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ANDERSON v. CONBOY 156 F.3d 167 (2d Cir. 1998)

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FACTS AND PROCEDURAL HISTORY

Following his removal from his union office as Business Representative, Linden Anderson, a Jamaican citizen, filed a complaint alleging alienage discrimination in violation of both the Civil Rights Act of 1991 as amended, 42 U.S.C. § 1981, and the New York City Human Rights Law.[1] His complaint also claimed "by terminating [Anderson] as a business representative without service of written specific charges, a reasonable time to prepare a defense, and a full and fair hearing" defendants violated the Labor-Management Reporting and Disclosure Act ("LMRDA").[2] He sought injunctive and declaratory relief, compensatory and punitive damages.[3]

Linden Anderson emigrated to the United States in 1968 and is a legal permanent resident.[4] In 1973, he began working for Local 17 of the United Brotherhood of Carpenters and Joiners ("UBC").[5] Nineteen years later, the UBC membership elected Anderson to the office of Business Representative.[6] For reasons not relevant to this litigation, the UBC was placed under a consent decree.[7] The consent decree designated Kenneth Conboy as Investigations and Review Officer ("IRO").[8] As a court-appointed IRO, his responsibilities included broad oversight of the activities of the District Council of New York and Vicinity ("District Council") of the UBC.[9]

Conboy's investigation of Local Union 17 resulted in a deposition of Anderson held on August 18, 1994.[10] During Anderson's deposition, Conboy discovered that Anderson remained a Jamaican citizen.[11] In a letter dated August 29, 1994, Conboy notified Anderson that he could no longer serve as a UBC officer.[12] Conboy determined that

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[1] Anderson v. Conboy, No. 94 Civ. 9159, 1997 WL 177890, at *2 (S.D.N.Y. Apr. 14, 1997). The New York City Human Rights Law prohibits discrimination on the basis of alienage or citizenship. Chapter 1, second, 8-107(1)(c) and 8-502 of the Administrative Code of New York.

42 U.S.C. § 1981(a) provides: "All persons within jurisdiction of the United States shall have the same right in every state and territory to . . . to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . ." *See also* Civil Rights Act of 1991, Pub.L. No. 102-166, §101, 105 Stat. 1071, 1071-72 (1991).

[2] *Anderson,* 1997 WL 177890, at *2. *See also* Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5).

[3] *Anderson,* 1997 WL 177890, at *2.

[4] *Id.* at *1.

[5] Anderson v. Conboy, 156 F.3d 167, 168 (2d Cir. 1998).

[6] *Id.*

[7] *Id.*

[8] *Anderson,* 156 F.3d at 168.

[9] *Anderson,* 1997 WL 177890, at *1. The Consent Decree conferred upon the IRO the authority "to investigate the operations of the District Council and its constituent locals [and] bring disciplinary charges against officers and members of the District Council and its constituent locals. . . ." *Id.* at *4 (quoting the UBC Consent Decree ¶ 4(a)). Under the Consent Decree, Conboy was authorized to: (1) "initiate disciplinary charges" against any District Council or union member for violations of any law, union constitution or by-law, (2) review and curb expenditures, (3) review contracts and proposed contracts, (4) study and recommend changes to the District Council's operations. *Id.* (omitting citations). The court required Conboy to submit progress reports back to the court for review. *Id.*

[10] *Id.* at *4.

[11] *Id.* at *1.

[12] *Id.*

Anderson was ineligible for service because he was not a United States citizen, in violation of the United Brotherhood of Carpenters and Joiners of America (the "United Brotherhood") Constitution.[13] Specifically, Conboy cited section 31(A), which provides:

> No member shall be eligible to be an officer or business representative, delegate or committee member unless such member is a citizen of the United States or Canada, and the member, to be eligible to serve in any such capacity, must be a citizen of the country in which the Local Union is located.[14]

Following removal from his position on September 19, 1994, Anderson filed a complaint against Conboy, the District Council and its President, Frederick W. Devine, the United Brotherhood, and Sigurd Lucassen.[15] The District Council and Devine filed cross-claims against Conboy[16] for indemnification.[17]

