

## LEGITIMACY OF INDEPENDENT CONTRACTOR SUITS FOR HOSTILE WORK ENVIRONMENT UNDER SECTION 1981

This Comment considers whether under the Civil Rights Act of 1991<sup>1</sup> (hereinafter section 1981), a person can sue under a hostile work environment claim when the person is an independent contractor. Under section 1981, an independent contractor can probably sue for a hostile work environment. The legislative history, although expanding section 1981's coverage in other respects, does not address independent contractors. The very nature of an independent contractor inherently implies that the individual has control over his own work environment—free from the control of an employer. Thus, as a matter of logical construction, independent contractors should not be able to sue under section 1981. On the other hand, however, most courts, such as the Seventh and Tenth Circuits, without giving the issue much attention, have allowed an independent contractor to sue under a hostile work environment claim. Even those courts that have examined the issue, such as the First Circuit, have permitted the claims based on either the text of the statute or its legislative history. More courts will probably follow those circuits and allow independent contractors to sue for a hostile work environment under section 1981 as long as there is no legislative intervention or preclusion. This Comment examines this issue by first considering the legislative history of the 1991 Amendments to section 1981, then proceeding to the tests that courts, specifically those in Alabama, use to judicially categorize independent contractors, and finally summarizing the case law from the courts that have encountered the issue.

### I. THE STATUTE AND ITS LEGISLATIVE HISTORY

Enacted to protect individuals from racial discrimination in the making and enforcement of contracts, the post-Civil War (1866) Reconstruction statute, 42 U.S.C. § 1981, provides:

(a) All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all

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1. 42 U.S.C. § 1981 (1994).

laws . . . as is enjoyed by white citizens. . . .

(b) 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.<sup>2</sup>

### A. *The Patterson Decision*

In response to the Supreme Court's decision in *Patterson v. McLean Credit Union*,<sup>3</sup> which severely narrowed the coverage of section 1981, Congress amended the statute to overrule the holding of *Patterson*. In fact, Congress found a "compelling need for legislation to overrule the *Patterson* decision."<sup>4</sup> In *Patterson*, Brenda Patterson sued her employer under section 1981, claiming that her employer had, among other things, harassed her on the job and denied her a promotion, because of her race.<sup>5</sup> In a five-to-four decision, the Court adopted an extremely narrow interpretation of the section 1981 guarantee of the "right to make and enforce contracts," holding that the provision applies only to discrimination in "the *formation* of a contract, . . . not to problems that may arise later from the conditions of continuing employment."<sup>6</sup> "[T]he right to make contracts," the Court ruled, "does not extend . . . 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."<sup>7</sup> The Court thus rejected Patterson's racial harassment claim and held that she could prevail on her promotion claim only if she could establish that the promotion "involved the opportunity to enter into a new contract with the employer."<sup>8</sup>

The *Patterson* decision sharply cut back on the scope and effectiveness of section 1981, shattering the uniform consensus the federal courts had reached on the scope of the statute, as every federal court of appeals had extended section 1981's protection to discrimination during the performance, as well as the formation, of the contract. Additionally, the Supreme Court's unprecedented reading of section 1981 stripped away equal employment coverage and remedies not provided by any other federal law since section 1981 covers employers of all sizes, while Title VII applies only to employers with fifteen or more employees.<sup>9</sup> In the

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2. 42 U.S.C. § 1981 (1994)

3. 491 U.S. 164 (1989).

4. H.R. REP. NO. 102-40(1), at 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630.

5. *Patterson*, 491 U.S. at 169.

6. *Id.* at 176 (emphasis added).

7. *Id.* at 177.

8. *Id.* at 185.

9. Compare 42 U.S.C. § 1981 (1994) with 42 U.S.C. § 2000e(b) (1994) (stating that an employer covered by the Act must have at least 15 employees).

aftermath of the decision, many courts were forced to dismiss claims and cases involving section 1981.

### B. *The 1991 Congressional Amendments*

In 1991, Congress, therefore, added subsection (b) to section 1981 to restore protection to post-formation discrimination. Subsection (b) defined the term "make and enforce contracts" as including formation, performance, modification, and termination of the contract.<sup>10</sup> Although nothing in the legislative history to the Civil Rights Act of 1991 directly extends protection to independent contractors, Congress intended to broaden the scope of the Act in other respects.<sup>11</sup> For example, Congress affirmed that section 1981 protects not only racial but also ethnic minorities (including any national origin or ancestry discrimination, but not discrimination based on citizenship) from unlawful discrimination.<sup>12</sup> The legislative history of the 1991 amendments focuses almost exclusively on "employment" arrangements.<sup>13</sup> While most comments use the term "employment" or similar language, other commentary mentions the term "job."<sup>14</sup> However, the congressional committee later recognized a self-termed fallacy—"[s]ection 1981 is not an employment statute at all."<sup>15</sup> Instead, section 1981 is a general civil rights statute covering many areas besides employment including housing, education, and zoning racial discrimination.<sup>16</sup>

On consideration of a separate issue, the House of Representatives noted that since courts have judicially decided to apply section 1981 to private sector employment in the 1970s, Congress has not "thoroughly considered" section 1981's proper application to employment discrimination.<sup>17</sup> Instead, Congress merely affirmed that section 1981 covers both public and private sector employment.<sup>18</sup> Despite not considering

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10. 42 U.S.C. § 1981(b) (1994).

