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USE OF THE CIVIL RIGHTS ACTS OF 1866 AND 1871 TO REDRESS EMPLOYMENT DISCRIMINATION*

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Over the past fifteen years, the United States has become officially committed to the goal of equal employment opportunity. Numerous statutes, executive orders, and Civil Service Commission regulations have been promulgated to expressly prohibit discrimination in employment because of race, color, religion, sex, or

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1 The government's policy of antidiscrimination in employment has been stated as follows: "It is the policy of the United States to insure equal employment opportunities . . . without discrimination because of race, color, religion, sex, or national origin." Federal Antidiscrimination in Employment Act, 5 U.S.C. § 7151 (1970).

The denial of equal employment opportunity is generally viewed, at least among black scholars, as the major cause of racial inequality in the United States. See e.g., D. Bell, Jr., RACE, RACISM AND AMERICAN LAW 711 (1973). "[I]n a land where money is practically synonymous with rights, power and respect, the central obstacle in the struggle for black equality is economic. Removal of the disparity between black and white incomes would enable blacks to purchase better housing (and therefore schooling), food and health services . . . With more and better jobs, participation in politics would increase, while the incidence of crime and racist police practices would lessen." Id. See generally Ross, The Negro in the American Economy, in EMPLOYMENT, RACE AND POVERTY (A. Ross & H. Hill eds. 1967).


national origin. Prominent among these measures are Title VII of the Civil Rights Act of 1964 and its 1972 amendments, which established the Equal Employment Opportunity Commission and created civil remedies for acts of employment discrimination.

Little attention, however, has been given to important statutory provisions derived from the Civil Rights Acts of 1866 and 1871 (the "Reconstruction Acts")—namely, sections 1981, 1983, and 1985(3) of Title 42, United States Code—which collectively proscribe the deprivation of civil rights, whether by state or private action. Although these provisions do not expressly prohibit discrimination in employment, they can be used to redress such discriminatory practices in both the public and private sectors. Significantly, actions under sections 1981, 1983, and 1985(3)
are free of two important limitations on actions under Title VII. First, a Title VII cause of action is unavailable to parties who fail to file complaints within 180 days after the alleged discriminatory episode, or in the case of federal employees, within thirty days. In contrast, a cause of action under the Reconstruction Acts runs as long as the applicable statute of limitations—a matter of several years in most cases. Second, a successful plaintiff under the Reconstruction Acts can recover punitive damages, while Title VII plaintiffs are normally limited to backpay awards and compensatory damages.

Thus, in some cases, the Reconstruction Acts offer relief unavailable under the more recently enacted statutes. This is not to say that sections 1981, 1983, and 1985(3) can or should preempt Title VII, which is still the dominant law in the area of employment discrimination. The inertia of discriminatory traditions, however, can only be curtailed by using a "full arsenal" of statutory weapons. Moreover, it is prudent for an attorney to file suit under more than one statutory provision, so as to assure survival of the action beyond the pretrial stage and maximize the chances for success at trial.

The purpose of this Article is to explore the points of law relevant to the use of the Reconstruction Acts in the battle against employment discrimination. The Article begins with a brief examination of the legislative history of these provisions (Part I), and then proceeds with an analysis of the averments that a complaint must contain in order to state a cause of action under each provision (Part II). Part III presents an exposition of issues likely to

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18 See notes 210-15 and accompanying text infra.
19 See notes 216-23 and accompanying text infra. The following cases deal with various requirements for Title VII actions (grouped by issues): (1) conditions precedent to filing suit—Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); (2) timely filing of the administrative complaint—Molybdenum Corp. of America v. EEOC, 457 F.2d 935 (10th Cir. 1972); Malone v. North Am. Rockwell Corp., 457 F.2d 779 (9th Cir. 1972); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); (3) timely filing of the civil action—Tuft v. McDonnell Douglas Corp., 385 F. Supp. 184 (E.D. Mo. 1974), rev'd, 517 F.2d 1301 (8th Cir. 1975), cert. denied, 423 U.S. 1052 (1976); and (4) requisite number of persons employed—Williams v. New Orleans S.S. Ass'n, 341 F. Supp. 613 (E.D. La. 1972).
21 See notes 50-53 and accompanying text infra.

I

LEGISLATIVE HISTORY

For the purposes of this Article, it is unnecessary to consider at great length the legislative history of sections 1981, 1983, and 1985(3).\textsuperscript{22} To understand the mechanics of these statutory provisions relative to employment discrimination one need only understand the constitutional foundations of each section. This requires consideration of the parent provisions of each section— the Civil Rights Acts of 1866\textsuperscript{23} and 1871.\textsuperscript{24}

The operative language of section 1981, traceable to section 1 of the Act of April 9, 1866,\textsuperscript{25} states:

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.\textsuperscript{26}

The Act of 1866 rested on the enabling clause of the thirteenth amendment\textsuperscript{27} and was enacted before the fourteenth amendment


\textsuperscript{23} See note 9 supra.

\textsuperscript{24} See note 10 supra.

\textsuperscript{25} See note 10 supra.

\textsuperscript{26} Section 1 of the Act of 1866 provided in pertinent part:
    That all persons born in the United States . . . of every race and color . . . 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.


\textsuperscript{27} U.S. Const. amend. Xlll, § 2. Sections 1 and 2 of the thirteenth amendment provide:
    Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
was even formally proposed. Since the thirteenth amendment may be violated in the absence of state action, section 1981 reaches discriminatory actions taken by private parties.

In contrast, section 1983 is of limited scope, and applicable to state action only. It states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983, derived from section 1 of the Act of April 20, 1871
(also known as the Klu Klux Klan Act of 1871), was passed pursuant to the enabling clause of the fourteenth amendment and borrows language directly from that amendment.

Section 1985(3) states in pertinent part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Like section 1983, section 1985(3) traces its source to the Civil Rights Act of 1871, specifically section 2 of that Act. The primary

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States in their civil rights, and to furnish the means of their vindication; and the other remedial laws of the United States which are in their nature applicable in such cases.

17 Stat. 13 (1871).


SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.


