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**CHAPTER 2: SECTION 1981, 42 USC §§1981-1988  
EEO LAW BASICS**

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**EEO LAW BASICS**

**CHAPTER:** 2 SECTION 1981, 42 USC §§1981-1988

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**ITEMS:** A through H



## 2-A | WHO IS PROTECTED UNDER SECTION 1981?

1) All persons within the jurisdiction of the United States have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and are subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

All jurisdictions that have addressed the employment-at-will issue have held that the employment-at-will relationship is a contract for Section 1981 purposes. The following discussion is limited to situations in which an employer has violated Section 1981 in his/her relations with an employee.

2) Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987): Racial discrimination prohibited by Section 1981 is any discrimination against identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.

3) Hostile environment-racial harassment claims and race-based constructive discharge also may be brought under Section 1981

4) Retaliation claims premised on assertion of rights are also protected by Section 1981

5) A Section 1981 claim CANNOT be based on allegations of national origin, religious discrimination, citizenship status, gender discrimination, disability or age discrimination

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## **2-B | WHO MAY BE LIABLE UNDER SECTION 1981?**

### **1) Private Sector Employers**

- a) There is no restriction as to employer size, which is found in other anti-discrimination statutes.
- b) The employer may be liable under certain circumstances for acts of intentional discrimination by employees even when the employees are not supervisors.
- c) Under certain circumstances, the parent corporation may be liable for discriminatory acts of its subsidiary.
- d) Supervisors may be individually liable if they make or recommend employment decisions.
- e) There is no liability for a corporate official when he/she did not participate in discrimination.

### **2) Public Sector Employers**

- a) Section 1981 does not waive sovereign immunity in suits against the United States. Federal officials may be personally liable for ultra vires acts/unauthorized acts or acts beyond the scope of their power.
- b) Local government employers
- c) State government employers
  - (1) State governmental entities and officers sued in official capacity enjoy sovereign immunity.
  - (2) State officials, in their individual capacity, may be sued for injunctive relief and damages.

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**2-C | WHAT IS PROHIBITED UNDER SECTION 1981?**

1) Section 1981 guarantees freedom from racial discrimination in the making, enforcement performance, modification, and termination of contracts.

2) Section 1981 also guarantees enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship

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**2-D | WHAT ARE THE REQUIRED ELEMENTS OF A SECTION 1981 CLAIM?**

1) General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982):

To state a claim:

- a) The plaintiff must allege deprivation of rights caused by racial discrimination (i.e., that the person was deprived of a right which, under similar circumstances, would have been accorded to a person of a different race);
- b) The plaintiff must present sufficient evidence to allow the jury to conclude that the defendant's action was motivated by racial considerations.
- c) Proof of disparate impact alone is insufficient.
- d) The plaintiff must establish a purposeful intent to discriminate.

2) Patterson v. McLean Credit Union, 491 U.S. 164 (1989):

Section 1981 prohibits not only racially motivated refusals to contract, but it also prohibits offers to enter into contracts only upon discriminatory terms.

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## 2-E | WHAT IS THE BURDEN OF PROOF UNDER SECTION 1981?

1) Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981):

The plaintiff maintains the ultimate burden of proving intentional racial discrimination under Section 1981.

2) The plaintiff's burden includes establishing a prima facie case of intentional discrimination by a preponderance of the evidence.

3) Under the burden shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and reiterated in Burdine, 450 U.S. 248 (1981), the plaintiff may prove intentional discrimination either by direct evidence of racial discrimination or by an inference of racial discrimination.

4) When the plaintiff has no direct evidence of racial discrimination, the plaintiff's claims must be analyzed under the framework established by the Supreme Court in McDonnell Douglas. Under this framework, the Plaintiff must prove that:

- (a) she is a member of a protected class;
- (b) an adverse employment action occurred;
- (c) similarly situated persons outside her protected class were treated differently.

McDonnell Douglas, 411 U.S. 792; Burdine, 450 U.S. 248.

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**2-F | THERE CAN BE NO SECTION 1981 CAUSE OF ACTION BASED ON DISPARATE IMPACT**

1) General Building Contractors Assn. v. Pennsylvania United Engineers and Constructors, Inc., 458 U.S. 375, 388-91 (1982):

Section 1981 only prohibits purposeful discrimination.  
It does not prohibit disparate impact discrimination.

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**2-G | WHO MAY SUE UNDER SECTION 1981?**

- 1) An individual may bring suit.
- 2) Section 1981 suits MAY NOT be pursued by organizations whose injuries derive only from the violation of others' civil rights.

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**2-H | WHAT DAMAGES ARE ALLOWED UNDER A SECTION 1981 CLAIM?**

The following relief may be obtained:

- 1) Unlimited monetary damages;
- 2) Compensatory damages;
- 3) Future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses;
- 4) Punitive damages when the employer (except municipalities) discriminated with malice or with reckless indifference to the federally protected rights of an aggrieved individual; and
- 5) Injunctive relief.

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APPENDIX



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