11. See *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999) (reasoning that the Congress did not intend to limit protection to employees).

12. 137 CONG. REC. S15472, S15486 (daily ed. Oct. 30, 1991) (adopting the definition from *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1986), *reh'g denied*, 483 U.S. 1011 (1987)) (remarks of Sens. DeConcini and Kennedy).

13. H.R. REP. NO. 102-40(II), at 35-37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 729-30 (explaining that section 1981 covers various aspects of employment, including "employers of all sizes," "formation of the employment contract," and "protection against employment discrimination").

14. See, e.g., 137 CONG. REC. H9505, H9536 (daily ed. Nov. 7, 1991) (Rep. Edwards remarked that "section 1981 covers discrimination against racial and ethnic minorities on the job"); H.R. REP. NO. 102-40(II), at 75 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 761 ("Section 1981 should be amended to give redress to victims of on-the-job racial harassment").

15. H.R. REP. NO. 102-40(I), at 146 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 675.

16. H.R. REP. NO. 102-40(I), at 146-47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 675.

17. *Id.*

18. H.R. REP. NO. 102-40(I), at 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630 (citing *Runyon v. McCrary*, 427 U.S. 160 (1976)).

the issue, the majority of "litigation under [S]ection 1981 is employment discrimination litigation."<sup>19</sup> Moreover, the 1991 amendments were explicitly intended to prohibit "racial discrimination in all aspects of employment."<sup>20</sup> In the context of employment discrimination, all aspects of employment include claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring.<sup>21</sup>

The amendments to section 1981 also restored protection under federal law against harassment and other forms of intentional discrimination in the terms and conditions of employment for the more than eleven million employees who are not covered by Title VII.<sup>22</sup> As amended, the statute provides a "remedy for individuals who are subjected to discriminatory performance of their employment contracts (through racial harassment, for example) or are dismissed or denied promotions because of race."<sup>23</sup> The Interpretative Memorandum which was "intended to reflect the intent of all of the original cosponsors"<sup>24</sup> of the bill states: "Section 4 also overturns *Patterson*<sup>25</sup> in contractual relationships other than employment, and nothing in the amended language should be construed to limit it to the employment context."<sup>26</sup> Although the legislative history of the 1991 amendments does not speak of independent contractors, it appears that Congress wished to broaden the scope of claims available under section 1981.

The legislature also clarified its intent with regard to statutory interpretation. Congress instructed that as a general rule of construction, one federal civil rights law should not be interpreted to narrow the scope of protection of another; thus, section 1981's remedies are independent of other laws.<sup>27</sup> The committee noted:

[I]n construing 42 U.S.C. Section 1981—a federal civil rights law protecting against discrimination on the basis of race in contractual relations, including employment contracts—courts should not rely on other federal civil rights statutes such as Title VII which also prohibit employment discrimination on the basis

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19. H.R. REP. NO. 102-40(I), at 90 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 628 (remarks of Professor Theodore Eisenberg).

20. H.R. REP. NO. 102-40(I), at 141 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 670; *see also* H.R. REP. NO. 102-40(I), at 89 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 627 (noting that courts should not rely on Title VII as a basis of construing, interpreting, or limiting the theories of liability or remedies available under section 1981).

21. H.R. REP. NO. 102-40(I), at 146 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 675 (also stating that section 1981 applies in contexts other than employment situations such as voting discrimination, hospital administration, and jury selection).

22. H.R. REP. NO. 102-40(I), at 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630.

23. 137 CONG. REC. S15472, S15472-73 (daily ed. Oct. 30, 1991).

24. 137 CONG. REC. S15472, S15483 (daily ed. Oct. 30, 1991).

25. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

26. 137 CONG. REC. S15472, S15483 (daily ed. Oct. 30, 1991).

27. H.R. REP. NO. 102-40(I), at 89 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 626-27.

of race as a basis for interpreting or limiting the theories of liability, rights, and remedies available under Section 1981.<sup>28</sup>

Therefore, because Congress's broad, inclusive language should not be read as limiting the substantive rights or remedies available, independent contractors should be able to sue under section 1981.