37 Griffin v. Breckenridge, 403 U.S. 88, 98-99 (1971). Section 2 of the Act of 1871 provided:

That if two or more persons within any State or Territory of the United States shall conspire together to . . . oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the
The purpose of the Act was to aid in the enforcement of fourteenth
duties thereof, or by force, intimidation, or threat to induce any officer of the
United States to leave any State, district, or place where his duties as such officer
might lawfully be performed, or to injure him in his person or property on ac-
count of his lawful discharge of the duties of his office, or to injure his person
while engaged in the lawful discharge of the duties of his office, or to injure his
property so as to molest, interrupt, hinder, or impede him in the discharge of his
official duty, or by force, intimidation, or threat to deter any party or witness in
any court of the United States from attending such court, or from testifying in
any matter pending in such court fully, freely, and truthfully, or to injure any
such party or witness in his person or property on account of his having so at-
tended or testified, or by force, intimidation, or threat to influence the verdict,
presentment, or indictment, of any juror or grand juror in any court of the
United States, or to injure such juror in his person or property on account of any
verdict, presentment, or indictment lawfully assented to by him, or on account of
his being or having been such juror, or shall conspire together, or go in disguise
upon the public highway or upon the premises of another for the purpose, either
directly or indirectly, of depriving any person or any class of persons of the equal
protection of the laws, or of equal privileges or immunities under the laws, or for
the purpose of preventing or hindering the constituted authorities of any State
from giving or securing to all persons within such State the equal protection of
the laws, or shall conspire together for the purpose of in any manner impeding,
hindering, obstructing, or defeating the due course of justice in any State or Ter-
ritory, with intent to deny to any citizen of the United States the due and equal
protection of the laws, or to injure any person in his person or his property for
lawfully enforcing the right of any person or class of persons to the equal protec-
tion of the laws, or by force, intimidation, or threat to prevent any citizen of the
United States lawfully entitled to vote from giving his support or advocacy in a
lawful manner towards or in favor of the election of any lawfully qualified person
as an elector of President or Vice-President of the United States, or as a member
of the Congress of the United States, or to injure any such citizen in his person or
property on account of such support or advocacy, each and every person so of-
fending shall be deemed guilty of a high crime, and, upon conviction thereof in
any district or circuit court of the United States or district or supreme court of
any Territory of the United States having jurisdiction of similar offences, shall be
punished by a fine not less than five hundred nor more than five thousand dol-
lars, or by imprisonment, with or without hard labor, as the court may determine,
for a period of not less than six months nor more than six years, as the court may
determine, or by both such fine and imprisonment as the court shall determine.
And if any one or more persons engaged in any such conspiracy shall do, or cause
to be done, any act in furtherance of the object of such conspiracy, whereby any
person shall be injured in his person or property, or deprived of having and
exercising any right or privilege of a citizen of the United States, the person so
injured or deprived of such rights and privileges may have and maintain an action
for the recovery of damages occasioned by such injury or deprivation of rights
and privileges against any one or more of the persons engaged in such conspiracy,
such action to be prosecuted in the proper district or circuit court of the United
States, with and subject to the same rights of appeal, review upon error, and oth-
er remedies provided in like cases in such courts under the provisions of the act
of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all per-
sons in the United States in their civil rights, and to furnish the means of their
vindication."
17 Stat. 13-14 (1871).
amendment rights. It would seem reasonable to conclude, therefore, that section 1985(3) protects solely against state action, and in fact the Supreme Court at one time adopted this position. In *Griffin v. Breckenridge*, however, the Court later expressed the view that limiting section 1985(3) to state action would deprive its sister provision, section 1983, of all independent effect. The Court also analogized section 1985(3) to its criminal counterpart, and concluded that section 1985(3) applies to all deprivations, "whatever their source," and that its constitutional basis is the enabling clause of the thirteenth amendment. The Court's holding does not mean that the enabling clause of the fourteenth amendment provides no constitutional basis for a section 1985(3) cause of action. Since the parent provision of section 1985(3) was passed pursuant to the fourteenth amendment, it is clear that

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38 See cases cited in note 34 supra.
41 Id. at 98-99.
42 Id. at 98, 104. The criminal statute to which the court referred is 18 U.S.C. § 241 (1970), which reads:
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.
As stated by Justice Frankfurter's plurality opinion in United States v. Williams, 341 U.S. 70 (1951), the purpose of § 241 of Title 18 is "to reach private action rather than officers of a State acting under its authority." 341 U.S. at 76. The criminal counterpart to § 1983 is 18 U.S.C. § 242 (1970), which provides:
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.
44 403 U.S. at 104-05. The thirteenth amendment is set out at note 27 supra.
45 See note 34 supra.
46 The allegations in the complaint in *Griffin* did not require consideration of the scope of the power of Congress under § 5 of the fourteenth amendment. 403 U.S. at 107.
a section 1985(3) cause of action may be predicated upon that amendment; and the courts, in interpreting Griffin, have so held.\textsuperscript{48}

To summarize: section 1981, having its basis in section 1 of the Civil Rights Act of 1866, which is based on the enabling clause of the thirteenth amendment, protects against infringement by anyone. These rights, however, may not be as broad as the rights protected by the fourteenth amendment. Section 1983, traceable to section 1 of the Civil Rights Act of 1871, which was passed pursuant to the enabling clause of the fourteenth amendment, protects against state action only. Finally, section 1985(3), derived from section 2 of the Civil Rights Act of 1871, which finds its authority in the enabling clauses of both the thirteenth and fourteenth amendments, protects against infringement by private, state, or federal action, depending on the source of the right violated.\textsuperscript{49}

II

ALLEGING CLAIMS OF EMPLOYMENT DISCRIMINATION UNDER THE RECONSTRUCTION ACTS

In order to withstand motions to dismiss for failure to state a cause of action,\textsuperscript{50} or for lack of subject matter jurisdiction,\textsuperscript{51} a complaint under the Reconstruction Acts must be carefully drafted. Although "notice" pleading is technically sufficient under the Federal Rules of Civil Procedure,\textsuperscript{52} some courts impose more demanding standards in civil rights actions in order to identify and dismiss frivolous suits.\textsuperscript{53} The required allegations vary depending on the particular section(s) being invoked.

