No. 05-3910

THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRYSTAL GREGORY, et al.

Plaintiffs – Appellants

vs.

DILLARD'S, INC.

Defendant – Appellee

Appeal From The United States District Court
for the Western District of Missouri
The Hon. Scott O. Wright, United States District Judge

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND REVERSAL OF THE JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF AMICUS CURIAE

A. Identity of Amicus Curiae

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Eastern Missouri is an affiliate of the ACLU and enjoys a membership of more than 4,800 individuals. As part of its mission, the ACLU/EM has advocated the Constitutional rights of individuals in numerous cases as counsel or as amicus. Those cases have included other cases involving the right to equal treatment regardless of race.

B. Interest in the Case

This Court's adjudication of the civil rights claims and defenses at issue here will have an impact upon individuals, entities, and commerce beyond the scope of the particular case. Retail stores are ubiquitous. A growing number of published opinions make it clear that the problem of racially discriminatory policies and practices in the retail setting is not confined to this case.

The Constitutional and policy interests of the ACLU/EM are not coextensive with the interests of the appellants. The responsibility of counsel for the appellants to advocate the particular interests of the

appellants may prevent the appellants' briefing and argument from fully addressing the important Constitutional and policy principles underlying this litigation. The principal interest of the amicus curiae is in the assertion and preservation of the civil liberties at issue in the case.

The division of this Court's panel suggests the depth of the conflict between individual rights and commercial prerogatives at issue in this case. The amicus curiae has sought the opportunity to be heard on those issues pursuant to its mission to advocate the Constitutional rights of individuals in judicial proceedings.

C. Authority to File Brief

On January 15, 2008, the amicus curiae filed its motion for leave to submit a brief supporting reversal of the judgment of the District Court. On January 25, 2008, the Court entered its order granting that request.

ARGUMENT

A. History and Purpose of 42 U.S.C. § 1981

This case arises under one of the nation's oldest civil rights laws, which begins by providing: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Promptly after the Supreme Court narrowed the scope of the statute's substantive protections in *Patterson v. McLean Credit Union,* 491 U.S. 164, 176-77 (1989), Congress amended § 1981 by expanding the definition of "make and enforce contracts" to include a complete array of the incidents that form and attend the contracting process.[1]

Those newest provisions of § 1981 read as follows:

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[1] The legislative history of the 1991 statutory revision makes the Congressional purpose clear:

> H.R. 1, the Civil Rights Act of 1991, has two primary purposes. The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

H.R. Rep. No. 102-40(II), at 1 (1991), as reprinted in 1991 U.S.C.C.A.N. 549, 694.

> **(b) "Make and enforce contracts" defined**
>
> For the 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) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (b) and (c). The statute thus provides for judicial relief to private plaintiffs when "racial discrimination blocks the creation of a contractual relationship," as well as when such discrimination "impairs an existing contractual relationship." *Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470, 476 (2006).

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H.R. Rep. No. 102-40(II), at 1 (1991). Congress went on to explain that the statutory list of what may constitute the "make" or "enforcing" of a contract under § 1981 "is intended to be illustrative rather than exhaustive," S. Rep.

No. 101-315 (1990); H.R. Rep. No. 102-40(II), supra, at 37, and to state that it intended the statute to apply in "a broad variety of contexts." H.R. Rep. No. 102-40(I) at 90 (1991).

B. Applicability of § 1981 in Retail Establishments

The availability of § 1981 as a remedy for race-based impairment of contractual freedom in the retail shopping environment is well established. *See, e.g., Green v. Dillard's, Inc.,* 483 F.3d 533, 538-39 (8th Cir. 2007); *Garrett v. Tandy Corp.,* 295 F.3d 94, 98-100 (1st Cir. 2002); *Williams v. Staples, Inc*., 372 F.3d 662, 667-68 (4th Cir. 2004); *Morris v. Dillard Department Stores, Inc.,* 277 F.3d 743, 752 (5th Cir. 2001); *Christian v. Wal-Mart Stores, Inc.,* 252 F.3d 862, 872 (6th Cir. 2001). In *Green* this Court held: "In the retail context, § 1981 plaintiffs are required to demonstrate that they actively sought to enter into a contract with the retailer." 483 F.3d at 538.

C. Alternative Tests For Actionable Discrimination

1. Severe or Pervasive Harassment

The dissenting opinion in the original decision of this appeal concluded that recovery for discrimination in the retail environment under § 1981 should require proof of "severe or pervasive harassment." *Gregory v. Dillard's, Inc.,* 494 F.3d 694, 718 (8th Cir. 2007) (Colloton, J., dissenting),

vacated and reh'g granted, 494 F.3d 694. The dissent would import that standard from employment discrimination cases. *Id.* at 717. The want of correspondence between the processes and dynamics of employment and those of retail shopping augur against a single test for identifying and assessing discrimination in both contexts.