## II. INDEPENDENT CONTRACTORS

### *A. Determination of Independent Contractor Status in Alabama*

Generally, in an employer/employee relationship, the employee performs services for the employer who controls the physical conduct and details of the service; on the other hand, an independent contractor is free from such control. Because section 1981 does not refer explicitly to employees, the statute does not define the term "employee" or "independent contractor." Therefore, the term "independent contractor" should be given its common, everyday meaning, as "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."<sup>29</sup>

Moreover, in construing terms for federal employment discrimination statutes, appellate courts generally adopted a hybrid approach, which tempers the common-law right to control test with a consideration of the "economic realities" of the hired party's dependence on the hiring party.<sup>30</sup> The Supreme Court has recently affirmed this approach in the ERISA context.<sup>31</sup>

In contrast to federal appellate courts, Alabama courts attempt to employ a hybrid of the right to control test and the economic realities

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28. H.R. REP. NO. 102-40(I), at 89 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 627.

29. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618 (1944).

30. *See, e.g., Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 (11th Cir. 1993) (ERISA case).

31. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). The court noted: In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (citation omitted).

*Darden*, 503 U.S. at 323-24.

test to determine if an individual is an employee or independent contractor.<sup>32</sup> The economic realities test considers individuals to be employees if they "are dependent upon the business to which they render service."<sup>33</sup> The right to control test considers individuals to be employees if the supervisor reserves not only the right to control the result accomplished by the work, but also the "details and means by which that result is accomplished."<sup>34</sup>

Despite claiming to apply both tests, the Alabama Supreme Court has held that the fundamental test to determine if an individual is an employee (and thus not an independent contractor) is whether the employer has reserved the right to control the details of the individual's work, that is, the means and methods by which the work is done.<sup>35</sup> It is irrelevant whether the control is actually exercised or just retained.<sup>36</sup>

To categorize someone as an independent contractor rather than an employee, courts usually look to the totality of the circumstances surrounding the relationship.<sup>37</sup> The relevant factors that indicate a right to control include: (1) direct evidence that demonstrates a right or the exercise of control, (2) the method by which the injured individual received payment for his services, (3) whether the equipment is furnished by the alleged employer or not, and (4) whether the individual has the right to terminate.<sup>38</sup> Another important consideration to evaluate the relationship is the written contract and subsequent performance under that contract between the parties.<sup>39</sup>

On the other hand, an employee relationship is *not* created by an individual who merely retains the right to supervise or inspect work of an independent contractor as it progresses for the purpose of determining whether it is completed according to plans and specifications, and

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32. *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 339 (11th Cir. 1982); *Daniels v. Mead Coated Bd.*, 858 F. Supp. 1103, 1106 (M.D. Ala. 1994).

33. *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 299 (5th Cir. 1975).

34. *Cobb*, 673 F.2d at 339 (citing *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976)).

35. *Martin v. Goodies Distribution*, 695 So. 2d 1175, 1177 (Ala. 1997); *Ex parte Curry*, 607 So. 2d 230, 232 (Ala. 1992); *Gossett v. Twin County Cable T.V., Inc.*, 594 So. 2d 635, 639 (Ala. 1992); *Collum v. Argo*, 599 So. 2d 1210, 1212 (Ala. Civ. App. 1992).

36. *Martin*, 695 So. 2d at 1177; *Gossett*, 594 So. 2d at 639; *Tittle v. Alabama Power Co.*, 570 So. 2d 601, 603 (Ala. 1990).

37. *Kendrick v. Alabama Power Co.*, 601 So. 2d 912, 915 (Ala. 1992); *Collum*, 599 So. 2d at 1212.

38. *Curry*, 607 So. 2d at 232-33 (finding that a truck driver is an employee of a trucking company when the company controls where and when a truck driver picks up and drops off cargo, controls the payment of expenses and services, and provides equipment); *see also Cobb*, 673 F.2d at 340 (noting that other factors include the degree of supervision necessary, the skill required, the ownership of equipment, method of payment for jobs, the employment benefits, and the intentions of the parties).

39. *Daniels v. Mead Coated Bd.*, 858 F. Supp. 1105, 1105 (M.D. Ala. 1994); *Pate v. United States Steel Corp.*, 393 So. 2d 992, 994 (Ala. 1981).

retains the right to stop work that is not properly done.<sup>40</sup> Thus, a supervisor just monitoring an independent contractor's work does not imply an employer/employee relationship.<sup>41</sup> Therefore, an independent contractor is one who personally controls the details of his own work environment.