\textsuperscript{48} Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 828 (7th Cir. 1975) (Stevens, J.), cert. denied, 425 U.S. 943 (1976); Dombrowski v. Dowling, 459 F.2d 190, 194-95 (7th Cir. 1972). This is particularly significant because it means that Griffin did not obviate the requirement of state involvement in alleging a § 1985(3) cause of action where the right violated arises under the fourteenth amendment. See notes 88-122 and accompanying text infra. In other words, a showing of state involvement remains necessary under § 1985(3) where the asserted deprivation involves the fourteenth amendment. See notes 102-09 and accompanying text infra.

\textsuperscript{49} In recent years the Supreme Court's approach in interpreting civil rights statutes of the Reconstruction Period has been to "accord [them] a sweep as broad as [their] language." Griffin v. Breckenridge, 403 U.S. 88, 97 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); United States v. Price, 383 U.S. 787, 801 (1966).

\textsuperscript{50} Fed. R. Civ. P. 12(b)(6).

\textsuperscript{51} Fed. R. Civ. P. 12(b)(1).


A. Section 1981

In Jones v. Alfred H. Mayer Co., the Supreme Court stated that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981 ...." Because "the main thrust of § 1981 is to prohibit discrimination based upon race," it is settled that section 1981 creates a cause of action in cases of racial discrimination in employment. Thus, to state a cause of action for employment discrimination under section 1981, a complaint need only allege, with some specificity, a racial basis for such discrimination.

The courts are not in agreement on the extent to which section 1981 embraces non-racial discriminatory practices such as discrimination based on alienage or sex. Although the Supreme
Court has not decided this issue, it is reasonable to assume that it would opt for a fairly broad interpretation. In *Jones v. Alfred H. Mayer Co.*, the Court observed that the legislative history of the Civil Rights Act of 1866,61 the parent provision of section 1981,62 "leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language."63 Moreover, the coverage of section 1981 must ultimately be determined by reference to the thirteenth amendment, the constitutional foundation of section 1981 and its parent.64 The Supreme Court has declared that while the thirteenth amendment is not limited to the protection of blacks, it is necessary, in ascertaining the extent of the amendment's protection, to look to the purpose or "pervading spirit" behind the evil which it was designed to remedy, and to "the process of continued addition to the Constitution."65

Finally, jurisdiction for a section 1981 cause of action may be properly invoked pursuant to 28 U.S.C. § 1343(4).66 No monetary minimum is necessary to sustain jurisdiction under that section.67

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61 Set out in relevant part at note 25 supra.
62 See notes 25-26 and accompanying text supra.
64 See notes 25-30 and accompanying text supra.
66 Bowers v. Campbell, 505 F.2d 1155, 1158 (9th Cir. 1974). 28 U.S.C. § 1343(4) (1970) reads: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." Because § 1981 is a "law" of the United States, jurisdiction for § 1981 could arguably be based on 28 U.S.C. § 1331(a) (1970) if the amount in controversy exceeds $10,000, exclusive of interest and cost. Section 1331(a) provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." However, it must also be noted that only § 1343(4) empowers federal courts to entertain a § 1981 action for damages or equitable relief; § 1331(a) does not on its face grant such competency. See R. FIELD & B. KAPLAN, CIVIL PROCEDURE 122 (3d ed. 1973); See generally 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573 (1975).
B. Section 1983

Section 1983 reaches employment discrimination at the state and municipal governmental levels. But unlike section 1981, it has been seldom used to redress employment discrimination.

A complaint stating a section 1983 cause of action must allege, in addition to jurisdiction, a deprivation, under color of state law, of rights, privileges, or immunities secured to the plaintiff by the Constitution or federal law. A deprivation of rights secured solely by state law will not sustain an action under section 1983.

Unlike section 1981, section 1983 provides a vicarious cause of action—the operative cause of action arises from the constitutional or federal right, privilege, or immunity violated. Thus, to withstand a motion to dismiss, the complaint must allege, in addition to action under color of state law, the elements constituting a cause of action under the particular federal right violated. To illustrate:

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68 These claims are generally redressed under Title VII through civil actions brought by the Department of Justice in which the aggrieved party is given the right to intervene. See 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). Depending upon the relief sought, Title VII may be the most effective vehicle for overcoming the problem of immunity which arises when an individual attempts to sue a state or its political subdivisions. See notes 123-53 and accompanying text infra.

69 See note 86 and accompanying text infra.

70 "Under color of state law" has been treated as equivalent to the state action requirement of the fourteenth amendment. United States v. Price, 383 U.S. 787, 794-95 n.7 (1966). Any discussion of the "protean concept" (Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1085 (1960)) of state action must begin with the Civil Rights Cases, 109 U.S. 3 (1883). There, the Supreme Court enunciated, for the first time, the principle that "[i]ndividual invasion of individual rights is not the subject-matter of the [fourteenth] amendment." Id. at 11. That amendment, on which § 1983 is based, only prohibits "[s]tate action of a particular character." Id. Notwithstanding that principle, subsequent decisions of the Supreme Court have found state action in private individual conduct in at least three general categories: (1) where state courts enforce an agreement affecting private parties (see, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948)); (2) where there is private performance of a governmental function (see, e.g., Terry v. Adams, 345 U.S. 461 (1953)); and (3) where the state "significantly" involves itself with the private party (see, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952); 19 Wayne L. Rev. 1309, 1310-12 (1973)).


74 See Fed. R. Civ. P. 12(b); notes 50-53 and accompanying text supra.

It is alleged that an employee of a quasi-state-owned and -operated racetrack has been summarily and permanently discharged by an official and employee of the racetrack for possessing a narcotic drug while working on the premises, although no drug was ever found in the employee's possession. In such a case, the constitutional deprivation consists of a denial of the right to ply one's trade—a right derived from the due process clauses of the fourteenth and fifth amendments. In order to state a cause of action to redress this deprivation, the plaintiff must allege: (1) state action, (2) a protected interest, in this case, "liberty" or "property," and (3) unreasonable conduct by the state. Therefore, to state a cause of action for a deprivation of the right to ply one's trade, it must be alleged that the state, or one acting under color of state law, has unreasonably deprived the plaintiff of the right to liberty or property.