All claims and cross-claims against Conboy were dismissed.[18] The district court found that he had absolute immunity from any liability arising from his activities as court-appointed IRO.[19] The court further determined that Anderson had abandoned his LMRDA claim.[20] Finally, the court dismissed Anderson's claim under section 1981, finding that its protections were limited to racial discrimination.[21] The court declined to exercise supplemental jurisdiction over Anderson's final claim, violation of the New York City Human Rights Law.[22] On appeal, Anderson challenged only the dismissal of his section 1981 claim of alienage discrimination.[23]

HOLDING

The United States Court of Appeals for the Second Circuit reversed the judgment of the district court, concluding that 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991 ("the 1991 amendment"), allows a claim against discrimination by private actors on the basis of alienage.[24] Prior to the 1991 amendment, the statute proscribed alienage discrimination by government actors.[25] The 1991 amendment extended that prohibition to private individuals.[26] Consequently, the statutory prohibitions present in section 1981 served as a proper basis for Linden Anderson's alienage discrimination claim.

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[13] *Id.*

[14] *Id.* (quoting section 31(A) of the constitution and laws of the parent international union, the United Brotherhood of Carpenters and Joiners of America).

[15] At the time of the events, Lucassen was the general president of the United Brotherhood. When Anderson received Conboy's letter informing him that his citizenship was contrary to the union's constitutional requirements, Anderson requested a waiver of the requirement from Lucassen through Devine. The United Brotherhood constitution allowed the granting of such waivers by the general president. Lucassen initially declined Anderson's request, but later reversed his decision. Anderson was reinstated to his position December 14, 1994. However, Local 17 eliminated the business representative position later that same month. *Anderson*, 1997 WL 177890, at *1-2.

[16] The District Council and Devine also filed cross-claims against the United Brotherhood and Lucassen. *Id.* at *1.

[17] *Anderson*, 1997 WL 177890, at *2.

[18] *Id.* at *8.

[19] *Id.*

[20] *Id.* at *9.

[21] *Id.* at *11.

[22] *Id.*

[23] *Anderson,* 156 F.3d at 169.

[24] *Id.*

[25] *Id.* at 178.

[26] *Id.* at 180.

ANALYSIS

The United States Court of Appeals for the Second Circuit engaged in *de novo* review of the district court's dismissal of Anderson's complaint.[27] It is well settled that the 1991 amendment bars racial discrimination by governmental actors in the context of contractual relationships.[28] Section 1981 bans discrimination at all stages of contractual relationships, including termination of an employment contract.[29] Further, the 1991 amendment extended the scope of section 1981 to private actors.[30] In the instant case, the disputed issue was whether the statute also proscribed *alienage* discrimination by private actors.

The post-1991 effect of section 1981 was a question of first impression for the Second Circuit.[31] Few prior cases had examined the application of section 1981 to alienage discrimination by either state or private actors. No other circuit had decided the issue, although two district courts previously had held that section 1981 bans alienage discrimination by private actors.[32] A third district court had taken the opposite position, holding that section 1981 does not prohibit alienage discrimination by private parties.[33]

The sole question on appeal was whether Anderson fell within the class of persons protected by the statute. Initially, the court examined the language of the statute, finding that it was compatible with the argument that section 1981 bans alienage discrimination but was not dispositive of the issue.[34] The relevant portion of the statute provides: "[A]ll *persons* . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed

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[27] *Id.* at 169.

[28] *Id.* at 170.

[29] Section 1981, as amended in 1991, is entitled "Equal rights under the law" and provides:

> (a) 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.
> (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.
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Prior to 1991, subsection (a) comprised the entire statute.

[30] *Anderson*, 156 F.3d at 170.

[31] *Id.* at 169.

[32] *See* Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 913 F. Supp. 248 (S.D.N.Y. 1996) (denying defendants' motion to dismiss a claim under section 1981 alleging alienage discrimination by a brokerage firm in refusing to open an investment account for a Canadian citizen); Chacko v. Texas A & M Univ., 960 F. Supp. 1180 (S.D. Tex. 1997), *aff'd*, 149 F.3d 1175 (5th Cir. 1998) (denying a summary judgment motion on a section 1981 claim by a Canadian citizen against a state university for discriminatory termination of an employment contract).