### B. General Duty Owed to an Independent Contractor

Generally, there is no duty owed even by a premises owner to an independent contractor. The Alabama Supreme Court has recognized that:

[a] premises owner owes no duty of care to employees of an independent contractor with respect to working conditions arising during the progress of the work on the contract. "The general rule does not apply, however, if the premises owner retains or reserves the right to control the manner in which the independent contractor performs its work."<sup>42</sup>

Moreover, a person who hires an independent contractor is not liable for tortious acts committed by that person's independent contractor to third parties.<sup>43</sup> Therefore, neither a premises owner nor a general contractor is responsible for the negligent acts of an independent contractor.<sup>44</sup>

Because a premise owner has no control over the details of the working environment, he does not owe any duty to the independent contractor with respect to the working conditions which arise during the course of the contract.<sup>45</sup> In fact, an employer only has a duty to an *employee* to provide a "reasonably safe work environment."<sup>46</sup>

There are, however, two exceptions to this general rule: inherently dangerous activities and non-delegable duties.<sup>47</sup> These exceptions are not absolute, but qualified, because a plaintiff who claims to fall within one must still prove that the defendant exercised control with respect to that particular activity or duty.<sup>48</sup> Additionally, a claim of hostile work

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40. *Pate*, 393 So. 2d at 995; *Titte*, 570 So. 2d at 603 (citing *Pate*, 393 So. 2d at 995).

41. *Daniels*, 858 F. Supp. at 1107.

42. *Titte*, 570 So. 2d at 603 (citations omitted); see also *Ramirez v. Alabama Power Co.*, 898 F. Supp. 1537, 1542 (M.D. Ala. 1995) (citing *Weeks v. Alabama Elec. Coop., Inc.*, 419 So. 2d 1381 (Ala. 1982)).

43. *General Fin. Corp. v. Smith*, 505 So. 2d 1045, 1047 (Ala. 1987).

44. *Bell v. Sugarwood Homes, Inc.*, 619 So. 2d 1298, 1301 (Ala. 1993).

45. *Ramirez*, 898 F. Supp. at 1542-44 (the plaintiff must prove that the defendant exercised control over the job site); see also *Daniels*, 858 F. Supp. at 1105; *Kendrick v. Alabama Power Co.*, 601 So. 2d 912, 914 (Ala. 1992) (citations omitted).

46. *Gossett v. Twin County Cable T.V., Inc.*, 594 So. 2d 635, 639 (Ala. 1992) (citation omitted).

47. *Ramirez*, 898 F. Supp. at 1544; *General Fin. Corp.*, 505 So. 2d at 1047.

48. *Ramirez*, 898 F. Supp. at 1544-45.

environment can survive a summary judgment motion only if sufficient evidence exists that the unwelcome advances occurred within the employment setting.<sup>49</sup> Clearly, racial discrimination would not be considered an inherently dangerous activity. Under other facts, the Supreme Court has held that section 1981 does not impose a non-delegable duty—the duty is delegable—on employers to ensure that there is no discrimination in selection of the work force.<sup>50</sup> Therefore, because an independent contractor controls the details of his own work environment, a person who employs one should not owe a duty to him.

### III. PROPRIETY OF SUIT BY INDEPENDENT CONTRACTOR FOR HOSTILE WORK ENVIRONMENT

#### A. *The Framework for a Hostile Work Environment Claim*

For racial discrimination, a claimant may choose to pursue a claim under several statutes. Section 1981 offers broad protection against discrimination because the statute applies to all contractual relationships (including employment and partnership arrangements), contains no statutory cap on damages, has a longer statute of limitation than Title VII, and has no administrative procedures.<sup>51</sup> Further, the statute covers discrimination against white individuals; it prohibits treating anyone more favorably because of his or her race.<sup>52</sup> There are several theories of liability for a section 1981 suit, including a hostile work environment, which is a type of disparate treatment case. Under section 1981, a plaintiff must prove intentional, purposeful discrimination to recover.<sup>53</sup> Generally, the plaintiff must prove that unwelcome racial comments or offensive conduct was severe or pervasive enough to alter the conditions of the employment or to create an abusive working environment.<sup>54</sup> The offensive utterances or conduct must both objectively (looking to the type and circumstances of the relationship) and subjectively (to the particular claimant) affect the conditions, making them hostile or abusive, of the workplace of a reasonable person.<sup>55</sup>

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49. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *see also* *Ligenza v. Genesis Health Ventures of Mass.*, 995 F. Supp. 226, 229 (D. Mass. 1998).

50. *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 395-96 (1982).

51. 42 U.S.C. § 1981 (1994).

52. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

53. *General Bldg. Contractors Ass'n*, 458 U.S. at 383.

54. *See* *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986); *accord* *Jackson v. Motel 6 Multipurposes, Inc.*, 130 F.3d 999, 1008 & n.17 (11th Cir. 1997) (noting the requirements and cases in the Eleventh Circuit for hostile work environment racial discrimination claims).

55. *See* *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993).