In addition to the constitutional right to ply one's trade, either section 1981 or Title VII can satisfy the operative cause of action requirement for section 1983. These provisions confer rights, secured to state and municipal employees by federal law, a violation of which can give rise to a section 1983 cause of action. The first and fourteenth amendments may also provide the basis for a claim under section 1983. Indeed, such multiple pleading may well be the most effective way in which counsel for the plaintiff can con-

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81 Whetzel v. Krause, 411 F. Supp. 523 (E.D. Pa. 1976), from which this illustration is taken, cannot be properly viewed as an employment discrimination case. The plaintiff in Whetzel did not expressly allege employment discrimination in connection with his § 1983 claim. Instead, he alleged a violation of fourteenth amendment due process. Nevertheless, the case clearly demonstrates the process of alleging the operative cause of action necessary to the statement of a claim under § 1983 and § 1985(3). See notes 88-122 and accompanying text infra.
82 Title VII reaches employment discrimination based on race, color, religion, sex, or national origin.
struct a complaint charging employment discrimination in violation of section 1983; it gives the plaintiff several bases for opposing defendant's motion to dismiss, while at the same time increasing the latter's burden in pursuing its motion and, ultimately, in prevailing at trial.\(^8\)

The jurisdictional basis for section 1983 is provided in 28 U.S.C. § 1343(3).\(^8\) Thus, no monetary minimum is necessary to sustain jurisdiction.\(^8^7\)

C. Section 1985(3)

Section 1985(3) reaches employment discrimination in all sectors—private and public. As with section 1983, however, the law governing the use of section 1985(3) to redress discriminatory employment practices is embryonic. In order to state a cause of action under section 1985(3), the plaintiff must allege (1) a conspiracy, (2) behind which is a "racial, or perhaps otherwise class-based invidiously discriminatory animus,"\(^8^8\) the purpose or object of which is the deprivation of equal protection of the laws, and (3) which results in injury to the plaintiff.\(^8^9\) To properly plead a section 1985(3) cause of action, it is necessary to understand the nature of the conspiracy, the plaintiff, the deprivation, and the injury contemplated by section 1985(3).

1. Conspiracy

The essence of a section 1985(3) conspiracy is an agreement to deprive a protected race or class\(^9^0\) of the equal protection of the

\(^{8}\) See note 20 and accompanying text supra.


The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any persons . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.


\(^{8^8}\) Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971), quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).


\(^{9^0}\) See note 98 infra.
laws. The plaintiff must plead specific facts which demonstrate that one of the alleged co-conspirators committed "any act in furtherance of the object of [the] conspiracy," and that all conspirators "shared in the knowledge and design of the conspiracy." Failure to "adequately show this in the complaint signifies that the cause of action must fail."

Where the defendant named in the complaint is a single business entity, the statutory requirement of a conspiracy between "two or more persons" is not satisfied by proof that two or more officers, employees, or agents of the business entity participated in the discriminatory conduct. The plaintiff can overcome this problem by alleging that the officers, employees, or agents of the business entity engaged in an ongoing pattern or practice of discrimination. Such a pattern or practice constitutes an entirely separate ground for alleging conspiracy under section 1985(3), and is distinct from the "two or more person" conspiracy cited above.

2. Plaintiff

In order to bring suit under section 1985(3), the plaintiff must be a member of a race or class protected by that section. If a...
plaintiff is not a member of a protected race or class, he may be entitled to file suit under section 1985(3) if he is an advocate of the rights of a protected race or class and sustains immediate injury to his person or property as a result of such advocacy. For example, an employee who is not a member of the class discriminated against but who alleges that he was discharged from his employment because he sought, to express "views criticizing and opposing what he believed to be . . . racially discriminating [sic] employment practices" may be entitled to bring a section 1985(3) cause of action.

3. Deprivation

The conspirators' actions must be animated by an invidious discriminatory intent. This means that the conspiracy must be designed to deprive the protected race or class of rights secured by the Constitution or by federal law.

Section 1985(3), like section 1983, provides a vicarious cause of action—the operative cause of action arises from the particular deprivation of rights alleged in the complaint. Thus, the nature of the right or privilege belonging to the protected race or class, the
deprivation of which is the object of the conspiracy, will determine the character of a plaintiff's cause of action. For example, where the asserted deprivation involves the fourteenth amendment, such as a claim of sex discrimination,107 a showing of state action is a necessary element of the section 1985(3) cause of action.108 On the other hand, a showing of state action is not a necessary element of a section 1985(3) cause of action if the alleged deprivation is of thirteenth amendment rights, such as a claim of racial discrimination, because state action is not a requisite element of a cause of action under the thirteenth amendment.109

The requirement that one must allege deprivation of a federally guaranteed right or privilege also points to another important feature of section 1985(3). Unlike section 1983, section 1985(3) reaches nonracial discrimination by the federal government.110 The fifth amendment due process clause—clearly an appropriate source for a section 1985(3) cause of action—prohibits the federal government from discriminating on the basis of color, religion, sex, or national origin, as well as race.111 A female federal employee

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107 The right to be free from gender-based discrimination can also derive from fifth amendment due process. See notes 110-13 and accompanying text infra. To this extent, fourteenth amendment equal protection and fifth amendment due process overlap.

108 See Milner v. National School of Health Tech., 409 F. Supp. 1389, 1394 (E.D. Pa. 1976), where the court stated: "[I]f the right is one which is protected only against infringement by the state government, e.g., the fourteenth amendment, there must be a sufficient allegation of state action." As Judge (now Justice) Stevens pointed out in Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 829 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976), some courts, without careful consideration of the issue, have cited Griffin v. Breckenridge, 403 U.S. 88 (1971), for the proposition that state action is never necessary in a § 1985(3) cause of action. See, e.g., Weise v. Syracuse Univ., 522 F.2d 397, 408 (2d Cir. 1975); Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971). The plaintiff did not have to allege state action in Griffin because the charge of racial discrimination brought the case within the thirteenth amendment and because the claim of infringement of the right to interstate travel can be asserted against private individuals as well as against the state. Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971). To this extent, the requirements of a § 1985(3) cause of action are identical to those of a § 1983 cause of action. See note 70 and accompanying text supra. Where a claim of sex discrimination is brought against a federal employer under the fifth amendment (see notes 110-13 and accompanying text infra) there is, of course, no requirement that plaintiff allege state action.


