

## 9th Cir: Section 1981 Retaliation Claim Subject to Four-Year Limitations Period

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Retaliation claims brought pursuant to 42 U.S.C. § 1981 are deemed to arise under the Civil Rights Act of 1991, and are therefore subject to the four-year limitations period set forth in 28 U.S.C. § 1658, the 9th U.S. Circuit Court of Appeals has ruled.

Russell H. Johnson, III, is a former Pennsylvania-based employee of AT&T Bell Laboratories, now known as Lucent Technologies Inc. Johnson took mental disability leave from Lucent in 1986, and was subsequently terminated in 1987.

In 1989, Johnson sued Lucent in Pennsylvania to obtain long-term disability benefits under a Lucent-sponsored plan. The court found Johnson eligible for such benefits, subject to certain conditions. Johnson failed to comply with the court's order, but brought a second lawsuit against Lucent in 1990, wherein Johnson was again awarded benefits subject to certain modified conditions.

In 2005, Johnson brought a largely unrelated California lawsuit against Lucent and several individuals. In June 2006, while the California action was still pending, Lucent petitioned the Pennsylvania court to terminate Johnson's disability benefits for noncompliance with the 1990 order. Lucent prevailed on its petition in December 2006, and terminated benefits in January 2007. In July 2008, the 3rd U.S. Circuit Court of Appeals upheld the order in Lucent's favor.

In August 2008, Johnson again sued Lucent in California, alleging that it had terminated his disability payments in retaliation for his 2005 lawsuit. Johnson, who is African-American, claimed that the purported retaliation violated § 1981 and Title VII. He also asserted a state law claim for intentional infliction of emotional distress (IIED), and later added various other theories of relief.

The district court dismissed the § 1981 claim as it was brought more than two years after the petition to terminate Johnson's benefits, and was thus untimely under the California statute of limitations governing personal injury claims. The court also dismissed the IIED claim as untimely under California's two-year limitations period, and dismissed the Title VII claim for Johnson's failure to submit an Equal Employment Opportunity Commission (EEOC) claim within the prescribed 180-day period.

On appeal, the 9th Circuit reversed the dismissal of Johnson's § 1981 retaliation claim, holding that such claims are governed by the four-year limitations period set forth in § 1658, rather than the period applicable to personal injury actions in California. Section 1658 applies only to actions arising under federal laws enacted after Dec. 1, 1990. Because § 1981 was initially enacted as part of the Civil Rights Act of 1866, claims that are cognizable under the statute's original language are not governed by § 1658, and are instead governed by the forum state's personal injury statute of limitations. If, however, a § 1981 claim is cognizable because of amendments enacted through the Civil Rights Act of 1991, the claim is governed by § 1658 and its four-year limitations period.

The 9th Circuit held that, although there is some debate as to whether § 1981 properly

encompassed retaliation claims prior to the U.S. Supreme Court's decision in *Patterson v. McLean Credit Union*, there is no dispute that such claims were not cognizable post-*Patterson* until § 1981 was amended by way of the Civil Rights Act of 1991. Thus, the 9th Circuit held that Johnson's § 1981 claim was not untimely because it arose under a post-1990 federal law, and was accordingly subject to § 1658.

The 9th Circuit also held that Johnson's IIED claim may not have been time-barred because, although Johnson filed this claim more than two years after Lucent initiated its action to terminate benefits, he brought suit less than two years after his benefits were actually terminated. The 9th Circuit did, however, affirm dismissal of the Title VII claim, as Johnson did not submit a claim to the EEOC within 180 days of any relevant event, and neither equitable estoppel nor equitable tolling were applicable under the circumstances.

*Johnson v. Lucent Technologies Inc.*, 9th Cir., No. 09–55203 (Aug. 4, 2011).

**Professional Pointer:** The limitations period applicable to certain race-based claims cognizable under § 1981 may extend beyond an employee's deadline for filing suit under Title VII and/or state law, and may provide an additional or alternative basis for suit.

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**Editor's Note: This article should not be construed as legal advice.**

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