### B. *The Textualist Argument*

Generally, for a simple race discrimination suit under section 1981, there is no requirement that the plaintiff be an employee, and courts have allowed an independent contractor to bring suit.<sup>56</sup> From a textualist's perspective, at least one author has argued that section 1981, based on the plain language of the statute, does not require an employment relationship to be an element of unlawful discrimination.<sup>57</sup> Instead, discrimination is actionable as long as it involves the denial of any contractual right.<sup>58</sup> Simply put, "federal law also prohibits discrimination in the making of private contracts, including contracts for the employment of independent contractors."<sup>59</sup>

### C. *Expanding the Analysis of the Employment Cases to Non-Employment Context*

Because most of the litigation involving section 1981 centers around the employment context, even in non-employment cases, courts turn to employment cases for guidance. Additionally, some courts even allow an employee to sue under section 1981 when there is no contract per se. For example, in *Adams v. McDougal*,<sup>60</sup> the Fifth Circuit allowed a black deputy sheriff to sue under section 1981.<sup>61</sup> The deputy sheriff did not have an employment contract, but was an appointed public official with employment for an indefinite time period.<sup>62</sup> The court, in adopting a broad definition of the term "contract," held that "the employment relationship presented in this case was sufficient" to be afforded protection under the statute.<sup>63</sup>

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56. See 42 U.S.C. § 1981 (1994); *Fitzgerald v. L & L Truck Brokers, Inc.*, 32 F. Supp. 2d 1080, 1085 (E.D. Ark. 1999) (disposing of a claim brought by an independently contracted truck operator because the plaintiff failed to show the environment was sufficiently hostile); *Nanavati v. Burdette Tomlin Mem'l Hosp.*, Nos. Civ. 83-0794 & 84-1790, 1986 WL 15318, at \*5 (D.N.J. June 23, 1986) (noting that being an employee is not required to maintain a section 1981 discrimination action and allowing an independently contracted doctor to sue a hospital); *Gutierrez v. Aero Mayflower Transit Co.*, No. C 78-1863 SC, 1979 WL 15372 (N.D. Cal. Apr. 27, 1979) (allowing a truck driver to sue the hauling company); see also *Lewis Maltby & David Yamada, Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 259 (1997).

57. See *Nanavati*, 1986 WL 15318, at \*5 (employment relationship is not necessary in order to maintain a section 1981 racial discrimination action); Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 683 (1996).

58. *Id.*

59. *Marquis v. City of Spokane*, 888 P.2d 753, 756 (Wash. Ct. App. 1995).

60. 695 F.2d 104 (5th Cir. 1983).

61. *Adams*, 695 F.2d at 108-09.

62. *Id.* at 107.

63. *Id.* at 108; see also *Jones v. United States Postal Serv.*, No. 89-399-CMW, 1990 WL 5198, at \*4 (D. Del. 1990) (noting that section 1981 and the reasoning in *Patterson* "applies to contracts with independent contractors").

Other courts take a more subtle and pragmatic approach in extending their definition of contract for recovery under section 1981. In *Capitol Marketing Associates, Inc. v. Western States Life Insurance Co.*,<sup>64</sup> the court found that a Marketing Organization Contract where the plaintiff "would act as an independent contractor for the defendant in the sale of life insurance policies and other related products"<sup>65</sup> was sufficiently similar to an employment contract to apply section 1981 employment decisions.<sup>66</sup>

Further, under a joint control theory, parent companies, labor unions, and others involved in employment decisions may be liable for discriminatory hostile working environments involving independent contractors.<sup>67</sup> Additionally, at least one trial court has held that in a Title VII action, an employee may sue not only his employer for a hostile work environment, but also other employers who interfere with that employee's working arrangement.<sup>68</sup> Nevertheless, courts still require that the claimant have standing to sue each particular defendant.<sup>69</sup> The current trend is to expand the definition of the term "contract" to allow more plaintiffs to sue more parties under section 1981.

#### D. Case Law Involving Independent Contractor Suits under Section 1981

##### 1. The Anomaly in Alabama

The overwhelming majority of the cases have allowed an independent contractor to sue under section 1981. However, one judge in the Northern District of Alabama has asserted that it is improper for an independent contractor to bring a discrimination claim pursuant to section 1981.<sup>70</sup> In *Roscoe v. Aetna Casualty and Surety Co.*,<sup>71</sup> an independent

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64. No. 88-4199-R, 1991 U.S. Dist. LEXIS 4570 (D. Kan. Mar. 14, 1991).

65. *Capitol Mktg. Assocs.*, 1991 U.S. Dist LEXIS 4570, at \*4.

66. *Id.* at \*7 (citing *Gonzalez v. Home Ins. Co.*, 50 Fair Empl. Prac. Cas. (BNA) 1173 (S.D.N.Y. 1989) (termination of insurance agent's contract is subject to suit for discrimination claim under section 1981)).