110 Section 1983 reaches conduct under color of state law only. See note 70 and accompanying text supra.

may thus be able to seek redress against some aspects of gender-based discrimination in federal employment, provided that she satisfies the other elements of a section 1985(3) cause of action.

4. Injury

Section 1985(3) requires that the plaintiff sustain a direct and immediate injury "in his person or property." Both a plaintiff who is a member of a protected race or class discriminated against or one who merely advocates the rights of such a race or class must meet this requirement. Where the plaintiff is an advocate rather than a member of a protected race or class, the complaint must allege, in addition to the requisite deprivation, that plaintiff has sustained injury as a consequence of such advocacy.

5. Summary

In brief, a section 1985(3) cause of action arises when a member or members of a protected race or class sustain a direct and immediate injury to his person or property as a consequence of a conspiracy to discriminate. In the case of an advocate for these groups, the injury must occur as a consequence of such advocacy.

For the purpose of alleging subject matter jurisdiction, 28 U.S.C. § 1343(1) seems sufficient, as does 28 U.S.C. § 1343(4), although at least one court has entertained a section 1985(3) cause of action pursuant to section 1343(3). As with the jurisdictional provisions for sections 1343(4) and 1343(3), no monetary minimum is necessary to sustain jurisdiction under section 1343(1).

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112 But see notes 184-209 and accompanying text infra.
113 See notes 88-89 and accompanying text supra.
116 See note 106 and accompanying text supra.
117 See note 99 and accompanying text supra.
118 28 U.S.C. § 1343(1) (1970) reads: The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right of [sic] privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.
119 Set out in full in note 66 supra.
120 See Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971).
121 Set out in full in note 86 supra.
III

ISSUES ARISING IN LITIGATION

The most significant issues likely to arise in the litigation of employment discrimination claims under sections 1981, 1983, and 1985(3) are those of immunity, exhaustion of administrative remedies, Title VII preemption or exclusivity, statute of limitations, and recovery for injury sustained as a consequence of employment discrimination.

A. Immunity

The issue of immunity arises when an attempt is made to bring suit against the government—municipal, state, or federal—or a governmental official. The doctrine of immunity—which comes from the ancient notion that the "King can do no wrong"—shields the public treasury and the public servant from liability. Of the various types of immunity claimed by public officials, municipal immunity, eleventh amendment immunity, executive immunity, and sovereign immunity are most likely to surface in the area of employment discrimination.

1. Municipal Immunity

The doctrine of municipal immunity precludes the maintenance of a federally cognizable claim under section 1983 against a municipality or other political subdivision of a state. A munici-

124 See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). Thus, the doctrine of immunity relates not merely to the nature or extent of relief possible but also to the substantive right of action in toto.
125 For example, the doctrines of judicial immunity, quasi-judicial immunity, and legislative immunity still exist. See generally Scheuer v. Rhodes, 416 U.S. 232 (1974).
ipality is not a suable “person,” as contemplated by Congress, under section 1983. The obstacle of municipal immunity can be avoided simply by bringing suit against an individual official. However, since a court will ordinarily look behind the pleadings to ascertain who the real parties are, the complaint must contain factual allegations that demonstrate personal wrongdoing on the official’s part.

2. Eleventh Amendment Immunity

Although the eleventh amendment does not specifically bar suits against a state by its own citizens, the Supreme Court “has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.” These decisions reach suits where the state is the party in fact. It is also settled that the eleventh amendment provides no shield for a state official who, under color of state law, infringes upon the federal rights of another. Ever since Ex parte Young, it has been clear that one may enjoin a government official who is acting either in excess of authority or pursuant to an unconstitutional statute. The Young Court noted that an official acting beyond his authority is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”

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134 Ex parte New York, 256 U.S. 490, 500 (1921).
135 For example, allegation of an ultra vires act would suffice. See notes 138-41 and accompanying text infra.
136 The eleventh amendment reads: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .
140 209 U.S. 123 (1908).
142 209 U.S. at 160.
Although the *Young* doctrine does not permit a plaintiff to seek damages from the public treasury, the case does not limit him to injunctive relief, although some lower courts have so held. The Supreme Court held in *Scheuer v. Rhodes* that "damages against individual defendants are a permissible remedy in some circumstances," specifically where a citizen is deprived of the right to vote or suffers injury as a consequence of criminal acts by a public official in the process of discharging his duties.

3. Executive Immunity

In *Scheuer* the Court also clarified, although not definitively, the extent to which executive immunity shields state officials. The Court announced that state officials have a qualified executive immunity, depending upon the scope of discretion, the responsibilities of the office, and the circumstances surrounding the action taken. When a state officer acts under color of state law in a manner violative of the Constitution, his actions will conflict with the paramount authority of the Constitution. Such action necessarily becomes one for "judicial inquiry in an appropriate proceeding directed against the individual charged with the transgression." As with the doctrine of *Ex parte Young*, the doctrine of

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144 *Cf. Penn v. Schlesinger*, 490 F.2d 700, 704 (5th Cir. 1973) (declaratory judgment), rev'd on other grounds, 497 F.2d 970 (5th Cir. 1974) (en banc); *Beale v. Blount*, 461 F.2d 1133, 1137-38 (5th Cir. 1972).
146 *Id.* at 238.
149 416 U.S. at 249.
150 *Id.* at 247.
151 *Id.* at 249. The Court stated:

It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

*Id.* at 247-48. There are grounds for arguing that a violation of the Civil Rights Acts must be deemed an ultra vires act per se by an official. *See* notes 158-59 and accompanying text infra.

quasi-executive immunity precludes neither damages nor injunctive relief.153

4. Sovereign Immunity

The United States, as a sovereign power, enjoys immunity from suit154 and from incidental costs except where Congress has otherwise provided.155 The doctrine of sovereign immunity does not, however, preclude a plaintiff from bringing suit against an official of the federal government. Following the doctrine of Ex parte Young, the Supreme Court held in Dugan v. Rank156 and Larson v. Domestic & Foreign Commerce Corp.157 that where a plaintiff sues a federal government official, the doctrine of sovereign immunity applies only if the suit is actually one against the United States. This situation arises if the request for relief would run against the government's property or funds, or would affect the official in the exercise of his authorized functions.158 Even where sovereign immunity would otherwise apply, the suit will not be characterized as one against the United States if "(1) [the challenged] action by officers [is] beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void."159 A "violation of Section 1981 by a federal official must be deemed an ultra vires action on the official's part,"160 and can therefore result in personal liability, damages, or injunctive relief.161

