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## ARGUELLO V. CONOCO, INC., 330 F.3D 355 (5TH CIR. 2003)

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**ARGUELLO V. CONOCO, INC.,  
330 F.3D 355 (5TH CIR. 2003)**

**FACTS**

On March 5, 1995, Denise Arguello, her father Alberto Govea, and other family members stopped at a Conoco store in Fort Worth, Texas, to purchase gas.<sup>1</sup> Arguello's husband filled up the car with gas and Arguello and Govea went inside the store to pay for the gas and to pick up some beer and other items.<sup>2</sup> Cindy Smith, one of the two clerks on duty, waited on them at the cash register.<sup>3</sup> Arguello and Govea, who are Hispanic, testified that Smith treated them less favorably than she had treated the previous white customers.<sup>4</sup> When Arguello gave Smith her credit card to complete the purchase, Smith asked for identification, claiming that she needed to see identification because Arguello was purchasing beer.<sup>5</sup> Asserting that she could not accept an out of state license, Smith initially refused to accept Arguello's Oklahoma license.<sup>6</sup> During the encounter between Smith and Arguello, Govea, angered by the way Smith was treating his daughter, walked out of the store and left the beer he intended to purchase on the counter.<sup>7</sup> Finally, Smith agreed to accept Arguello's license and credit card.<sup>8</sup> Smith, however, did not ring up the beer that Govea left on the counter.<sup>9</sup> After Arguello completed her purchase, the interaction between Smith and Arguello escalated and Smith began shouting racially discriminatory remarks toward Arguello.<sup>10</sup> Arguello started to leave the store, but discovered that she had the wrong credit card slip and returned to the counter to exchange the credit card slips.<sup>11</sup> Smith shouted a few more racially charged remarks at Arguello and hastily exchanged slips with her. As Arguello walked away from the counter, Smith pushed the six-pack of beer off the counter and onto the floor.<sup>12</sup> When Arguello walked outside to her car, Smith made rude gestures, laughed, and heckled Arguello and her family.<sup>13</sup>

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<sup>1</sup> Arguello v. Conoco, Inc., 330 F.3d 355 (5th Cir. 2003).

<sup>2</sup> *Id.* at 356.

<sup>3</sup> *Id.* at 357.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The facts did not indicate if Smith ever asked Govea for identification, even though he was the one who initially attempted to buy the beer.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Govea called a Conoco representative from a pay phone outside the store to lodge a complaint against Smith.<sup>14</sup> The Conoco representative directed Govea to find out the name of the clerk.<sup>15</sup> Not knowing Smith's name at that point, Govea attempted to re-enter the store.<sup>16</sup> However, Smith locked the door and continued to make fun of Arguello and her family through the store windows.<sup>17</sup>

Arguello and Govea sued the owner of Conoco alleging race discrimination in violation of 42 U.S.C. § 1981.<sup>18</sup> At trial, the jury found for Arguello and Govea and awarded them compensatory and punitive damages.<sup>19</sup> However, the United States District Court Judge for the Northern District of Texas, Judge Barefoot Sanders, granted a post verdict judgment as a matter of law (j.m.l.) in favor of the defendant owner, finding that the record provided no reasonable basis upon which a reasonable jury could have found for the plaintiffs.<sup>20</sup> Arguello and Govea appealed.<sup>21</sup>

### HOLDING

The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling holding that: (1) the plaintiffs' claims did not amount to a violation of § 1981; and (2) the plaintiffs lacked the standing required to assert a Title VII claim.<sup>22</sup>

### ANALYSIS

Noting that this case involved the de novo review of the j.m.l. overturning the jury's finding for the plaintiffs at trial, the appellate court began its analysis by pointing out that a j.m.l. is only proper where there is no legally sufficient basis for a reasonable jury to have found for a party.<sup>23</sup> The review of a motion for j.m.l. requires that the reviewing court "consider the entire trial record in the light most favorable to the verdict winner, drawing all reasonable inferences in his favor."<sup>24</sup>

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14 *Id.*  
 15 *Id.*  
 16 *Id.*  
 17 *Id.*  
 18 *Id.*  
 19 *Id.*  
 20 *Id.*  
 21 *Id.*  
 22 *Id.*  
 23 *Id.* at 358.  
 24 *Id.*