[33] *See* Murtaza v. New York City Health & Hosps. Corp., No. 97-CV-4554, 1998 WL 229253 (E.D. N.Y. Mar. 31, 1998) (relying upon a pre-1991 case, *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981)), and perceived conflict between the statute and the Immigration Reform and Control Act of 1986. *Anderson*, 156 F.3d 177-78 & n.18.

[34] *Anderson*, 156 F.3d at 171.

by *white citizens*."[35] Although the juxtaposition of "persons" with "citizens" supports a reading prohibiting discrimination on the basis of alienage, it simultaneously permits an alternative interpretation. It may merely guarantee that non-citizens enjoy the same freedom from racial discrimination as citizens.[36] Determining the scope of the text to be unclear, the court looked further to the legislative history of the Act, focusing particularly on the statute's structure.[37]

The present statute consolidates provisions of two separate enactments:[38] section 1 of the Civil Rights Act of 1866 ("1866 Act"),[39] and section 16 of the Voting Rights Act of 1870 ("1870 Act").[40] Because section 1 of the 1866 Act was passed pursuant to the enabling section of the Thirteenth Amendment, it proscribes race discrimination by private as well as state actors.[41] Nevertheless, section 1 of the 1866 Act originally prohibited only acts of racial discrimination against "citizens."

Ultimately, the basis for any prohibition against alienage discrimination found in section 1981 must have its origin in section 16 of the 1870 Act.[42] The 1870 Act was passed pursuant to the Fourteenth Amendment, which prohibited discrimination by state actors.[43] Although the language of section 16 resembles that found in section 1 of the 1866 Act,[44] the court noted the particularly relevant difference in language between the two. While section 1 protected solely "citizens," section 16 protected "all *persons* within the jurisdiction of the United States." The use of "persons" mirrors the language of the Fourteenth Amendment upon which the 1870 Act was based.[45] This choice of language indicates congressional intent to extend "the country's guarantee of the equal protection of the laws to 'any person within its

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[35] 42 U.S.C. § 1981(a) (1998) (emphasis added).

[36] *Anderson,* 156 F.3d at 171.

[37] *Id.* at 172-75.

[38] *See* Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1350 (5th Cir. 1987) (en banc): "[Section] 1981 is a redactor's amalgam of two different enactments, each aimed at a different group."

[39] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866). Section 1 of the 1866 Act provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

"The portions of Section 1 concerning the rights to 'inherit, purchase, lease, sell, hold, and convey real and personal property,' were codified to create what is now 42 U.S.C. § 1982 (1998)." *Anderson*, 156 F.3d at 172 n.8.

[40] Voting Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (1870). Portions are identical to the present 42 U.S.C. § 1981(a) (1998).

[41] *Anderson*, 156 F.3d at 171. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Choudhury v. Polytechnic Inst. of N.Y., 735 F.2d 38 (2d Cir. 1984).

[42] *Anderson,* 156 F.3d at 173.

[43] *Id.*

[44] Notably, the current 42 U.S.C. § 1981(a) contains language identical to section 16.

[45] *Anderson*, 156 F.3d at 173.

jurisdiction.'"[46]

The court next examined the legislative history of the 1870 Act. Senator Stewart of Nevada sponsored the bill "which, with minor revisions, would become sections 16 through 18 of the 1870 Act."[47] Senator Stewart indicated that his immediate purpose was the protection of the Chinese aliens in California from burdensome and discriminatory state laws.[48] In the instant case, Chief Judge Winter observed that "the desire to protect Chinese immigrants from discrimination, however, is as consistent with prohibiting racial discrimination as with prohibiting alienage discrimination."[49]

Ultimately, the court found its most persuasive evidence of congressional intent to ban alienage discrimination in the structure of the 1870 Act. Both sections 16 and 17 are drawn from the bill sponsored by Senator Stewart, S. 365.[50] Section 17 of the 1870 Act, "provided for criminal sanctions for any person who, under color of law," deprived "any inhabitant of any State or Territory . . . of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties *on account of such person being an alien*, or by reason of his color or race, than is prescribed for the punishment of citizens."[51] Section 17, a criminal statute, has no direct application to the instant case.[52] Its specific relevance here is enforcement of rights protected by section 16.[53] The court reasoned that section 17's enforcement of criminal penalties for those discriminating against aliens would be "anomalous" if section 16 did not include aliens within its statutory protections.[54]

The court further supported its conclusion that section 1981 has *always* prohibited alienage discrimination by reviewing the case law on point. Only two courts of appeal, the Fourth Circuit and the Fifth Circuit, have directly addressed the application of section 1981 to alienage discrimination.[55] Both courts agreed that the pre-1991 statute prohibited governmental

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[46] *Id.*

[47] *Id.* Senator Stewart saw the bill as "simply extend[ing] to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section [of the 1866 Act]."