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160 Penn v. Schlesinger, 490 F.2d 700, 704 (5th Cir. 1973), rev'd on other grounds, 497 F.2d 970 (5th Cir. 1974) (en banc), quoted in Henry v. Schlesinger, 407 F. Supp. 1179, 1190 (E.D. Pa. 1976). There is nothing to suggest that the ultra vires proposition is limited to § 1981, and it is reasonable to argue that a violation of § 1983 or § 1985(3) must also be deemed an act in excess of a federal official's authority.
161 Because damages are recoverable from a culpable state official under the doctrine
Justice Blackmun, while still a Circuit Judge, suggested a method for handling the sovereign immunity issue without resorting to the Dugan-Larson exception. In *Gnotta v. United States*,\(^{162}\) he indicated that where Congress provides a federal jurisdictional basis for a particular cause of action, the argument that the doctrine of sovereign immunity bars a federal court from entertaining the cause of action is a non sequitur.\(^{163}\) This reasoning prompted the Eastern District of Pennsylvania to hold in *Henry v. Schlesinger*\(^{164}\) that the jurisdictional basis for section 1981\(^{165}\) precludes the sovereign immunity defense in section 1981 actions.

Less than two months after the decision in *Henry*, however, the Supreme Court clarified the issue of sovereign immunity in *United States v. Testan*.\(^{166}\) Discussing the issue in the context of the Tucker Act,\(^{167}\) the Court stated that since the concept of sovereign immunity is substantive rather than jurisdictional,\(^{168}\) a waiver of sovereign immunity must be found, if at all, in the cause of action itself rather than in the statute bestowing jurisdiction.\(^{169}\)

Following the *Testan* reasoning, it is not possible to find a waiver of sovereign immunity in section 1981 because, like most

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\(^{162}\) 415 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970).

\(^{163}\) Acknowledging that the court did not have before it any provision of the Civil Rights Acts of 1866 or 1871, he stated:

This court, of course, is most familiar with the *Jones* case. We fail to see its application here, and we get little assistance from the plaintiff's argument as to its general applicability. The Joneses did invoke federal jurisdiction under § 1343(4) but their action, if 42 U.S.C. § 1982 was applicable, was then clearly "authorized by law". *Jones v. Alfred H. Mayer Co.* [392 U.S. 409, 412 n.1 (1967)]. . . The Supreme Court held that § 1982 was applicable. In the present case, there is nothing comparable to § 1982 unless the Executive Order in question could so qualify. We have held above that it does not.


\(^{168}\) 424 U.S. at 399-402.

\(^{169}\) See also note 124 and accompanying text supra.
other anti-discrimination enactments\textsuperscript{170} and all constitutional provi-
sions,\textsuperscript{171} it does not contain an explicit waiver.\textsuperscript{172} Section 1981 constitutes a mere "general prohibition of discrimination on racial grounds, [and] does not constitute a waiver of this immunity."\textsuperscript{173}

Section 1985(3), by contrast, does contain language that would seem to indicate an express waiver of sovereign immunity. The statute provides that "the party . . . injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."\textsuperscript{174} It would thus appear that a plaintiff may bring an action for damages under section 1985(3) against individual federal co-conspirators,\textsuperscript{175} without resorting to the \textit{Dugan-Larson} exception to sovereign immunity.

B. Exhaustion of Administrative Remedies

It is sometimes argued that employees who seek redress for discriminatory employment practices under section 1981 must exhaust all available administrative remedies prior to filing suit in a federal court.\textsuperscript{176} In \textit{Johnson v. Railway Express Agency, Inc.},\textsuperscript{177} the Supreme Court rejected this argument for suits brought under section 1981 against parties in the private sector. The Court based its decision on the legislative history of the 1972 Amendments to Title VII, in which Congress declared that Title VII remedies are coextensive with the right to sue under section 1981.\textsuperscript{178}

Although \textit{Johnson} involved acts of discrimination by a private

\textsuperscript{170} Title VII does provide an express statutory waiver of sovereign immunity in EEO Act of 1972, § 717(c), 42 U.S.C. § 2000e-16(c) (Supp. V 1975), as does the Back Pay Act, 5 U.S.C. § 5596 (1970 & Supp. V 1975). Indeed, one of the stated reasons for the enactment of the 1972 Amendments to Title VII was to provide some form of relief for federal employees who were otherwise denied relief on the basis of sovereign immunity. S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971).

\textsuperscript{171} See, e.g., U.S. Const. amend. XIII (set out in note 27 supra); U.S Const. amend. XIV (pertinent parts set out in note 34 supra).

\textsuperscript{172} Section 1981 is set out in text accompanying note 26 supra.

\textsuperscript{173} Penn. v. Schlesinger, 490 F.2d 700, 703 (5th Cir. 1973), rev'd on other grounds, 497 F.2d 970 (5th Cir. 1974) (en banc); see Beale v. Blount, 461 F.2d 1113 (5th Cir. 1972).

\textsuperscript{174} Section 1985(3) is set out in text accompanying note 36 supra (emphasis added).

