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What Is the Time Limit for Filing a Lawsuit?
It Depends on What Your Definition of "Arising Under" Is!

by Barbara J. Fick

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42 U.S.C. § 1981, originally enacted by Congress in 1866, gives all persons the same right "to make and enforce contracts" as is enjoyed by white citizens, thus providing a cause of action for race discrimination in the making of, among other things, employment contracts. As with many federal statutes, § 1981 did not contain its own statute of limitations for filing a lawsuit. The Supreme Court has held that when federal law does not supply a statute of limitations, the courts should apply the most closely analogous state-law statute of limitations so long as it is not inconsistent with federal law. In the case of § 1981, the Supreme Court determined that when federal law does not supply a statute of limitations, the courts should apply the most closely analogous state-law statute of limitations so long as it is not inconsistent with federal law. In the case of § 1981, the Supreme Court determined that courts should apply the forum state’s limitations period for personal injury suits. Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).

The scope of the rights protected under § 1981 was unclear: did the phrase “make and enforce contracts” include only discrimination in the initial act of contract formation (i.e., hiring), or was it broad enough to include discrimination in terms and conditions of employment as well as firing? In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court held that § 1981 prohibits discrimination only as to the initial decision to enter into the contract (i.e., hiring) and does not apply to any conduct occurring thereafter.

In response, Congress amended § 1981 by passing the Civil Rights Act of 1991, adding to 42 U.S.C. § 1981 a subsection (b) that specifically defines the term “to make and enforce contracts” to include not only the initial contract formation but also "termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Codified at 42 U.S.C. § 1981(b).

In the interim between the Patterson decision and the amendment to § 1981, Congress enacted

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28 U.S.C. § 1658, a catch-all uniform statute of limitations of four years that governs actions arising under federal laws enacted after December 1, 1990, (the date of the enactment of § 1658) whenever the federal law does not contain its own limitations period. The purpose behind § 1658 was to supplant the uncertainty and variations created by the previous rule under which courts attempted to identify the most closely analogous state statute of limitations to apply in the absence of a federal rule.

**ISSUE**

In deciding the statute of limitations for lawsuits filed under 42 U.S.C. § 1981 alleging race discrimination with respect to firing and terms and conditions of employment, should courts apply the forum state's personal injury limitations period or the four-year catch-all period contained in 28 U.S.C. § 1658?

**FACTS**

R.R. Donnelley & Sons is a commercial printing company that operated a manufacturing plant in Chicago. The Chicago plant was closed in July 1994. On November 25, 1996, a class action lawsuit was filed in federal district court for the northern district of Illinois under 42 U.S.C. § 1981 alleging that R.R. Donnelley had discriminated against its African American employees by 1) discharging African American employees when the plant closed but giving white employees the opportunity to transfer; 2) regularly assigning African American employees to nonpermanent jobs at the Chicago plant whereas white employees were assigned to permanent jobs; and 3) subjecting African American employees to a racially discriminatory work environment.

Donnelley filed a motion for partial summary judgment seeking dismissal of all claims that arose prior to November 26, 1994, asserting that those claims fell outside the Illinois two-year statute of limitations for personal injury lawsuits, a limitations period that was to be applied pursuant to *Goodman*. The district court denied Donnelley's motion as to the first and third category of claims, holding that these claims were governed by the statute of limitations established in 28 U.S.C. § 1658. (The court left open the limitations question as to the second category of claims.) The court determined that claims relating to discharge and terms and conditions of employment (i.e., harassment) were cognizable only after Congress amended § 1981 in 1991; therefore these claims arose under a federal law enacted after December 1, 1990, and thus were governed by § 1658. *Jones v. R.R. Donnelley & Sons*, 149 F. Supp. 2d 459 (N.D. Ill. 2001).

The district court granted Donnelley's motion to certify to the Seventh Circuit Court of Appeals the question whether the termination and harassment claims were governed by § 1658 or by the Illinois personal-injury statute of limitations. The Seventh Circuit accepted Donnelley's appeal. The Seventh Circuit disagreed with the district court's interpretation of § 1658. It held that the phrase used in § 1658, "an Act of Congress enacted after" December 1, 1990, is not the same as "an Act of Congress enacted or amended" after that date. When Congress amends an existing statute it does not create a new act. Section 1658 applies only when Congress creates a wholly new cause of action. When Congress amended § 1981 by supplying a broader definition for the term "to make and enforce contracts" it was not creating a new statutory provision but merely more precisely defining an existing right. Therefore § 1658 does not apply to plaintiffs' § 1981 claims; rather their cause of action is governed by Illinois' two-year personal injury limitations period as per *Goodman*. *Jones v. R.R. Donnelley & Sons Co.*, 305 F.3d 717 (7th Cir. 2002). Plaintiffs filed a petition for writ of certiorari with the Supreme Court, which the Court granted. 123 S.Ct. 2074, 155 L.Ed. 2d 1059 (2003).

**CASE ANALYSIS**

The arguments in this case are focused on interpreting the phrase, contained in 28 U.S.C. § 1658, "a civil action arising under an Act of Congress enacted after" December 1, 1990.

