stated:

The right to enforce contracts extends to private efforts to obstruct nonjudicial methods of adjudicating disputes involving discrimination. Plaintiff alleges that he was retaliated against because he complained of discrimination and instigated an investigation regarding his charges. These allegations fall

59. See supra text accompanying notes 52-54 for a discussion of Young.
62. Id.
63. Id.
65. Id. at 1368.
within the coverage afforded by the right to enforce contracts in § 1981. Therefore, according to the district court, an employee’s claim that he was discharged because he filed a discrimination claim with a government agency is actionable under section 1981.

However, in Sherman v. Burke Contracting, the Eleventh Circuit Court of Appeals held that an employee’s claim that he was terminated for filing an EEOC complaint was not actionable because the complaint “did not relate to any right created by his employment contract.” The Sherman court stated, however, that section 1981 would apply to retaliatory conduct “when the employer aims to prevent or discourage an employee from using legal process to enforce a specific contract right.”

D. Promotion Claims

In Patterson, the Court addressed two issues relating to discriminatory promotion claims. The first of these issues is whether discriminatory promotion claims are actionable under section 1981. Patterson held that such claims are actionable. However, the Court stated that section 1981 does not cover all discriminatory promotion claims, only those claims where “the nature of the change in position was such that it involved the opportunity to enter into a new contract.”

Patterson does not indicate how substantial the change in position must be before a discriminatory promotion claim can be brought under section 1981. Furthermore, this limitation raises questions about the actionability of claims that an employee was transferred to a different department for discriminatory reasons or that an employee was transferred to a wholly owned subsidiary for discriminatory reasons. The Court’s failure to explain this limitation makes it impossibly

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66. Id. at 1368-69.
67. 891 F.2d 1527 (11th Cir. 1990).
68. Id. at 1535.
69. Id. See McKnight v. General Motors, 908 F.2d 104, 112 (7th Cir. 1990)(relied on Sherman to hold that retaliatory discharge claim was not actionable and also stated that termination for attempting to collect wages due, to enforce pension rights, or to enforce a “just cause” or seniority rights provision in a collective bargaining agreement would be actionable because these are the types of specific contract rights covered by the language of the statute).
71. In McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), the court provided some guidance on this issue when it stated, “[a] transfer between divisions of a company does not automatically create a new employment relation either. Conceivably, if the two divisions are unrelated and the employee’s jobs in the division are significantly different, the transfer might . . . count as the creation of a new employment relationship.” Id. at 110. The court went on to state that the transfer of an executive from the accounting to the manufacturing division in the same plant is not of this character. Such job changes are part of the ordinary progression of a business executive in his career
ble to answer these questions with certainty and it is possible that the limitation will prove to be meaningless, but the questions referred to above should be kept in mind. Justice Brennan, in his dissent, apparently felt that the limitation would have a minor impact. He noted his displeasure with the limitation but said that "[i]t is admittedly difficult to see how a 'promotion'—which would seem to imply different duties and employment terms—could be achieved without a new contract, and it may well be as a result that promotion will always be cognizable under § 1981." 72

However, it appears that the courts are not going to hold that every promotion is sufficient to create a new contract. In *Greggs v. Hillman Distributing Co.*, 73 the court held that a promotion from sales supervisor to area supervisor did not itself create a new contract. The court held that the plaintiff had to establish that the promotion "would have resulted in a new contract—a 'new and distinct relation'—had such a promotion occurred." 74

The second promotion issue in *Patterson* was whether the district court's jury instruction on the discriminatory promotion claim was correct. The Court held that the district court erred when it instructed the jury that Patterson had to prove she was better qualified than the white employee who received the promotion. 75 In order for an employee to establish a discriminatory promotion claim he or she must establish a prima facie case of discrimination by proving "by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or . . . filled the position with a white employee." 76 The employer is then given the opportunity to show that the employee was not chosen because of a legitimate nondiscriminatory reason. 77 If the employer can make such a showing then the employee must be given the opportunity to show that the reasons were pretextual. 78

According to the Supreme Court, the district court's instruction that Patterson had to prove she was better qualified than the white employee who received the job was error. The Court stated that several methods can be used to prove that an employer's alleged legiti-

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74. *Id.* at 555.
76. *Id.* at 2378.
77. *Id.*
78. *Id.*
The instruction in *Patterson* failed to list any of those other methods or to give the jury the opportunity to consider evidence relating to those other methods. Therefore, the Court concluded that the instruction was erroneous.

