In *Comcast v. National Association of African-American Owned Media* [2] the Supreme Court held unanimously that a plaintiff who sues under 42 U.S.C. §1981 must plead and prove that race was the but-for cause of his or her injury. This case is particularly relevant to states and local governments as employers. The but-for causation is a standard favorable to employers.

Section 1981 [3], enacted in 1866, prohibits discrimination on the basis of race in contracting and employment, among other things. It states “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”

This case arose in the contracting context. African-American entrepreneur, Byron Allen, owner of Entertainment Studios Network (ESN), sought to have Comcast carry its channels. Comcast refused and ESN sued under §1981. ESN didn’t dispute that Comcast offered legitimate business reasons for not carrying its channels, but claimed these reasons were pretextual.

The Ninth Circuit held that a §1981 plaintiff only has to show that race discrimination played “some role” in the defendant’s decision-making process, not that it was the “but for” cause of the defendant’s conduct. Under this “more forgiving” causation standard, ESN’s lawsuit could proceed.

The Supreme Court rejected the Ninth Circuit’s view and held that to win a §1981 case the plaintiff must plead and prove but-for causation. Justice Gorsuch, writing for the Court, noted that it is “textbook tort law” that plaintiffs must prove but-for causation. The Court rejected ESN’s argument that §1981 creates an exception to the general rule.

According to the Court: “While the statute’s text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the ‘same right . . . as is enjoyed by white citizens’ directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation.”

ESN encouraged the Court to adopt the “motivating factor” causation test from Title VII, which also prohibits race discrimination in employment. This standard is more favorable to employees than the but-for causation standard. The Court declined noting the differences between the statutes. “Title VII was enacted in 1964; this Court recognized its motivating factor test in 1989; and Congress replaced that rule with its own version two years later. Meanwhile, §1981 dates back to 1866 and has never said a word about motivating factors. So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard.”

Justice Ginsburg wrote a concurring opinion noting that the Court didn’t decide whether §1981 applies to earlier stages of the contract-formation process because this question wasn’t presented in this case. She stated that it must apply otherwise employers could, for example, reimburse white interviewees by not black interviewee or even refuse to consider black applicants.
States and local governments like private employers can be sued for employment discrimination under Section 1981. The Ninth Circuit decision had numerous downsides for employers. First, it is easier for employees to prove that discrimination was one of a number of factors in an employment decision rather than the sole factor. Second, if the Supreme Court had agreed with the Ninth Circuit, Section 1981 will be an even more attractive vehicle to sue employers. Compared to Title VII it has a longer statute of limitations, no damages cap, and presumably no defense to damages where the employer would have made the same decision regardless of race.

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