Petitioners assert that the 1991 congressional amendment of § 1981 expanded the scope of the statute and created substantive rights that had not existed before the amendment. The Supreme Court in *Patterson* quite clearly held that claims of race discrimination relating to discharge and racial harassment were not cognizable under the original § 1981.

Moreover, the Supreme Court has acknowledged that Congress's 1991 amendment of § 1981 created an entirely new cause of action. In *Rivers v. Roadway Express*, 511 U.S. 298 (1994), the Court held that the obligations imposed by the 1991 amendment should not be applied retroactively because they created causes of action that "had no legal existence before th[at] Act passed." The amendment was not solely definitional but created new legal obligations, expanding the scope of the original protections contained in § 1981.

The term "enact" means "to make into law"; thus every statute passed by Congress, whether it deals with an entirely new subject or amends an existing law, is an enactment.
Petitioners' claims constitute a civil action arising under an act of Congress enacted after December 1, 1990 and the four-year statute of limitations from 28 U.S.C. § 1658 applies.

The United States, in an amicus brief supporting petitioners, notes that the term “arising under” has a settled legal meaning. The Supreme Court has held that a claim “arises under” federal law if either federal law creates the cause of action or the plaintiff's right to relief depends on resolution of a substantial question of federal law. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). Petitioners' claims in this case clearly arise under the 1991 amendment because that was the federal law that created their cause of action. As the Supreme Court in *Patterson* made clear, petitioners had no cause of action for racial harassment or discriminatory discharge under the original § 1981.

The key question for deciding if § 1658 applies is not the method Congress used to create the new cause of action (i.e., the process) but rather whether Congress has created a new cause of action (i.e., the substance). Congress may create a cause of action by enacting a free-standing statute or by enacting an amendment to an existing statute. The substance of a congressional enactment may change the burden of proof governing an existing claim or may create an entirely new claim. In the former case, a plaintiff's chances for success may improve or decrease but the existence of the plaintiffs' claim has not been affected. The 1991 amendment was an act of Congress that created a new cause of action.

When Congress enacted § 1658 it determined that it would apply prospectively only so as not to disrupt the settled expectations of litigants with respect to previously enacted legislation. While parties had expectations with respect to the limitations period for claims of discrimination in hiring under the original § 1981, there was no such expectation as to claims relating to discharge or terms and conditions of employment, since such claims did not exist. Therefore, application of § 1658 to the 1991 amendment of § 1981 will not disrupt settled expectations.

Moreover § 1658 does not require that a claim must exclusively arise under an act enacted after December 1, 1990, only that it arise under such an act. That petitioners' claims depend in part on the original § 1981, as well as the amended section, does not undermine the fact that their claims arise under the 1991 amendment.

Applying § 1658 to some claims that arise under § 1981 (those based on the 1991 amendment) and applying the forum state personal-injury limitation period to other claims arising under the original § 1981 will not be unworkable. Courts routinely apply different statutes of limitations to different claims within the same lawsuit.

Respondent counters that the term “arising under” is ambiguous and should be interpreted based on the statutory context and purpose. Congress intended to preserve the limitations period for existing statutory regimes and to create the catch-all limitation rule only for newly created statutory regimes; that is why Congress expressly stated that § 1658 should be applied prospectively only. There was a clearly existing statute of limitations rule for the § 1981 statutory regime, established by the Supreme Court in *Goodman*, which predates the passage of § 1658.

A civil action arises from the statute that codifies the elements of a claim. In this case, petitioners' claim is that there was racial discrimination in the making of a contract, a claim that is codified in the original § 1981. The 1991 amendment (§ 1981(b)) is a definitional subsection of the original text that states that the term “to make” a contract includes the termination of the contract and the terms and conditions of the contract. Thus petitioners are suing for racial discrimination in the making of a contract (a cause of action arising under the original § 1981), which is defined by the 1991 amendment to include claims of discharge and racial harassment. A cause of action does not arise under a statute's definitions, but rather under its substantive terms, which in this case is the original § 1981.

The respondent further contends that petitioners' interpretation of § 1658 will create uncertainty and increased litigation. It is often difficult to determine whether an amendment modifies an existing right or creates a new one. Every time Congress amends a federal statute, there will be litigation about whether § 1658 applies. Indeed, in this case the district court refused to decide whether § 1658 applied to the second category of claims (discriminatory assignment) because further facts needed to be developed in order to determine whether those claims were actionable under *Patterson* before the 1991 amendment.

Civil actions that arise under statutory regimes that pre-date § 1658 (such as § 1981) have established limitations periods that Congress intended to preserve. A claim “arises under” a statute enacted after December 1, 1990, only if the statute creates a wholly new claim

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that does not have an existing statute of limitations. Petitioners’ claims in this case arise under § 1981 and are governed by the existing statute of limitations rule as established in Goodman.

SIGNIFICANCE
The Court’s decision on this issue could determine the outcome of the entire case. The overwhelming majority of petitioners’ claims will be time barred if the Court applies the two-year Illinois personal injury limitations period as per Goodman. On the other hand, if the Court applies the § 1658 four-year limitations period, respondent will be facing claims from more than 500 former employees in this class action.

On a broader scale, the Court’s interpretation of § 1658 will provide guidance to the lower courts in determining when to apply this federal catch-all limitations period to other federal statutes.

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