E. The Relationship Between Section 1981 and Title VII

The Court's narrow interpretation of section 1981 in *Patterson* could have a substantial impact on civil rights litigation. The majority in *Patterson*, however, apparently felt that section 1981 was unnecessary in light of Title VII and that section 1981 interfered with Title VII's strict procedures designed to reduce litigation through conciliation. The majority assumed that the two statutes are interchangeable. However, as Justice Brennan noted in his dissent, there are several substantive differences between section 1981 and Title VII. First, section 1981 covers all contracts while Title VII only covers employment discrimination. Also, Title VII only covers employment discrimination in businesses with more than 15 employees. According to one study, the 15 employee limitation excludes 15% of the workforce from coverage under Title VII. This 15% of the workforce would be covered under section 1981 which applies to all contracts. Section 1981, unlike Title VII, provides a right to a jury trial. Title VII limits damages to backpay and possible injunctive relief while compensatory and punitive damages can be recovered under section 1981. In addition, Title VII has a two year limit on backpay but section 1981 has no statutory limit; in a section 1981 claim the statute of limitations is usually "the most appropriate one provided by state law." Finally, possibly the most important difference between

79. "For example, petitioner could . . . present evidence of respondent's past treatment of petitioner, including the instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position." Id. at 2378.
80. Title VII provides in relevant part:
   It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .
87. Id. at 462. For a complete discussion of statute of limitations considerations under
the two statutes is that section 1981 allows an employee to bring suit without having to follow the strict procedures of Title VII.88

When the procedural requirements of Title VII are considered it becomes apparent that they can create a trap for an unsuspecting or uninformed employee. The first requirement under Title VII is that within the appropriate time frame the employee alleging discrimination must file a charge of discrimination in writing and under oath with the Equal Employment Opportunity Commission ("EEOC").89 In a state without a local or state antidiscrimination agency, the charge must be filed within 180 days of the alleged discriminatory act.90 In a state with a state or local agency the employee must first file with the state, and the time limit for filing with the EEOC is extended to 300 days or 30 days after the employee receives notice that the state or local agency has terminated its proceedings.91 After the employee properly files a charge, the EEOC is required to serve a notice of the charge on the employer.92 After the notice is given, the EEOC must investigate the charge to determine whether there is reasonable cause to believe that it is true.93 If the EEOC makes a determination of reasonable cause it is required to attempt to work out a conciliation agreement between the parties. If the parties cannot reach an acceptable agreement within 30 days after the conciliation process begins, the EEOC will terminate the proceedings. The EEOC can terminate the proceedings earlier if the employer refuses to conciliate or to make a good faith effort to resolve the dispute.94

Once the conciliation proceedings are completed and an agreement has not been reached the EEOC may bring a civil suit in federal court on behalf of the employee.95 If the EEOC does not bring a civil action within 180 days it is required to issue the employee a right to sue letter. The employee is then required to file a suit in federal court within 90 days of receiving the right to sue letter. If the employee fails to file suit within 90 days he or she will be barred from bringing any further action under Title VII.96 The employee will similarly be denied recovery if any of the other procedural requirements are not met.

91. Id. For a general discussion of timing considerations, see C. SULLIVAN, J. ZIMMER & R. RICHARDS, supra note 87, at § 3.4.
93. Id.
95. Id.
96. Id.
An employee bringing an action under section 1981 is not required to follow these procedures which creates obvious advantages for the employee. Prior to Patterson, an employee who missed one of the Title VII deadlines or who did not want to face the administrative process could file a section 1981 claim. Following Patterson, a careless or uninformed employee will be totally denied a remedy if the charge is not filed within 180 days or if one of the other requirements is not met. It is likely that the trap created by Title VII will catch many victims of racial harassment and without section 1981 they will have no way to escape.

One other potential ramification of Patterson should also be considered. Again, a major difference between Title VII and section 1981 is that section 1981 allows compensatory and punitive damages while Title VII damages are limited to backpay. The fact that victims of racial harassment can no longer recover compensatory and punitive damages creates an obvious monetary disadvantage to the victims. However, the loss of these types of damages could have a much more substantial impact on civil rights litigation than is readily apparent. Because of limited governmental resources, all laws which prohibit discrimination rely heavily on private enforcement. As a result, individuals who bring discrimination claims act not only on their own behalf but also on behalf of society's interest in eradicating discrimination. When all other factors are held constant and the amount of damages are reduced, the number of plaintiffs willing to bring discrimination claims should be reduced. Thus, it is likely that more active discrimination will go unprosecuted and the inexpensive enforcement scheme will be at least partially undermined.

It is also highly likely that many civil rights attorneys will refuse to take discrimination claims on a contingency fee basis because the potential for large damage awards no longer exists. Along the same lines, it will be much more difficult for employees to convince employers to settle claims when the employer knows there is no potential for a jury trial and large punitive damage awards. The end result is that victims of racial harassment could be denied the benefit of competent counsel because they cannot afford the fees and because attorneys will be cautious about getting involved in litigation that has very limited damage potential and very low possibility of early settlement.