[48] *Id.*

[49] *Id.* at 174.

[50] Evidence of congressional intent to extend section 16's protections to aliens is provided by another statement by Senator Stewart: "'we will protect Chinese aliens or any other aliens whom we allow to come here.'" *Anderson*, 156 F.3d at 174 (quoting Cong. Globe, 41st Cong., 2d Sess.).

[51] *Id.* (quoting Voting Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 at 144 (1870)) (emphasis added). Section 17 is codified, as amended, at 18 U.S.C. § 242 (1998). The complete text of section 17 provides: "And be it further enacted, That any person who, under color of any law, statute, or ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." *See Anderson*, 156 F.3d at 175 & n.15 for further discussion of the amendments to section 17.

[52] *Anderson*, 156 F.3d at 175.

[53] *Id.*

[54] *Id.* "If, therefore, Section 16 did not prohibit discrimination on the basis of alienage, Section 17, imposing criminal penalties for depriving a person of those specific rights 'on account of such person being an alien,' would be so anomalous as to make no sense."

[55] *See* Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987) (en banc) (overruling Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974)), *vacated,* 492 U.S. 901 (1989), *reinstated on remand,* 887 F.2d 609 (5th Cir. 1989) (per curiam) (decided prior to the 1991 amendment); Duane v. Geico, 37 F.3d 1036 (4th Cir. 1994).

discrimination on the basis of alienage.[56] Nevertheless, they reached opposite conclusions as to whether section 1981's prohibitions extended to private actors prior to the 1991 amendment.[57] Both the Fourth Circuit and the Fifth Circuit courts recognized that the pre-1991 statute went beyond race discrimination to prohibit alienage discrimination.[58]

The United States Supreme Court expressly declined to decide whether section 1981 prohibits alienage discrimination by private actors in *Espinoza v. Farah Manufacturing Company.*[59] However, twice it has cited section 1981 while considering and, ultimately, invalidating state laws that discriminated against aliens. The Court neither specifically construed nor relied upon section 1981 in *Takahashi v. Fish and Game Commission*[60] or *Graham v. Richardson.*[61] However, both opinions provide relevant dicta.[62] In *Takahashi*, the court declared unconstitutional a California ban on the issuance of commercial fishing licenses to "any person ineligible to citizenship."[63] The *Anderson* court concluded that "*Takahashi* thus implicitly supports the proposition that the pre-1991 section 1981 proscribed state laws that discriminate on the basis of alienage."[64] The Supreme Court partially relied upon *Takahashi* in deciding *Graham.* There the Court determined that state welfare laws differentiating between citizens and non-citizens in their criteria violated the Equal Protection Clause.[65] Referring to section 1981, the Court noted that these laws overrode "national [immigration] policies" against alienage discrimination.[66]

The court summarily dismissed the two instances in which district courts have concluded that section 1981 does *not* prohibit alienage discrimination.[67] In *Rios v. Marshall,*[68] the *Anderson* court held, the court construed sections 1981 and 1982 as "companion" cases, finding that claims under

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[56] *Anderson*, 156 F.3d at 175-76.

[57] *Id.* The Fifth Circuit concluded in *Bhandari* that section 1981 only bans alienage discrimination by government actors. The Fourth Circuit held in *Duane* that the pre-1991 statute prohibited such discrimination by private actors as well.

[58] "The enactment of section 1981(c) in 1991 mooted the arguments made in *Bhandari* and *Duane* over whether Congress, in enacting the provisions which later became present-day section 1981, meant to prohibit private citizenship discrimination." *Id.* at 176 (quoting *Cheung*, 913 F. Supp. at 251).

[59] Espinoza v. Farah Mfg. Co., 414 U.S. 86, 96 n.9 (1973).

[60] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[61] Graham v. Richardson, 403 U.S. 365 (1971) (invalidating state welfare laws that either denied benefits to non-citizens or imposed residency standards not required of citizens).