67. See, e.g., *United States E.E.O.C. v. Foster Wheeler Constructors, Inc.*, No. 98 C 1601, 1999 WL 515524, at \*8-\*9 (N.D. Ill. July 14, 1999) (holding that liability exists in a joint control situation where the organizations contribute to or intentionally acquiesce in the hostile work environment); see also, *General Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 396-98 & n.21 (1982) (finding potential liability where there is a mutual right of control).

68. *Foster Wheeler Constructors, Inc.*, 1999 WL 515524, at \*5.

69. *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984) (holding black insurance agent lacked standing to challenge employer's failure to insure houses in predominately black neighborhoods as a loss of business under section 1981).

70. See *Roscoe v. Aetna Cas. and Surety Co.*, No. 88-AR-0882-S, 1988 WL 214511, at \*1 (N.D. Ala. Nov. 8, 1988) (Acker, J.).

contractor filed a complaint alleging, among other things, discrimination in employment practices which violate Title VII of the Civil Rights Act of 1991 and section 1981.<sup>72</sup> In a collateral hearing, the court found that the plaintiff failed to prove that he was an employee of the defendant.<sup>73</sup> Then the court held that, as a matter of law, "[a] § 1981 claim asserting discrimination in employment practices requires that plaintiff show that he is defendant's employee, just as in plaintiff's three claims above discussed [*i.e.*, Title VII claim]."<sup>74</sup> The court reasoned that because the plaintiff was not an employee of the defendant, the plaintiff could not maintain a section 1981 claim and that claim should be dismissed with prejudice.<sup>75</sup>

## 2. *The Seventh Circuit Cases*

The Seventh Circuit did not specifically determine if an independent contractor can sue under section 1981; rather, it only evaluated the merits of the claim itself. In *Bratton v. Roadway Package System, Inc.*,<sup>76</sup> Mr. Bratton, a black independent contractor who delivered packages for a parcel delivery company, sued for racial discrimination under section 1981.<sup>77</sup> In violation of specific provisions of his employment contract and direct orders of his supervisor, Mr. Bratton allowed his wife to assist him with his deliveries in their personal car.<sup>78</sup> As a result, Bratton's number of deliveries was reduced and he was eventually terminated.<sup>79</sup> The Seventh Circuit affirmed summary judgment for the parcel delivery company because, under the *McDonnell Douglas* burden-shifting analysis for individual disparate treatment action, Bratton failed to show that similarly situated white contractors were treated more favorably with respect to route assignments.<sup>80</sup> Additionally, in *Miller v. Advanced Studies, Inc.*,<sup>81</sup> an Illinois trial court, in a footnote, indicated that for a section 1981 claim, the employee/independent contractor distinction was irrelevant.<sup>82</sup> Therefore, the Seventh Circuit allows independent contractors to sue under section 1981.

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71. No. 88-AR-0882-S, 1988 WL 214511, at \*1 (N.D. Ala. Nov. 8, 1988).

72. *Roscoe*, 1988 WL 214511, at \*1.

73. *Id.*

74. *Id.* at \*2; see also Maltby & Yamada, *supra* note 56, at 258-59 (noting that the Northern District of Alabama required a claimant to be an employee to sue under section 1981).

75. *Roscoe*, 1988 WL 214511, at \*2.

76. 77 F.3d 168 (7th Cir. 1996).

77. *Bratton*, 77 F.3d at 171.

78. *Id.* at 172. Although a prior supervisor allowed Bratton's wife to help, a new supervisor clearly stated that this assistance was not permitted. *Id.*

79. *Id.* Mr. Bratton claimed that the company took these actions to his detriment because of his race. *Id.*

80. *Bratton*, 77 F.3d at 176.

81. 635 F. Supp. 1196 (N.D. Ill. 1986).

82. *Miller*, 635 F. Supp. at 1199 n.4.

### 3. *The Tenth Circuit Cases*

Despite never actually analyzing the issue of the propriety of independent contractor suits for hostile work environments directly, the Tenth Circuit has been the most permissive with these suits. For example, in *Wright v. State Farm Mutual Automobile Insurance Co.*,<sup>83</sup> a black insurance agent-trainee brought suit alleging racial discrimination in the training procedure and assignment of existing insurance policies due to be renewed.<sup>84</sup> In analyzing the Title VII claim, the court explicitly found that the agent-trainee was an independent contractor, and thus granted summary judgment for the defendant.<sup>85</sup> In the section 1981 portion of the opinion, the court noted that the plaintiff asserted a hostile work environment claim.<sup>86</sup> Assuming that an independent contractor could sue, the court only addressed the merits of the claim and held that the alleged conduct was not sufficiently pervasive to withstand a motion for summary judgment.<sup>87</sup>