V. SURVEY OF EIGHTH CIRCUIT SECTION 1981 CLAIMS

As discussed above, the differences between Title VII and section 1981 are substantial. However, the majority in Patterson may have been correct in believing that few people will be totally denied a remedy because of the limitations placed on section 1981. A study of all

section 1981 cases in the Eighth Circuit in which a final judgment has been issued since January 1, 1985 produced the following results:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases involving section 1981 claims</td>
<td>53</td>
</tr>
<tr>
<td>Total cases in which plaintiff prevailed on section 1981 claim</td>
<td>3</td>
</tr>
<tr>
<td>Total cases in which section 1981 claim was made in employment context</td>
<td>50</td>
</tr>
<tr>
<td>Total cases in which section 1981 Claim was the Sole Source of Recovery Relyed Upon</td>
<td>10</td>
</tr>
<tr>
<td>Total cases in employment context that were not joined with a Title VII claim</td>
<td>9</td>
</tr>
</tbody>
</table>

Again, one of the major concerns created by *Patterson* is that victims of racial harassment outside of the employment setting will be denied a remedy because of the narrow interpretation of section 1981. It is possible that this concern will be valid in the future. However, the fact that racial harassment claims by non-employees are no longer actionable under section 1981 would have had a very nominal impact in the Eighth Circuit during the time frame of the survey. The survey indicated that only 3 of the 53 section 1981 claims in the Eighth Circuit were non-employment discrimination claims and all 3 of those claims were unsuccessful. Therefore, Title VII's restriction to employment discrimination would not have been a major factor in the Eighth Circuit because all of the successful claims were employment related.

A second statistic that must be considered when assessing the potential impact of *Patterson* is the number of section 1981 claims that were unaccompanied by an alternative means of recovery. This statistic is important because a victim of racial harassment who brings a section 1981 claim without also bringing another related claim may be affected by *Patterson* more than an individual who has another claim available. The survey indicated that 10 of the 53 section 1981 claims were unaccompanied by an alternative means of recovery. There-

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98. The study includes only cases that appeared in a Lexis search using various forms of the key words section 1981 (e.g., 42 U.S.C. § 1981, § 1981, and section 1981) and focuses on the following issues: 1) whether the claim was successful; 2) whether the claim was based on employment discrimination; and 3) whether the section 1981 claim was brought alone or whether alternative means of recovery were sought. Again, only those cases where there was a final adjudication were included in the survey.

99. See Lewellen v. Raff, 843 F.2d 1103 (8th Cir. 1988) (police misconduct claim); Washington v. Simpson, 806 F.2d 192 (8th Cir. 1986) (racially motivated arrest); Devan v. City of Des Moines, 767 F.2d 423 (8th Cir. 1985) (police misconduct).

fore, 43 of the persons claiming discrimination potentially would not have been without a remedy if their section 1981 claim was denied. Instead, they had an alternative source of recovery.

It is also important to analyze the 10 claims which were brought individually to determine whether they were employment discrimination claims and thus potentially actionable under Title VII. The results indicate that 9 of the 10 claims were in fact employment discrimination claims. This indicates that all but one of the section 1981 claims in the Eighth Circuit had a potential source of recovery outside of section 1981 which is a very substantial statistic.

The survey also reveals that only three section 1981 claims were successful during the relevant time frame. The next section discusses the three successful claims and points out that all three successful claims involved employment discrimination and all three could have been brought under Title VII.101

VI. SUCCESSFUL SECTION 1981 CLAIMS

The final portion of this Note will discuss how Patterson would have affected the three successful section 1981 claims in the Eighth Circuit since January 1985. In Edwards v. Jewish Hospital,102 William Edwards, a black male, was terminated by Jewish Hospital after funds were stolen from the hospital safe.103 Edwards was asked to submit to a polygraph test because he was among thirteen employees who had access to the safe.104 Edwards, along with three other employees, failed the polygraph examination. Edwards was then tested two additional times and was terminated after he failed the polygraph examination for the third time.105

After his termination, Edwards filed a claim under section 1981 alleging that he was terminated because of his race. The case was tried before a jury. The jury in two separate special interrogatories found that Jewish Hospital had intentionally discriminated against Edwards but that Edwards would have been terminated regardless of his race.106 The jury then awarded $50,000 in compensatory damages, $5,000 backpay, and $25,000 in punitive damages.107

101. See Edwards v. Jewish Hosp., 855 F.2d 1345 (8th Cir. 1988); Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986); Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985).
102. 855 F.2d 1345 (8th Cir. 1988).
103. Id. at 1347.
104. Id.
105. Id.
106. Id. at 1348.
107. Id.
The trial court, however, reduced the compensatory damages to $1 and struck the backpay award. The court reasoned that Edwards would have been terminated regardless of his race so there were no actual damages. However, the trial court did allow the $25,000 punitive damage award because "[t]he deterrent purposes which also underlie § 1981 would be thwarted in many cases if an employer were able to avoid liability completely by showing that his intentional racial discrimination happened in this particular instance to be 'harmless.'"