The court then addressed the merits of the lower court's finding. In order to state a claim in the making and enforcing of contracts under § 1981, plaintiffs must establish that: (1) they are members of a racial minority; (2) the defendant intentionally discriminated against them; and (3) the discrimination was directed towards one of more of the activities enumerated under § 1981.<sup>25</sup> The court found that Arguello and Govea, as Hispanics, clearly satisfied the first element.<sup>26</sup> As to the second element, courts generally find that plaintiffs can establish evidence of race discrimination where there is a basis for comparison between the defendant's treatment of a white person and their treatment of a minority and there is no obvious reason for the difference in treatment.<sup>27</sup> The court found that there was sufficient evidence to show that the Smith's treatment of Arguello and Govea was less favorable than her treatment of white customers.<sup>28</sup> Furthermore, the court found that Smith failed to articulate a non-discriminatory reason for her treatment of Arguello and Govea.<sup>29</sup> Accordingly, the court found that a jury could reasonably conclude that Smith intentionally discriminated against Arguello and Govea.<sup>30</sup>

However, the court noted that § 1981 does not provide a general cause of action for race discrimination claims.<sup>31</sup> In order to establish a claim under § 1981, plaintiffs must also meet the third element, requiring that the discrimination involve one of the enumerated activities of § 1981.<sup>32</sup> Among other things, § 1981 prohibits discrimination in the making and enforcing of contracts.<sup>33</sup> However, in line with the treatment of other courts addressing this issue, this court held that in order for Arguello and Govea to recover they must show the "loss of an actual, not speculative, or prospective contract interest."<sup>34</sup> The court explained that under § 1981 it is not enough for a defendant to have deterred the plaintiff from contracting or have treated the plaintiff less favorably than others during the making of the contract.<sup>35</sup> Under § 1981, plaintiffs can recover only if "they were actually prevented, and not merely deterred, from making a contract or purchasing a service."<sup>36</sup>

Under this narrow construction of § 1981, the court held that neither Govea nor Arguello could establish that Smith's behavior thwarted their

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*Id.*

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*Id.*

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Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 713 (7th Cir. 1998).

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Arguello v. Conoco, Inc., 330 F.3d 355, 358 (5th Cir. 2003).

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*Id.*

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*Id.* at 359.

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*Id.*

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*Id.*

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*Id.*

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*Id.*

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*Id.*

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*Id.*

attempts to contract.<sup>37</sup> With respect to Govea, the court found that his decision not to purchase his beer because of Smith's treatment of his daughter was a voluntary choice not to contract.<sup>38</sup> Therefore, § 1981 did not proscribe Smith's conduct, even though it was discriminatory. Furthermore, the court found that Smith's actions of locking the door and preventing Govea from re-entering did not violate § 1981 because Govea was not attempting to enter the store to purchase a product, but to ascertain Smith's name for the Conoco representative.<sup>39</sup>

Similarly, the court found that Smith's treatment of Arguello was not actionable under § 1981.<sup>40</sup> Arguello was able to complete her purchase, at the regular price, using her preferred method of payment.<sup>41</sup> The court, however, noted that Arguello was not able to purchase the beer.<sup>42</sup> Arguello contended that she expected Smith to ring up the beer with the rest of the purchases and that she would have purchased the beer in a second transaction if it were not for Smith's behavior. The court, however, found that regardless of Arguello's intentions, the only action she took to indicate her desire to buy the beer was to slide the beer across the counter closer to her purchases after her father left the store.<sup>43</sup> Noting that after Arguello realized that she had not purchased the beer she did not take any further steps to show her intent to her purchase the beer in a second transaction, the court found that Smith's failure to sell her the beer did not constitute conduct that thwarted Arguello's attempt to contract.<sup>44</sup>

Asserting that the court should have adopted a broader interpretation of § 1981, Arguello and Govea argued that § 1981 should cover conduct occurring after the completed purchase.<sup>45</sup> They point out that the Civil Rights Act of 1991, enacted as a direct response to *Patterson v. McLean*,<sup>46</sup> expressly provides for a broad interpretation of § 1981.<sup>47</sup> In *Patterson*, the petitioner, a black woman, sued her employer alleging a violation of § 1981 when he engaged in a pattern of racially discriminatory acts towards her after hiring her.<sup>48</sup> *Patterson* claimed that § 1981 should cover discriminatory acts

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The court, however, did not address the fact that Smith claimed that she asked Arguello for identification for the beer but then failed to ring up the beer along with the other purchases.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 360.

<sup>46</sup> *Patterson v. McLean*, 491 U.S. 164 (1989).

<sup>47</sup> *Id.* at 169.