The Tenth Circuit has even applied section 1981 without considering the issue, only assuming that it applies. In *Crabtree v. DMJM-Phillips Reister Haley, Inc.*,<sup>88</sup> the Tenth Circuit assumed that section 1981 applied in all respects for the appeal.<sup>89</sup> Mr. Crabtree, a black contractor, won a contract to install guardrails on a highway project.<sup>90</sup> However, because Crabtree could not obtain a bond for the subcontractors and DMJR would not waive the bonding requirements, DMJR awarded the contract to a white female.<sup>91</sup> Although Crabtree claimed that the regular practice was to waive the bond requirement, the court affirmed summary judgment because the bonding requirement was a legitimate, non-discriminatory reason for the termination.<sup>92</sup>

Another case decided by a trial court in the Tenth Circuit has broadly interpreted the term "contract" to analyze other non-employment contractual discrimination as employment discrimination. In *Capitol Marketing Associates, Inc. v. Western States Life Insurance Co.*,<sup>93</sup> plaintiff contracted with defendant to market life insurance contracts under a Marketing Organization Contract and "would act as an

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83. 911 F. Supp. 1364 (D. Kan. 1995), *aff'd* 94 F.3d 657 (10th Cir. 1996).

84. *Wright*, 911 F. Supp. at 1369.

85. *Id.* at 1371.

86. *Id.* at 1374, 1376. The plaintiff only alleged two incidents in support of his claim: failure of his supervisor to return his calls and a manager entering plaintiff's office without knocking. *Id.*

87. *Id.* at 1376 (failing to address the issue of the suit).

88. No. 91-1160, 1992 U.S. App. LEXIS 25203 (10th Cir. Sept. 30, 1992).

89. *Crabtree*, 1992 U.S. App. LEXIS 25203, at \*5.

90. *Id.* at \*2.

91. *Id.* at \*3-\*4.

92. *Id.* at \*5.

93. No. 88-4199-R, 1991 U.S. Dist. LEXIS 4570 (D. Kan. Mar. 14, 1991).

independent contractor” for the sale of related products.<sup>94</sup> The court found that the contract between independent contracted sales agents and the insurance company was similar enough to an employment contract to apply the analysis from section 1981.<sup>95</sup> Therefore, the Tenth Circuit most likely would allow an independent contractor to sue for a hostile work environment claim under section 1981.

#### 4. *The First Circuit Case—Danco, Inc. v. Wal-Mart Stores, Inc.*

The First Circuit specifically addressed the issue of whether an independent contractor may sue under section 1981 for a hostile work environment in *Danco, Inc. v. Wal-Mart Stores, Inc.*<sup>96</sup> After little consideration, the court specifically found that an independent contractor may sue under section 1981.<sup>97</sup> The plaintiff in that case, a Mexican-American, maintained parking lots for several stores, including Wal-Mart.<sup>98</sup> The plaintiff, Guiliani, and his company, Danco, were not employees of the store, but independent contractors.<sup>99</sup> Guiliani identified three incidents to support his claim of a hostile working environment: (1) the words “White Supremacy” were sprayed on the parking lot where Guiliani unloaded his equipment, (2) another employee remarked that he did not like Puerto Ricans and threatened to “rip Guiliani’s head off,” and (3) that same employee made another racial slur directed toward Guiliani.<sup>100</sup> When Wal-Mart hired a new manager, Guiliani and Danco were fired, allegedly because the parking lot was not clean enough.<sup>101</sup>

The jury found Wal-Mart liable for \$650,000 on the hostile work environment claim; the court remitted the amount to \$300,000.<sup>102</sup> On appeal, the court examined the legislative history of the Civil Rights Act of 1991 and found that nothing prohibits an independent contractor from suing under a hostile work environment theory.<sup>103</sup> Further, the court did not find any legislative history or well-reasoned case law specifically addressing this issue.<sup>104</sup> The court, in affirming the district court, held

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94. *Capitol Mktg. Assoc.*, 1991 U.S. Dist. LEXIS 4570, at \*4.

95. *Id.* at \*7 (citing *Gonzalez v. Home Ins. Co.*, No. 85 CIV 5856(JMC), 1989 WL 106467 (S.D.N.Y. July 28, 1989) (holding that termination of insurance agent’s contract is subject to suit for discrimination claim under section 1981)). Both cases were decided under *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), prior to the 1991 Amendments to section 1981.

96. 178 F.3d 8 (1st Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

97. *Danco, Inc.*, 178 F.3d at 13-14.

98. *Id.* at 10.

99. *Id.* at 10-11.

100. *Id.*

101. *Id.* at 10-11.

102. *Danco, Inc.*, 178 F.3d. at 12.

103. *Id.* at 14.