In the majority of jurisdictions Edwards would no longer have a valid section 1981 claim in light of Patterson because in these jurisdictions discriminatory termination claims are no longer actionable under section 1981. However, based on a recent United States Supreme Court case, Edwards would have likely been unable to recover damages even if his claims were still actionable under section 1981. In *Price Waterhouse v. Hopkins*, the Court stated that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. This same reasoning would likely apply to Edwards because the jury found that Edwards would have been terminated regardless of his race. Therefore, it is unlikely that Patterson would have been a factor in Edwards.

In *Wilmington v. J.I. Case Co.*, the plaintiff filed a section 1981 claim after he was terminated by Case. The claim alleged that Case's discriminatory treatment "denied him equal opportunities for increased pay, promotion, or other advancement" and that he was subjected to stricter rules and terminated all because of his race. A jury found for Wilmington and awarded $400,000 in actual damages which included damages for pain and suffering and $40,000 in punitive damages. Once again, the major impact Patterson would have had on Wilmington was in the amount of damages that could have been recovered. Wilmington could have been brought under Title VII because Case employed more than 15 people and all of Wilmington's claims were for employment discrimination. Thus

108. Id.
109. Id. at 1349.
110. Id. at 1351-52.
111. See supra notes 48-59 and accompanying text.
112. 109 S. Ct. 1775, 1786 (1989). *Price Waterhouse* was a Title VII claim, so it is possible, but unlikely, that the test would be applied differently when a § 1981 claim is involved.
113. 793 F.2d 909 (8th Cir. 1986).
114. Id. at 913.
115. Id. at 922.
116. Id. at 911.
117. Id. (Wilmington was one of thirty-five welders under his immediate supervisor)
Wilmington could have recovered back-pay under Title VII but not punitive damages or damages for pain and suffering. It is important to remember, however, that the right to a jury trial does not exist under Title VII and that the outcome of the claim and the amount of damages may have been different if decided by the court.

The final successful claim was *Easley v. Anheuser-Busch, Inc.* In *Easley*, three unsuccessful job applicants alleged that Anheuser-Busch had discriminated against them in hiring because of their race. The applicants filed claims under both section 1981 and Title VII. The plaintiffs did not request a jury trial on the section 1981 claim and the court concluded that Anheuser-Busch’s employment test was unfair to black applicants and that the plaintiffs had established a prima facie case of racial discrimination.

*Easley* is a good example of the type of claim that is still likely to be available under section 1981. The plaintiffs in *Easley* alleged that they were not hired because of their race. Yet, even after *Patterson*, this appears to be actionable under section 1981 because the alleged discriminatory conduct centers on the failure to enter into a contract, not on post-formation conduct.

Based on this survey, it appears that *Patterson* would have had little impact on the success of civil rights claims in the Eighth Circuit since 1985. However, this is not to say that the holding of *Patterson* is insignificant. On the contrary, *Patterson* will likely have a substantial impact on civil rights litigation even if all future claims are actionable under Title VII. *Patterson* makes it more difficult for employees to file claims because of the strict filing deadlines of Title VII. The decision will decrease the chances of cases being settled because employers no longer face the threat of compensatory and punitive damages. And finally, employees who are discriminated against will no longer have the possibility of a jury trial and may consequently receive smaller damage awards.

VII. CONCLUSION

Justice Brennan summed up the holding in *Patterson* when he stated that “what the Court declines to snatch away with one hand, it takes with the other.” Although the Court upheld *Runyon v. McCrory*, thereby holding that section 1981 applies to private contracts, the Court interpreted section 1981 so narrowly that the statute

118. 758 F.2d 251 (8th Cir. 1985).
119. Id. at 254.
120. Id.
121. Id. at 256.
123. Id. at 2379 (Brennan, J., concurring in part and dissenting in part).
no longer protects racial harassment and discriminatory termination in most jurisdictions and may only cover discriminatory promotion claims in limited circumstances. The Court arrived at this interpretation by reasoning that section 1981 was unnecessary because Title VII affords protection for the very same rights. A survey of section 1981 cases in the Eighth Circuit indicates that the Court may have been correct in this reasoning. However, this does not diminish the fact that by forcing victims of racial harassment to proceed under Title VII the Court denies these victims the right to a jury trial and the ability to recover compensatory and punitive damages. The end result is that victims of racial harassment must be conscious of the strict timing requirements of Title VII because they no longer have a remedy available under 42 U.S.C. § 1981.

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