<sup>48</sup> *Id.*

taking place after the formation of the employment contract.<sup>49</sup> The Supreme Court, however, held that § 1981 did not apply to problems arising after the creation of the contract.<sup>50</sup> The effect of *Patterson* had an unreasonably limiting effect on race discrimination claims.<sup>51</sup> In response, Congress enacted the Civil Rights Act of 1991,<sup>52</sup> explicitly rejecting *Patterson's* narrow interpretation of § 1981 and reaffirming that the provision proscribing conduct that interfered with the right to "make and enforce contracts" included "all phases and incidents of the contractual relationship."<sup>53</sup>

Arguello and Govea argued that this new language indicated Congress's intent to proscribe discriminatory conduct that occurred after the formation of the contract.<sup>54</sup> The court, however, rejected this argument distinguishing between an employment contract and a retail contract.<sup>55</sup> The court reasoned that the terms and conditions of an employment contract extend from contract formation until termination.<sup>56</sup> A retail contract, the court explained, does not involve a continuing relationship.<sup>57</sup> It is a single transaction where the parties transfer property from one another in exchange for some type of consideration, usually monetary.<sup>58</sup> Therefore, the contract ends upon the exchange of goods.<sup>59</sup> The court found that § 1981 is applicable only so long as the contractual relationship continues.<sup>60</sup>

The court, however, noted that there are two situations in which § 1981 is applicable even after the completion of a purchase: (1) situations involving discrimination in clubs and restaurants; and (2) discrimination in pre-payment or check writing policies.<sup>61</sup> In the club or restaurant context, the court explained, the contractual relationship entails more than just exchange of food for money.<sup>62</sup> The payment includes the customer's right to service and the contract continues throughout the course of the meal.<sup>63</sup>

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<sup>49</sup> *Id.*, at 170.

<sup>50</sup> *Id.*

<sup>51</sup> Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 299 (2001).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Arguello v. Conoco, Inc.*, 330 F.3d 355, 360 (5th Cir. 2003).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 360; *see also* *Grinnell Corp. v. United States*, 390 F.2d 932, 947-48 (Fed. Cl. 1968).

<sup>59</sup> *Arguello*, 330 F.3d at 361.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Therefore, § 1981 proscribes discriminatory conduct of servers during the meal.<sup>64</sup>

Additionally, the court noted that § 1981 covers discrimination in check writing or prepayment policies.<sup>65</sup> In this situation, the court explained that if the terms of the contract are discriminatory, it is not necessary for a plaintiff to prove the inference with the ability to contract. The language of § 1981 specifically gives minorities the right to enjoy the same "benefits, privileges, terms, and conditions of the contractual relationship" as whites.<sup>66</sup> Therefore, to establish a violation of § 1981, a plaintiff alleging discrimination in payment policies need only show that the conditions of payment were discriminatory.<sup>67</sup>

The court, however, found that in the instant case neither of the situations in which § 1981 is applicable after the completion of a purchase—discriminatory terms and conditions in payment, or an ongoing contractual relationship associated with clubs and restaurants—was present.<sup>68</sup> Therefore, the court concluded, no violation of § 1981 had occurred.

Finally, the court noted that Govea and Arguello were not able to state a valid claim for injunctive relief because they lacked standing.<sup>69</sup> For a plaintiff to obtain injunctive relief, he must demonstrate "that he is likely to suffer future injury by the defendant and that the sought-after relief will prevent that future injury."<sup>70</sup> Finding that evidence of Conoco's discriminatory treatment of Govea and Arguello in the past does not necessarily mean that they will encounter similar treatment in the future, the court held that they were not eligible for injunctive relief.<sup>71</sup>

## CONCLUSION

Consumer discrimination is anathema to a fair and just society. However, despite Congressional action explicitly delegating broad authority to courts, pursuant to § 1981, to guarantee racial minorities the same right as whites to the "benefits, privileges, terms, and conditions of the contractual relationship," most courts continue to unreasonably limit the claims of

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<sup>64</sup> See *Charity v. Denny's, Inc.*, No. CIV.A.98-0554-C, 1999 WL 544687, at \*3 (E.D. La. 1999) (finding that a customer dining in a restaurant is contracting for more than just food); *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043 (N.D. Ill. 1998) (finding that customers have a right to the full benefit of a restaurant contract that includes, among others things, a pleasant atmosphere to dine in and proper utensils).

<sup>65</sup> *Arguello v. Conoco, Inc.*, 330 F.3d 355, 361 (5th Cir. 2003).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

minority claimants. The reluctance of courts to adopt the permissible broad application of § 1981 perpetuates an acceptance of discriminatory treatment in society and sends a message to minorities that they are not worthy of the same treatment as whites. Courts must give effect to the Civil Rights Act of 1991 and use their authority pursuant to § 1981 to give redress to victims of discrimination, sending the message to society that discrimination is wrong and will not be tolerated.

Summary and Analysis Prepared By:  
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