[62] The *Anderson* court provides the following language from *Takahashi*: "'Congress, in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization, has broadly provided: [Text of Section 1981...] The protection of this section has been held to extend to aliens as well as to citizens." *Anderson*, 156 F.3d at 177 (quoting *Takahashi*, 334 U.S. at 419) (footnotes and citation omitted).

[63] *Anderson*, 156 F.3d at 177 (quoting *Takahashi*, 334 U.S. at 413).

[64] *Id.*

[65] *Id.* The Equal Protection Clause of the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

[66] *Anderson*, 156 F.3d at 177 (quoting *Graham*, 403 U.S. at 378). Further, "'State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies' set forth in . . . Section 1981." *Id.*

[67] *See* Murtaza v. New York City Health & Hosps. Corp., No. 97-CV-4554, 1998 WL 229253 (E.D. N.Y. Mar. 31, 1998); Rios v. Marshall, 530 F. Supp. 351 (S.D. N.Y. 1981). Because both courts find that a claim under section 1981 must allege racial discrimination, neither addresses whether or not private actors fall within the scope of the prohibition.

[68] 530 F. Supp. 351 (S.D. N.Y. 1981).

section 1981 must therefore allege racial discrimination.[69] In reviewing the *Rios* analysis, Chief Judge Winter finds the opinion's reliance on section 1982 analysis to be inappropriate.[70] Whereas section 1982 is derived solely from section 1 of the 1866 Act, section 1981 is partially derived from section 16 of the 1870 Act. Thus, he finds the resulting decision ill-reasoned.[71]

Additionally, both the *Rios* and *Murtaza v. New York City Health & Hospitals*[72] decisions result from a contrary reading of the Supreme Court's dicta in *Takahashi*.[73] Each court adopts a limited reading of the *Takahashi* dicta that section 1981 extends to aliens, as well as citizens, protection from racial discrimination.[74] The *Anderson* court concludes that this interpretation is simply not persuasive.[75] Having acknowledged and distinguished these contrary cases, the court addresses the impact of the 1991 amendment on construction of section 1981.

After examining the case law, the court directed its attention to the passage of the Civil Rights Act of 1991, focusing on whether section 1981 as amended proscribes alienage discrimination by state actors.[76] The newly-added subsection (c) of section 1981 provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law."[77] In the year prior to the amendment's passage, the Supreme Court denied certiorari in one particular case. Dissenting from the denial of certiorari, Justice White stated: "'Prior cases,' citing *Graham* and *Takahashi*, 'have indicated that § 1981 prohibits official discrimination against aliens . . . . Certiorari should be granted to settle whether § 1981 proscribes private alienage discrimination.'"[78] Congress was therefore well aware that section 1981 had been interpreted to protect aliens from discrimination and yet chose not to insert "race" before "discrimination" in subsection (c). Finally, because Congress was focused on correcting the outcome in *Patterson v. McLean Credit Union*[79] the legislative history contains no reference to claims of alienage discrimination.[80] The court is persuaded that this silence is not significant given Congress' awareness of the implications of its amendment, extending existing prohibitions to private parties.[81]

In its final paragraphs, the court addresses appellees' argument that determining alienage discrimination to be within the prohibitions of section 1981 would conflict with and potentially undermine the Immigration Reform and Control Act of 1986

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[69] *Anderson*, 156 F.3d at 178.

[70] *Id.*

[71] *Id.*

[72] No. 97-CV-4554, 1998 WL 229253 (E.D. N.Y. Mar. 31, 1998).

[73] *Id. See also Anderson,* 156 F.3d at 178 & n.18.

[74] "We also believe that the district court in *Rios* understated the significance of *Takahashi. See Rios*, 530 F. Supp. at 461 n.9 (suggesting that *Takahashi* merely established that aliens are protected from racial discrimination by Section 1981, not that they are protected from alienage discrimination). Similarly, we are not persuaded by the reasoning in *Murtaza*, which adopted in large part this reading of *Takahashi*." *Anderson*, 156 F.3d at 178.

[75] *Id.*

[76] "The Civil Rights Act of 1991 amended Section 1981 by redesignating the existing text as Section 1981(a) and by adding subsections (b) and (c)." *Anderson*, 156 F.3d at 178.