There are in fact profound distinctions between the incidents of contracts between shoppers and retailers and the incidents of contracts between workers and employees. As one commentator has noted:

> Retail shoppers enter stores, browse around, examine items, perhaps ask employees for assistance, and finally proceed to pay for their items. Even after the purchase is complete, the customer often has the option to return or exchange the items, and thus the contractual relationship continues. Each step in this shopping experience affects the final outcome—if, what, and how much the customer will purchase.

Abby Morrow Richardson, Note, *Applying 42 U.S.C. § 1981 To Claims Of Consumer Discrimination,* 39 U. MICH. J. L. REFORM 119, 135-36 (2005). Consumers may have been induced to enter retail establishments by pervasive advertisement placed across the gamut of media. The previous dissent in this case clearly noted at least the essence of distinction between discrimination in the retail environment and in the work environment:

> In the workplace setting, the severity and pervasiveness of alleged harassment is typically measured over a period of time, whereas harassment in a retail environment must sometimes be

> evaluated on a single occasion involving a single alleged contractual event . . .

Gregory v. Dillard's, Inc., supra, 494 F.3d at 718. The judicial assessment of discrimination against consumers who belong to protected classes is not likely to be accomplished as dependably or as efficiently with a test borrowed from an entirely different context as with methods formulated especially for the task at hand.

Jobsite discrimination is "severe and pervasive" if it creates a work environment "that a reasonable person would find hostile or abusive" and that the victim does "subjectively perceive . . . to be abusive." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21-22 (1993). The function of the "severe or pervasive" standard in the employment context is not to immunize employers from liability for workplaces where statutorily protected individuals are routinely subjected to humiliating mistreatment or harassment at the hands of their co-workers or supervisors:

> These standards . . . [p]roperly applied . . . will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.

Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). The "critical issue" in workplace harassment cases is whether members of a protected group "are exposed to disadvantageous terms or conditions of employment"

that are not visited upon others. *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80 (1998). The filter that works to separate substantial from insubstantial discrimination complaints among employees is not necessarily the most apt filter in the very different context of retail shopping.

Being subjected to routine race-based surveillance based on a purported expectation of shoplifting, racially discriminatory limitations on merchandise returns and exchanges, race-motivated assault either physical or verbal, or the withholding or limitation of the service provided to white people entering the premises surely cannot comprise the "ordinary tribulations" of retail shopping. Brevity of interaction is not a badge of the relationship between employer and employee. It frequently is the case in the relationship between retailers and their prospective customers. Further, while it is reasonable to insist upon one measure of tolerance for the "abusive language, gender-related jokes, and occasional teasing" of fellow employees in the workplace, consumers who accept the explicit or implicit invitation to enter a retail merchant's premises may be entitled to a different test for determining whether the racial harassment to which they are subjected is actionable.

Depending on circumstances that are unique to shopping and have no equivalent in the work environment, the encounter between a shopper and

prospective contractor who belongs to a protected class and a merchant or its agents may begin and end in a matter of moments. Still, with utter certainty, a perfectly good prospect for contracting can be extinguished—for the individual shopper and for any reasonable person—by quick and efficient racially discriminatory conduct. Employing a "severe or pervasive" standard for judging discrimination is hardly designed or particularly well-suited for the task.

Civil rights legislation such as § 1981 generally is afforded a liberal construction to effectuate its remedial purpose. *See Youngblood v. Hy-Vee Food Stores, Inc.,* 266 F.3d 851, 857-58 (8th Cir. 2001) (Richard Arnold, J., dissenting); 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 60.01 (5th ed. 1992). Given the well established applicability and the importance of § 1981 protection to members of protected categories in the retail shopping context, the fundamental differences between workplace operations and store operations, and the liberal construction generally due federal civil rights enactments, the adjudication of discrimination complaints that have arisen in the shopping environment ought to have a screening methodology thoughtfully designed to address the realities of shopping rather than those of employment. The tests articulated by the panel majority

in this case and by *Christian v. Wal-Mart Stores, Inc.,* 252 F.3d 862, 872 (6th Cir. 2001), are within that category.[2]

2. Racially Motivated Thwarting of Intent to Close Contract

The panel majority in this case established a clear test for § 1981 claims of racial discrimination in the context of retail shopping. *Gregory,* 494 F.3d at 703-05. The opinion identified four elements that a plaintiff must allege and prove in order to succeed with such a claim: (1) membership in a protected class, (2) a contractual relationship or an intent to form such a relationship by making a purchase, (3) the merchant's interference with that contractual interest, and (4) the merchant's discriminatory intent. *Id.* The statutory basis of that test is patent: individuals who are subjected to racially motivated non-governmental interference with an actual intent to form a contract by making a purchase are held to a cogent evidentiary burden drawn directly from § 1981 and, if they are able to meet that burden, are afforded a judicial remedy for the violation of their civil rights.