\textsuperscript{175} See text accompanying notes 187-209 infra.


employer, its rationale also seems applicable to the federal sector. Congress intended to provide plaintiffs with alternative causes of action under Title VII or section 1981, without distinguishing between federal and non-federal plaintiffs.\textsuperscript{179} The Supreme Court imposed just such a distinction, however, in its recent decision in Brown v. General Services Administration (GSA).\textsuperscript{180} Finding a significant difference between private and federal employees, the Brown Court ruled that federal employees may not bring a section 1981 action for employment discrimination.\textsuperscript{181}

The issue of exhaustion of administrative remedies has also been raised in connection with section 1983. The remedies at issue there, in contrast to section 1981, concern adjudication of a plaintiff's federal claim before state courts or administrative agencies as a condition precedent to the filing of a section 1983 action in federal district court.\textsuperscript{182} The Supreme Court has decisively ruled that the exhaustion doctrine does not apply to section 1983 actions.\textsuperscript{183}

C. Title VII Exclusivity or Preemption

In Alexander v. Gardner-Denver Co.,\textsuperscript{184} the Supreme Court observed that "the legislative history of Title VII manifests a congressional intent to allow an individual to independently pursue his rights under both Title VII and other applicable state and federal statutes."\textsuperscript{185} Based on this observation, the Court later held in Johnson v. Railway Express Agency, Inc.,\textsuperscript{186} that Title VII does not preempt other remedies available to private employees who bring job-related racial discrimination suits. Thus, it is well established


\textsuperscript{180} 425 U.S. 820 (1976).

\textsuperscript{181} \textit{Id. Brown} is discussed in detail at notes 184-209 and accompanying text infra.

\textsuperscript{182} The argument for exhausting remedies in the state courts was first advanced by Mr. Justice Frankfurter in his dissenting opinion in Monroe v. Pape, 365 U.S. 167 (1961). In his view, § 1983 was enacted to provide federal redress for deprivations of federal rights by state and local officials only if the plaintiff could not obtain redress in the state courts. He reasoned that any invasion violating federal law was not committed under color of state law unless the state courts refused to grant an appropriate remedy for the official's misconduct. \textit{Id.} at 237.


\textsuperscript{184} 415 U.S. 36 (1974).

\textsuperscript{185} \textit{Id.} at 48.

\textsuperscript{186} 421 U.S. 454 (1975).
that private employees are not limited to Title VII in seeking redress for employment discrimination.

With respect to federal employees, however, the Court ruled in *Brown v. GSA*\(^{187}\) that section 717 of the Equal Employment Opportunities Act of 1972\(^{188}\) constitutes the exclusive individual remedy for job-related racial discrimination. The Court's holding is puzzling, not only in light of *Alexander* and *Johnson*, but also because Congress indisputably intended to give federal and private employees equal legal rights in the area of employment discrimination.\(^{189}\) Curiously, the Court cited this congressional intent in *Chandler v. Roudebush*,\(^{190}\) decided the same day as *Brown*, in holding that federal employees have the same right to a trial de novo in federal district court as enjoyed by private sector employees under Title VII.\(^{191}\)

The Court in *Brown* concluded that Congress intended by the 1972 Amendments to create an exclusive, preemptive, administrative and judicial scheme for the redress of federal employment discrimination. Specifically, the Court pointed to the Senate\(^{192}\) and House Committee Reports,\(^{193}\) to remarks of Senator Cranston

\(^{187}\) 425 U.S. 820 (1976). The split was six to two with Justice Stevens, joined by Justice Brennan, dissenting. Justice Marshall did not take part in considering or deciding the case.


\(^{190}\) 425 U.S. 840 (1976).

\(^{191}\) As Justice Stewart stated for a unanimous Court in *Chandler*:

In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964 . . . to employees of the Federal Government. A principal goal of the amending legislation, the Equal Employment Opportunity Act of 1972 . . ., was to eradicate "'entrenched discrimination in the Federal service,'" *Morton v. Manarei*, 417 U.S. 535, 547 . . ., by strengthening internal safeguards and by according "'[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under title VII.'"


\(^{192}\) 425 U.S. at 827-28. The pertinent part of the Senate Report reads:

The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt.

S. REP. No. 415, 92d Cong., 1st Sess. 16 (1971).

\(^{193}\) 425 U.S. at 828. The relevant portion of the House Report states, "There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available." H.R. REP. No. 238, 92d Cong., 1st Sess. 25 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2160.
(co-author of the amendment relating to federal employees), and to remarks of Senator Williams (sponsor and floor manager of the bill). Both Senators expressed a belief that the 1972 Amendments would, for the first time, give federal employees the right to sue the federal government for employment discrimination. This evidence, the Court held, left little doubt that “Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy” prior to 1972.

As Justice Stevens pointed out in his dissenting opinion, however, Congress was clearly wrong on the state of the law at the time of enactment of the 1972 Amendments. Other remedies were available to federal employees victimized by discriminatory employment practices. Nevertheless, the majority ruled that “the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.” The Court cited no precedent in support of this proposition. In response to petitioner’s contention that section 717 was merely designed to supplement other punitive remedies, the Court stated that the “balance, completeness, and structural integrity of § 717” warranted a finding of exclusivity. The Court also invoked the oft-quoted maxim of statutory construction that “a precisely drawn, detailed statute [i.e., Title VII] pre-empts more general remedies.”

There seems little question, however, that the Court’s decision in Brown turned almost exclusively on the fact that federal, rather than private, job discrimination was alleged. Indeed, in distinguishing Johnson, the Brown Court emphasized that it was not dealing with employment discrimination in the private sector. The considerable support for nonexclusivity in both the legislative history and the Court’s own precedents, makes it clear that the Brown decision was motivated by more than pure legal analysis.

194 425 U.S. at 828. Senator Cranston stated that the amendment would “[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases . . . .” 118 Cong. Rec. 4929 (1972).
195 425 U.S. at 828. Senator Williams stated that the amendment “provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court.” 118 Cong. Rec. 4922 (1972) (emphasis added).
196 425 U.S. at 828.
197 See notes 1-16 and accompanying text supra.
198 425 U.S. at 828.
199 Id. at 832.
200 Id. at 834.
201 “In Johnson the Court held that in the context of private employment Title VII did not pre-empt other remedies.” Id. at 834 (emphasis in original).
The fiscal consequences of providing an “extra” remedy to federal employees might have influenced the Justices. Employment discrimination suits are generally brought as class actions, often involving thousands of plaintiffs. Compensatory and punitive damages—both available under the Reconstruction Acts—can easily amount to millions of dollars. In an era of rising federal deficits and increased demands on the federal budget, the Court could hardly avoid considering the potential cost of providing additional relief to victims of employment discrimination at the federal level.