[77] 42 U.S.C. § 1981(c).

[78] *Anderson*, 156 F.3d at 177 (quoting *Bhandari*, 494 U.S. 1061, 1061-62 (1990) (White, J., dissenting)) (emphasis added).

[79] 491 U.S. 164 (1989) (holding that section 1981 was inapplicable to conduct occurring post-formation of an employment contract).

[80] *Anderson*, 156 F.3d at 179.

[81] *Id.* at 179-80.

("IRCA").[82] IRCA imposes sanctions on employers who hire or continue to employ aliens not in compliance with federal immigration requirements.[83] Additionally, it bans discrimination in employment on the basis of national origin or citizenship.[84] However, the fact that IRCA and section 1981 partially overlap does not indicate conflict in the judgment of this court.[85] Chief Justice Winter responds to appellees' suggestion that employers might be held liable under section 1981 for refusal to hire *illegal* aliens: "If an employer refuses to hire a person because that person is in the country illegally, that employer is discriminating on the basis not of alienage but of noncompliance with federal law."[86]

CONCLUSION

The Second Circuit has provided a coherent, detailed basis for its conclusion that section 1981 in its present form prohibits alienage discrimination by private actors. Because the district court had dismissed Anderson's complaint, *de novo* review mandated the court's rigorous examination of both the case law and the legislative history of both the original statute and the statute as amended. Having decided that section 1981 proscribes alienage discrimination by private actors, the court deemed Linden Anderson, a Jamaican citizen and legal permanent resident of the United States, to fall within the statute's protections. Thus, his claim may now proceed. In future litigation, courts should construe section 1981 to reach private acts of discrimination on the basis of alienage, following the reasoning provided in the instant case. The Second Circuit has provided a compelling argument for recognition of alienage discrimination claims under section 1981.

As claims of racial discrimination have occupied the courts in recent decades, claims of alienage discrimination may well be the next critical battleground in private enforcement of civil rights. In the absence of Supreme Court or legislative clarification on this issue, a construction of section 1981 supporting a claim of alienage discrimination is an essential tool for providing equality of opportunity in employment. The Supreme Court has determined that Title VII does *not* prohibit discrimination on the basis of citizenship.[87] Furthermore, Title VII only prohibits discrimination by employers with fifteen or more employees.[88] Only section 1981 offers a refuge for aliens discriminated against in the employment context, including those who experience discrimination by smaller employers.

The number of immigrants living in the United States has almost tripled since 1970, rising from 9.6 million to 26.3 million today, accounting for 9.8 percent of the population.[89] That data is limited in its value

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[82] *Id.* at 180. *See also* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a.

[83] *Anderson*, 156 F.3d at 180.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See Espinoza*, 414 U.S. at 91.

[88] 42 U.S.C. § 2000e(b) (1998). Recently, the Fifth Circuit held that employment-at-will relationships are contracts for Section 1981 purposes, allowing an African-American plaintiff to pursue her claim of employment discrimination under the statute. Lamarilyn Fadeyi, an at-will employee, could not have pursued her racial discrimination in employment claim under Title VII because her former employer had fewer than 15 employees at all relevant times in the employment relationship. Hence she based her claim upon 42 U.S.C. § 1981. *See* Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048 (5th Cir. 1998).

[89] These figures were released by the Center for Immigration Studies on January 8, 1999. The study relied upon the Census Bureau's Current Population Survey for March 1998 as its source for raw population numbers. The Center is a non-profit organization

because it merges the populations of illegal and legal aliens with foreign-born citizens. However, it should provoke a sense of congressional and judicial urgency to clarify the application of our existing civil rights protections to almost ten percent of the American people. Public policy concerns require no less. Ultimately though, until the Supreme Court takes up this issue, victims of alienage discrimination may continue to have their claims disposed of at the summary judgment stage by courts not in agreement with the Second Circuit's analysis.

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supporting a policy of limited immigration. Gabriel Escobar, *The Washington Post* (visited January 17, 1998) <http://www.washingtonpost.com/wp-srv/national/longterm/immig/immig.htm>. For more data on immigration and related concerns, *See* <http://migration.ucdavis.edu/Data/pop.on.www/foreign_pop.html>.