

5 Differences Between Title VII And Section 1981 That Can Help Your Employment Race Discrimination Case

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Two important federal laws protect employees from racial discrimination: Title VII of the 1964 Civil Rights Act (Title VII) and 42 U.S.C. 1981 (Section 1981). Courts often analyze legal claims under these two statutes in a very similar, if not identical, fashion and the same set of facts can be pursued under both laws simultaneously.

Congress and the Supreme Court, however, have made it clear that, while these two statutes are similar, they remain separate and distinct causes of actions. It is thus important to know how the differences between Title VII and Section 1981 can help, or potentially sink, your case.

Title VII of the 1964 Civil Rights Act

The [U.S. Department of Justice](#) provides the following helpful summary of Title VII:

Title VII makes it unlawful to discriminate against someone on the basis of race, color, national origin, sex (including pregnancy and gender identity) or religion. The Act also makes it unlawful to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

Section 1981

Originally included as part of the Civil Rights Act of 1866, Section 1981(a) states in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, 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 shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other

On a broader level, both statutes outlaw employment discrimination based on race. But five key differences exist between these two related laws that can make or break your case.

Difference #1: Title VII, but not Section 1981, prohibits disparate impact discrimination

Title VII outlaws intentional discrimination based on gender, race, national origin, and other protected characteristics during the hiring process. But Title VII also prohibits using hiring practices that are neutral on their face (such as written tests), which have a discriminatory outcome: disproportionately excluding female, African-American, and other protected classes of applicants.

Under the [disparate impact theory](#), even if the employer did not *intend* for an employment practice to exclude protected groups, if the practice ultimately has the *effect* of rejecting an excessive number of otherwise qualified, for example, female or African-American applicants, then using the practice might violate Title VII.

Section 1981, on the other hand, outlaws only intentional discrimination.

So if your case involves a disparate impact claim challenging, for example, an employment test or a compensation system, that claim may be pursued under Title VII, but not Section 1981.

Difference #2: Section 1981 does not require an EEOC charge to be filed

To file a Title VII lawsuit in court, an employee must first have exhausted their administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). And depending on which state the employee lives in, the time period can be either 180 or 300 days to file the charge if the employee works in the private sector. Different procedures and time periods apply if the employee works for the federal, state, or local government.

Section 1981, however, does not require an employee to file a charge of discrimination with the EEOC. This distinction is particularly important if the employee has missed the deadline to file an EEOC charge of discrimination because the employee may still be able to assert a claim under Section 1981.

Difference #3: Section 1981 has a longer statute of limitations than Title VII

As noted above, the deadline for filing an EEOC charge of discrimination can be up to 300 days, depending on where you live and whether you are in the public or private sector. The EEOC's website has helpful information on what deadline may apply to your claim. Also, a Title VII lawsuit must generally be filed within 90 days after the EEOC's Right to Sue Notice is received.

Claims asserted under Section 1981 though have a significantly longer statute of limitations for filing a lawsuit. Indeed, an employee may file a Section 1981 within four years of the violation. *Jones v.*

Difference #4: Section 1981 does not have any cap on damages

If an employee wins their Title VII employment discrimination case, a cap will apply on the amount of damages that the jury can award. Under Title VII, the most that an individual employee can receive for compensatory damages (to compensate for emotional distress and out of pocket expenses for medical treatment) and punitive damages (designed to punish an employer for particularly malicious or reckless discrimination) is \$300,000. Other forms of monetary damages, including back pay and front pay, are also available under Title VII and are not subject to a cap.

By contrast, no cap on monetary damages exists for a lawsuit brought under Section 1981.

Difference #5: Section 1981 applies only to race discrimination while Title VII covers more classes of people

Section 1981 provides several additional benefits not contained in Title VII, but in at least one area—scope of protected classes—Title VII offers broader coverage.

Section 1981 covers discrimination based only on race or ethnicity.

Title VII covers discrimination based not only on an employee's race and ethnicity, but also, for example, gender and religion.

Practice pointer: asserting national origin claims under Section 1981

One ongoing question about the relationship between Section 1981 and Title VII claims is whether Section 1981 covers national origin discrimination, which Title VII clearly does.

A case out of the U.S. Court of Appeals for the Eighth Circuit, *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011), held that Section 1981 does not cover discrimination based solely on national origin. This and other federal rulings, see, e.g., *Nadesan v. Citizens Financial Group*, 673 Fed.Appx. 47, 49 (2d Cir. 2016), highlight **the need to carefully identify the basis for the claimed discrimination**.

In *Torgerson*, the plaintiff claimed he was discriminated against “on the basis of his national origin.” The 8th Circuit noted that Section 1981 protects “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.” *Id.* at 1052 (quoting *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

For example, if an individual is “subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin ... [then] he will have made out a case under § 1981.” *Id.* at 1053 (citations omitted).

The *Torgerson* case thus holds that Section 1981 does not authorize discrimination claims based on national origin. *Id.* *Torgerson's* complaint, which he never amended to include race discrimination,

stated only, “Defendant has discriminated [] against Plaintiff in the formation of an employment contract on the basis of his national origin, in violation of 42 U.S.C. § 1981.” *Id.* As such, the court dismissed his Section 1981 claim.

End result: if you seek to assert a claim for discrimination that relates to your national origin under Section 1981, it is important to make clear in the complaint and during the litigation of the case that the discrimination also relates to your race, ancestry, or ethnic characteristics.

Takeaways

- If your case involves a disparate impact claim, it should be pursued under Title VII rather than Section 1981;
- You do not need to file an EEOC charge of discrimination in a Section 1981 lawsuit, but you must under Title VII;
- The statute of limitations for a Section 1981 complaint is 4 years, while the deadline to file an EEOC charge of discrimination in a Title VII lawsuit is less than one year (the exact deadline varies on the type of employer and the state you work in);
- No cap on monetary damages exists in a Section 1981 case, but the maximum compensatory and punitive damages that can be awarded in an individual Title VII case is \$300,000;
- If your claim involves discrimination based on a protected characteristic other than race (for example, gender or religion), then Section 1981 likely will not apply although Title VII would still be an option; and
- If you assert a claim for national origin discrimination under Section 1981, courts may require a clear link showing that the claimed discrimination was tied to your race, ancestry, or ethnic characteristics

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