104. *Id.*

that an independent contractor can sue under section 1981 for a hostile working environment.<sup>105</sup> The First Circuit rejected both of Wal-Mart's arguments: (1) that the legislative history reveals that the framers intended to protect only employees, not independent contractors, and (2), that liability would be extreme for the contracting party under this decision.<sup>106</sup> It reasoned that Congress intended to expand the coverage of section 1981 and the text of the statute should not be read as words of limitation.<sup>107</sup>

However, in dicta, the court did impose two limits on this type of suit. First, the theory is probably limited to independent contractors who work on the site of the employer. Secondly, only the independent contracting party may sue.<sup>108</sup> This second limitation means that, in the future, only a proper party to the contract can sue; thus, the First Circuit reasoned that only Danco should have been able to bring the claim, not Guiliani.<sup>109</sup> Therefore, the First Circuit allows an independent contractor to sue for a hostile work environment under section 1981.

#### *E. Other Civil Rights Legislation's Views on Independent Contractors Suits*

No other civil rights legislation dealing with employment-type relationships offers protection to independent contractors. Most importantly, Title VII of the Civil Rights Act of 1964 does not protect independent contractors from discrimination in workplace environments. The text of Title VII provides that:

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 . . .<sup>110</sup>

Although the text of the statute applies to "any individual," courts view the word "employment" as strictly limiting the protection to employees.<sup>111</sup> Additionally, Title VII defines an employee circularly as "an in-

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105. *Id.*

106. *Id.* at 14.

107. *Danco, Inc.*, 178 F.3d at 14.

108. *Id.*

109. *Id.* at 14-15.

110. 42 U.S.C. § 2000e-2(a)(1) (1994) (emphasis added).

111. See *Knight v. United Farm Bureau*, 950 F.2d 377, 380 (7th Cir. 1991) (holding that an insurance agent was an independent contractor, not employee of insurance company, and thus not

dividual employed by an employer.”<sup>112</sup> Agreeing with other circuits, the Eleventh Circuit has not expanded Title VII to protect independent contractors.<sup>113</sup> Further, the Age Discrimination in Employment Act does not apply to independent contractors, but only to employees because it adopts the Title VII definition.<sup>114</sup> Moreover, the Americans with Disability Act also exempts independent contractors from its scope.<sup>115</sup>

Although federal law may not allow independent contractors to sue, some state civil rights law specifically provide a cause for independent contractors.<sup>116</sup>

#### IV. CONCLUSION

Although all courts, with the exception of the Northern District of Alabama, have allowed an independent contractor to sue by claiming a hostile work environment under section 1981, nothing in the text or legislative history specifically extends protection to an independent contractor. The legislative history of the 1991 amendments to section 1981 does generally expand the coverage of the statute. Alabama courts apply a right to control test, which evaluates who controls the details in the working environment, to determine if an individual is an employee or independent contractor. Consequently, one who employs an independent contractor owes no common law duty to that independent contractor with respect to any conditions in the working environment. Given the past history of decisions, a court should allow an independent contractor to sue for a hostile work environment under section 1981.

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protected by Title VII); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980) (holding that a musician, under an independent contract arrangement, was not protected by Title VII because there is no employment connection required after examining the legislative history).

112. 42 U.S.C. § 2000e(f) (1994).

113. *Cobb v. Sun Papers, Inc.*, 673 F.2d 337 (11th Cir. 1982).

114. See 29 U.S.C.A. § 630(f) (1994) (defining employee as “an individual employed by any employer”); see also *Oestman v. National Farmers Union Ins. Co.*, 958 F.2d 303 (10th Cir. 1992) (applying a hybrid test to determine if insurance agent is an employee or independent contractor under ADEA); *Frondui v. Trinity Indust.*, 928 F. Supp. 1107 (M.D. Ala. 1996) (holding that coverage of the ADEA does not extend to protect independent contractors).

115. See 29 U.S.C.A. § 1211(4) (1994) (defining employee as “an individual employed by an employer.”); see also *Dykes v. Depuy, Inc.*, 140 F.3d 31 (1st Cir. 1991) (holding that the ADA does not protect independent contractors); *Robinson v. Bankers Life & Cas. Co.*, 899 F. Supp. 848 (D.N.H. 1995) (holding that the defendant insurance company was not plaintiff’s employer within the meaning of ADA, and therefore, the agent’s complaint failed to state a claim).

116. See, e.g., *Cody v. Sutar*, 6 Mass. L. Rptr. 457, 1997 WL 109563 (Mass. Super. Mar. 11, 1997) (allowing a real estate sales person who was an independent contractor to sue under a state anti-sexual harassment statute); see also *Marquis v. City of Spokane*, 922 P.2d 43, 56-59 (1996) (Madsen, J., dissenting) (holding that where the legislative history of a state anti-discrimination statute does not mention independent contractors, there should be no cause of action for an independent contractor alleging discrimination in the making or performance of a contract for personal services).

