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The High Court Heightens the Bar for Section 1981 Discrimination Claims

March 25, 2020

On March 23, the Supreme Court announced its opinion in *Comcast Corp. v. National Ass'n of African American-Owned Media*, No. 18-1171. In an opinion written by Justice Gorsuch and joined by all eight of his colleagues (except for one footnote, which Justice Ginsburg declined to join), the Court held that a plaintiff bringing a claim under 42 U.S.C. § 1981(a) for race discrimination in the formation or enforcement of contracts must show "but-for" causation: *i.e.*, that the injury claimed would not have occurred *but for* the unlawful discrimination.

While this case addresses a hot-button issue—race discrimination—and was the subject of great interest, with many *amici* and much media attention, the Court's opinion is a relatively straightforward exercise in statutory construction. The holding was predicated on (1) traditional tort principles, under which "the ancient and simple 'but-for' common law causation test" is the "default" rule; (2) the text and history of the 1866 Civil Rights Act, which uses language that suggests but-for causation; and (3) textual differences between §1981 and Title VII of the 1964 Civil Rights Act, only the latter of which includes language suggesting that race need only be a "motivating factor" leading to the claimed injury. The Court summed up its analysis as follows: "All the traditional tools of statutory interpretation persuade us that §1981 follows the usual rules, not any 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." The Court also rebuffed the plaintiff's argument that, under §1981, the standard is lower at the pleading stage, reminding litigants that "the essential elements of a claim remain constant through the life of a lawsuit," and rejecting the suggestion that §1981 is an exception to that rule.

Justice Ginsburg concurred, but wrote separately to convey that, while the Court did not address whether §1981 covers "only the final decision to enter a contract" (Comcast's view) or "earlier stages of the contract formation process," she believes the answer to that question must be the latter. Otherwise, a business would be able to discriminate by, for example, declining to accept applications from persons of color, thereby rendering Section 1981 "an empty promise."

Going forward, institutions faced with §1981 discrimination claims may be more likely to succeed in securing early dismissal based on arguments that the plaintiff has not alleged facts sufficient to show that, but for his or her race, he or she would not have been harmed. Combined with the pleading standards of *Iqbal* and *Twombly*, which require that claims be supported by specific alleged facts as opposed to bare assertions that simply echo the elements of the claim, the *Comcast* decision may provide the knock-out punch in many cases where the allegations are less fulsome and detailed. In the Court's view, this simply aligns the application of §1981 with §1982 and most other causes of action. Critics, however, will no doubt argue that the Court has significantly reduced any realistic chance of obtaining redress when plaintiffs claim injury based on unequal treatment.

The *Comcast* decision seems to follow an ongoing trend toward a heightened pleading standard, requiring more specificity and detail at the pleading stage to survive a motion to dismiss and obtain the discovery that plaintiffs in discrimination cases may require to support their claims. We will continue to monitor this trend and see whether, over time, the *Comcast* decision contributes to an increase in early dismissals of §1981 cases.

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