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[2] Reversal ought to be the result for much of the present case even if the Court concludes that the "severe and pervasive" filter utilized in employment-based civil rights litigation can be applied to § 1981 cases that arise in the context of retail shopping. "Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." *Howard v. Burns Bros., Inc.* 149 F.3d 835, 840-41 (8th Cir. 1998).

The principal focus of both the panel majority and the dissent was on the parameters of the contractual interest protected by § 1981 and the nature or degree of discriminatory conduct necessary to trigger a cognizable claim of interference under the statute. Regarding the scope of the protected contractual interest, the majority held that "[m]ere presence on a store's premises with no indication of a desire to contract is insufficient" and that a plaintiff must show "'some tangible attempt to contract' by selecting particular items" for § 1981 to be implicated. 494 F.3d at 704. The dissent agreed with that definition of the protected contractual interest. *Id.* at 714-15.

But where the dissent contended for a requirement that the discriminatory behavior of a merchant be "severe and pervasive" in order to trigger the protection of § 1981, the majority articulated a standard tailored to the realities of the retail environment: "[Plaintiffs] must produce evidence of conduct, policies, or practices which 'a trier of fact could find as a whole thwarted their attempt to make and close a contract.'" 494 F.3d at 707.

The majority opinion paid heed to the "varying circumstances" in which discriminatory interference with contractual rights may occur, and concluded that "careful line-drawing" on a case-by-case basis will be necessary to give effect to § 1981 for consumers who suffer discrimination

while shopping. *Id.* Illustrating the need for case-by-case analysis of claims under this statute, the majority identified a panoply of circumstances in which actionable discrimination had been found: "interruption of the plaintiff's attempt to redeem a coupon," "[r]efusal to accept a check," "discriminatory accusations of shoplifting and being ejected from [store] premises," "[r]efusal to wait on black customers," "interference with another salesperson's assistance," "racially offensive comments," and "[t]he deliberate provision of inferior service to black patrons." *Id.*

The dissent expressed dissatisfaction with the majority's recognition of a need for case-by-case analysis and purported failure "to establish an appropriate objective standard" for evaluating discriminatory merchant conduct. *Id.* at 716-17. The dissent criticized particularly its perception that the majority had proposed a test under which racial discrimination that demeans and humiliates a shopper would be actionable. Id. In fact the majority stated: "The proper test is whether Dillard's thwarted the plaintiffs' attempts to contract—to purchase goods or obtain services offered to other customers." *Id.* at 707.

A standard for evaluating merchant discrimination that requires the thwarting of an attempt to contract with the recognition that actionable discrimination will occur in a plethora of circumstances is firmly rooted in

the language of and the Congressional purpose in enacting § 1981. It is consistent with the breadth of circumstances that the statute was intended to affect when first enacted, *see Denny v. Elizabeth Arden Salons, Inc.,* 456 F.3d 427, 437 (4th Cir. 2006) (Wilkinson, J.) (recognizing that "[t]he Reconstruction Congress wrote broadly, and we have given effect to that breadth as expressed in section 1981") (quoted in *Gregory, supra,* 494 F.3d at 707), as well as with the purposeful expansion by amendment in 1991.

3. Denial of Service or Rendering of Service in a Markedly Hostile Manner

The Court of Appeals for the Sixth Circuit adopted the following three-part test for determining whether a plaintiff has made a prima facie showing "of race discrimination in the commercial establishment context":

> In a § 1981 commercial establishment case, a plaintiff must prove:
>
> (1) plaintiff is a member of a protected class;
>
> (2) plaintiff sought to make or enforce a contract for services ordinarily provided by the defendant; and
>
> (3) plaintiff was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that (a) plaintiff was deprived of services while similarly situated persons outside the protected class were not and/or (b) plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.

Christian v. Wal-Mart Stores, Inc., supra, 252 F.3d at 872. Like the test articulated by the panel majority in the present appeal, this standard has a sound basis in the statute and is well suited to its task.

In *Christian* the Court of Appeals found it appropriate to limit the plaintiff's initial burden to a prima facie showing and to make it clear that direct proof of the defendant's discriminatory intent is not required to establish a prima facie case. 252 F.3d at 867-71. It concluded that the analytical framework established for Title VII cases in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), appropriate for § 1981 cases as well:

> Under this standard, a plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence. The burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. To prevail, the plaintiff must then prove by a preponderance of the evidence that the defendant's proffered reason is not its true reason but a pretext for discrimination.

