

U.S. Supreme Court Holds Section 1981 Racial Discrimination Claims Require But-For Causation

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In a [unanimous decision](#) issued on March 23, 2020, the United States Supreme Court held that a but-for causation standard applies to claims brought under Section 1981 of the Civil Rights Act of 1866. The Supreme Court also noted that this standard applies throughout the litigation process, including the initial pleading stage.

The Civil Rights Act of 1866, a Reconstruction-era statute, includes Section 1981, which guarantees “[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” In *Comcast Corp. v. National Association of African American-Owned Media*, the plaintiff pursued a number of theories, but essentially argued that the Court should adopt the [motivating factor test](#) employed in cases arising under Title VII of the Civil Rights Act of 1964. Employment law practitioners often will see complaints including counts for both violations of Title VII and Section 1981. It is important to recognize that the causation standards are different for these two statutes.

By way of background, plaintiff Entertainment Studios Network (ESN), owned principally by prominent African-American media entrepreneur, Byron Allen, sued Comcast, claiming that Comcast’s decision not to carry ESN channels was racially motivated. Seeking billions in damages, ESN alleged that Comcast systematically disfavored “one hundred percent African-American-owned media companies.” While ESN acknowledged that Comcast offered legitimate business reasons for refusing to carry its channels, ESN contended those reasons were merely pretextual.

The district court entered judgment on a motion to dismiss after giving ESN several opportunities to plausibly show that, but-for racial *animus*, Comcast would have contracted with ESN. After reviewing three rounds of pleadings, the district court dismissed the cause of action with prejudice. The Ninth Circuit reversed, concluding that the district court used the wrong causation standard when assessing ESN’s pleadings. Specifically, the Ninth Circuit held that a plaintiff must only plead facts plausibly showing that race played “some role” in the defendant’s decision-making process. The Ninth Circuit’s decision placed it at odds with other federal circuits,

including the Seventh Circuit. Comcast appealed and the stage was set for the Supreme Court to resolve the circuit split and determine which causation test should be used in Section 1981 cases.

Writing for the Court, Justice Gorsuch found that a plaintiff in a Section 1981 case must ultimately prove but-for causation. Justice Gorsuch began his analysis by noting that it is textbook tort law that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation. In arguing that the Ninth Circuit was

correct, ESN at times appeared to argue that a Section 1981 plaintiff only bears the burden of showing that race was a "motivating factor" in the defendant's challenged decision. According to Justice Gorsuch, ESN also appeared to argue that while a Section 1981 plaintiff ultimately does need to prove but-for causation, the rule could be different at the pleading stage. Neither argument succeeded.

In examining the text and history of Section 1981, the Supreme Court found multiple reasons to support a but-for causation standard. The opinion pointed out that Section 1982 of the same Act, which deals with the conveyance of real and personal property, requires a plaintiff to show that the challenged conduct was because of race. Justice Gorsuch noted it would be odd to require but-for causation from a Section 1982 plaintiff, but then demand less from a Section 1981 plaintiff.

The Supreme Court also was not persuaded by ESN's suggestion that the motivating factor test from Title VII of the Civil Rights Act of 1964 should be incorporated into Section 1981 jurisprudence. The Supreme Court noted that the motivating factor analysis was first employed by the Court in *Price Waterhouse v. Hopkins*, and then later codified in a modified form in the Civil Rights Act of 1991. When Congress enacted the Civil Rights Act of 1991, which amended Title VII, it also amended certain provisions of Section 1981, but did not do anything with the commonly understood causation standard. After tracing the development of the motivating factor causation test, the Supreme Court rejected the notion that it should be adopted for Section 1981.

Ultimately, the Supreme Court held that to prevail on a Section 1981 claim, a plaintiff must initially plead and ultimately prove that but for race, the plaintiff would not have suffered the loss of a legally protected right. Since the Ninth Circuit reversed the district court's judgment on the motion to dismiss on the wrong legal standard, the Supreme Court returned the case to the Ninth Circuit for consideration of the appeal on the district court's judgment under the proper legal standard.

In a separate concurring opinion, Justice Ginsburg joined in the Supreme Court's ruling on but-for causation, but noted that an equal right to make contracts is an empty promise without equal opportunities to present or receive offers and negotiate over terms. She observed that if race indeed accounted for Comcast's conduct,



Comcast should not escape liability for injuries inflicted during the contract formation process. As the Supreme Court reserved that issue for consideration on remand, Justice Ginsburg joined in the opinion on the issue of causation.

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