Notwithstanding the Brown decision, federal employees may still be able to obtain immediate relief under the Reconstruction Acts in some cases of employment discrimination. For example, a federal employee might still have a cause of action against his supervisor in the latter’s individual capacity for harassment or

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202 Library of Congress researchers have estimated that employment discrimination on account of race costs the nation $55.8 billion a year in reduced gross national product equal to 3.7% of the 1975 GNP. Wall St. J., June 22, 1976, at 1, col. 5. The figure, of course, would be even greater if other forms of invidious employment discrimination (e.g., sex and alienage) were included in the study. See also Wall St. J., Oct. 1, 1976, at 32, col. 1 (Court’s docket reflects increased awareness of economic issues).

203 See, e.g., United States v. Allegheny-Lundlum Indus., Inc., 517 F.2d 826, 836 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976): At the time of the decrees’ entry, hundreds of employment discrimination charges were pending against the defendants before the EEOC and federal district courts scattered throughout the country. Between twenty and sixty thousand minority and female individuals then stood beneath the overlapping umbrellas of these charges as members of putative aggrieved classes in actions seeking systemic injunctive relief and back pay.

204 The steel industry employment discrimination suits have advanced far enough in litigation to permit estimation of their ultimate cost. With the filing of hundreds of private class actions alleging job-related bias in the nation’s steel industry, the EEOC and the Secretary of Labor in April, 1974, sued nine major steel companies and the United Steelworkers of America in the federal district court for the Northern District of Alabama. The EEOC entered into consent decrees with the steel companies and the union separately. The EEOC union consent decree did not purport “to bind any individual employee or to prevent the institution or maintenance of private litigation.” United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 836 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Yet it promised $30.9 million in back pay alone. This consent decree did not reach compensatory or punitive damages because suit was brought under Title VII and Executive Order 11246 (see note 3 supra), neither of which provides for such damages. See note 219 infra. Similarly, in Cooper v. Allied Chem., Inc., No. 75-2938 (E.D. Pa., filed Oct. 16, 1975), the plaintiff claimed damages to the aggrieved class of $100 million.

other forms of emotional injury sustained as a result of discrimination on or off the job. Plaintiff's counsel must be cautious in constructing the complaint in such cases—taking care, for example, to omit class action allegations and Title VII claims—so as to minimize the chances that the suit will be characterized as an employment discrimination claim that should have been brought under Title VII. District court judges who disagree with the Brown decision or doubt its vitality may be persuaded that the plaintiff is bringing a private suit for damages against a person who has violated his civil rights. The claim could thus survive the critical pretrial motion stage of the litigation, after which the chances of a favorable settlement dramatically increase.

D. Statute of Limitations

There is presently no federal statute of limitations governing suits brought under sections 1981, 1983, and 1985(3). Therefore, the period of limitations is governed by the period set forth in the most analogous state action; often determined by considering whether a plaintiff's action sounds in contract or tort.


207 A similar pattern of litigation has developed in response to the problems of municipal immunity. See notes 130-35 and accompanying text supra.

208 See notes 50-53 and accompanying text supra.

209 When a suit is not settled, it is often because of a so-called "greedy plaintiff." In such cases, counsel must work especially hard to force his client to confront the realities of the case.


212 See id.


E. Recovery

The Reconstruction Acts are silent as to the nature of damages that may be awarded to a successful plaintiff. Nevertheless, courts have awarded punitive damages under sections 1981 and 1983, as well as compensatory damages for pain and suffering. As already noted, punitive damages are apparently not available to Title VII plaintiffs, and some courts have also ruled that compensatory damage awards are impermissible in Title VII actions. Thus, in terms of recovery, the Reconstruction Acts may, at least in some cases, be preferable to Title VII.

The possibility of recovering punitive damages against private defendants is particularly significant in assuring enforcement of the Acts, since it encourages plaintiffs to seek redress in the many cases where actual injury is too small to warrant a suit for compensatory damages alone. Where the defendant has systematically engaged in unlawful discrimination—wanton and willful disregard of the plaintiff's rights—punitive damages are justified.

No reported cases discuss the kinds of damages that may be awarded under section 1985(3). It seems reasonable to assume, however, that courts will allow the same kinds of damages under 1985(3) as under the other Reconstruction Acts, especially since

216 Section 1981 is set out in text accompanying notes 25-26 supra, § 1983 is set out in text accompanying notes 31-32 supra, and § 1985(3) is set out in text accompanying notes 35-36 supra. See also Basista v. Weir, 340 F.2d 75, 85 (3d Cir. 1965).


219 For example, under Title VII a court, upon proof of an intentional violation of the statute, may award back pay for a period not to exceed the two-year period prior to the filing of the charge with the administrative agency, and order "such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g) (Supp. V 1975). See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 458 (1975); Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975). Some courts have ruled that neither compensatory nor punitive damages may be awarded in Title VII suits. See cases cited in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 458-59 n.5 (1975), for the proposition that only restitutionary and other equitable remedies—e.g., injunctive relief—are available under Title VII. Jiron v. Sperry Rand Corp., 10 Fair Emp. Prac. Cas. 730, 736-40 (D. Utah 1975). It seems, however, that since the purpose of recovery under Title VII is "to bring one group of employees up to the economic level of another," compensatory damages could be imposed. Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 96 (3d Cir. 1973).


222 See Seaton v. Sky Realty Co., 491 F.2d 634, 638 (7th Cir. 1974).
1985(3) is derived from the same parent statute as section 1983,²²³ under which both compensatory and punitive damages have consistently been awarded.

Filing suit under the Reconstruction Acts thus presents two benefits. First, the aggrieved party may recover full compensation. Second, the possibility of punitive damage awards provides a greater deterrent to employment discrimination, thus advancing the national goal of equal employment opportunity.

CONCLUSION

The Civil Rights Acts of 1866 and 1871 can be extremely useful tools for the lawyer who seeks to end the injustices of discriminatory employment practices. Successful litigation under the Acts requires precision and foresight in constructing the complaint, in order to assure survival of the action beyond the pretrial stage. Considering the vulnerability of other types of employment discrimination actions to pretrial dismissal, and the possibility of compensatory and punitive damages under the Reconstruction Acts, the latter can prove indispensable in planning successful actions to combat employment discrimination.

²²³ See notes 31-37 and accompanying text supra.