Christian, 252 F.3d at 868.

Christian embraced the rationale of a Maryland district court for omitting direct proof of discriminatory intent from the elements of a prima facie showing:

> [T]o the extent that any formulation of the elements of a prima facie case includes a requirement that the plaintiff show that the

> defendant had an intent to discriminate on the basis of race, such a formulation is inappropriate because the very point of the prima facie case requirement is to provide a basis for inferring the existence of a discriminatory motive.

Id. at 870 (quoting *Callwood v. Dave & Buster's, Inc.,* 98 F.Supp.2d 694, 705 (D.Md. 2000)).[3] *Christian* explained that in § 1981 cases, as in Title VII cases, "the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." 252 F.3d at 869 (quoting *Burdine,* 450 U.S. at 256).

The Sixth Circuit offered the following rationale for the analytical framework that it was adopting for the evaluation of § 1981 claims that arise in the retail shopping environment:

> The test's advantages are many. First, it best accounts for the differences between employment and commercial establishment claims. The test offers the most traditional method of proving discrimination, namely by demonstrating discriminatory treatment with respect to similarly situated persons. It also allows a plaintiff to state a claim when similarly situated persons are not available for comparison, as will often be the case in the commercial establishment context.
>
> Second, the language in subpart (3)(a) which makes actionable the deprivation of service, as opposed to an outright refusal of service, better comprehends the realities of commercial

[3] The Sixth Circuit noted in *Christian* that "the burden of establishing a prima facie case of discriminatory treatment is not meant to be 'onerous.'" 252 F.3d at 870 (quoting *Burdine,* 450 U.S. at 253).

> establishment cases in which an aggrieved plaintiff may have been asked to leave the place of business prior to completing her purchase, refused service within the establishment, or refused outright access to the establishment. It is thus in harmony with the promise of § 1981(b), which guaranties all persons equal rights in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

Id. at 872-73.

In the final analysis a plaintiff asserting a § 1981 claim must establish intentional discrimination. *Green v. Dillard's, Inc.,* 483 F.3d 533, 538 (8th Cir. 2007); *Christian,* 252 F.3d at 870. The burden-shifting analysis promulgated in *McDonnell Douglas* and *Burdine* is a proven method for assessing the presence or absence of discriminatory intent. The Supreme Court has explained that the "division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question [of intentional discrimination]." *Burdine,* 450 U.S. at 253.

While the plaintiff surely bears this evidentiary burden, it is a burden that can be satisfied by circumstantial evidence that supports an inference of discriminatory intent. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. at 133, 147 (2000) (holding that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the emloyer's explanation"); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993)

(explaining that the factfinder's rejection of the reasons put forward by the defendant "may, together with the elements of the prima facie case, suffice to show intentional discrimination"); *Green,* 483 F.3d at 540 (noting that "direct evidence is not necessary to raise a reasonable inference of discriminatory intent"). The burden-shifting paradigm approved in Christian can further the salutary purposes of this civil rights legislation precisely by sharpening the inquiry into the elusive factual question of intentional discrimination.[4]

[4] In *Christian* the Sixth Circuit noted its surprise at the infrequency with which other courts have recognized "the incongruity of dispensing with a prima facie test, or requiring a plaintiff to prove intentional discrimination as an element of a prima facie case in the commercial establishment context." 252 F.3d at 870. That court found it axiomatic that "a plaintiff may establish a prima facie case of intentional discrimination without having direct evidence of the defendant's intent to discriminate," stating with conviction that "the rationale for employing a prima facie case is to allow a plaintiff to create a 'legally mandatory, rebuttable presumption' of discrimination with only circumstantial evidence." Id.

CONCLUSION

For the foregoing reasons, the amicus curiae American Civil Liberties Union of Eastern Missouri urge the Court to (A) adopt either the standard articulated by the panel majority in this case, or that set forth in *Christian v. Wal-Mart Stores, Inc.,* 252 F.3d 862 (6th Cir. 2001), for the evaluation of discrimination claims arising under 42 U.S.C. § 1981 in the environment of retail establishments, and (B) reverse the judgment of the United States District Court in all respects.

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CERTIFICATE COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because the brief contains 4,071 words, excluding the portions of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the word processing application Microsoft Word for Macintosh, version 2004, and the typeface Times New Roman in 14-point font.

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CERTIFICATE OF SERVICE

Two copies of this brief and one electronic copy of the brief recorded on a compact disc were sent via Federal Express second day delivery on February 22, 2008, to each of the following:

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