

***MAYER, BROWN, ROWE & MAW'S  
SUPREME COURT DOCKET REPORT  
OCTOBER TERM, 2002 – NUMBER 12***

Today the Supreme Court granted certiorari in one case of potential interest to the business community. Amicus briefs in support of the petitioners are due on Thursday, July 3, 2003, and amicus briefs in support of the respondent are due on Thursday, August 7, 2003. Any questions about this case should be directed to Miriam Nemetz (202-263-3253) or Robert Bronston (202-263-3244) in our Washington office.

***Employment Discrimination — Civil Rights Act — Statute of Limitations.*** Unless federal law provides otherwise, 28 U.S.C. § 1658 subjects any “civil action arising under an Act of Congress enacted” after December 1, 1990, to a four-year limitations period. The Supreme Court granted certiorari in *Jones v. R.R. Donnelley & Sons Co.*, No. 02-1205, to determine whether Section 1658’s catchall statute of limitations applies to employment discrimination claims under 42 U.S.C. § 1981, which were made cognizable by a 1991 Act of Congress.

Section 1981 of Title 42 grants “[a]ll persons within the jurisdiction of the United States” the right to “make and enforce contracts.” In *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-177 (1989), the Supreme Court held that the phrase “make and enforce contracts” in Section 1981 did not countenance employment discrimination lawsuits. Congress responded to *Patterson* by amending Section 1981 as part of the Civil Rights Act of 1991. The 1991 Act left the original language of Section 1981 intact, but added a subsection defining the phrase “make and enforce contracts” more broadly. This new definition effectively abrogated *Patterson* and permitted plaintiffs to bring employment discrimination actions under Section 1981.

On November 25, 1996, the petitioners brought a Section 1981 employment discrimination suit against their former employer, R.R. Donnelley & Sons Co. Many of these plaintiffs sought relief for conduct on or before July 29, 1994, when R.R. Donnelley & Sons closed one of its facilities. Because Section 1981 contains no statute of limitations, courts have followed a well-settled practice of applying state-law limitations periods to actions filed under the statute; but borrowing Illinois’s two-year statute of limitations in this case would have barred the plaintiffs’ claims insofar as they related to the July 1994 facility closure. *Adams v. R.R. Donnelley & Sons*, 149 F. Supp. 2d 459, 461 (2001). The plaintiffs accordingly contended that their suit — which became cognizable only after the 1991 amendments to Section 1981 — was instead subject to Section 1658’s four-year statute of limitations. The district court agreed with the plaintiffs, reasoning that: (1) the 1991 Civil Rights Act was “an Act of Congress enacted” after December 1, 1990; (2) the plaintiffs’ claims constituted “a civil action arising under” the 1991 Act; and (3) a four-year limitation period therefore applied to plaintiffs’ claims under the plain language of Section 1658. See *id.* at 463-464. The district court certified the statute of limitations question for immediate appeal under 28 U.S.C. § 1292(b).

The Seventh Circuit granted the interlocutory appeal and reversed. 305 F.3d 717 (2002). The court explained that, although employment discrimination claims like the plaintiffs’ “depend on the amendatory language” in the 1991 Act, the cause of action itself still “aris[es] under” the pre-1991 language in Section 1981 that “provides the actual right to recovery.” *Id.* at 727. Looking to Section 1658’s legislative history, the court emphasized congressional concern over “disrupting the settled expectations” of litigants who relied on Section 1981’s traditional state-law statute of limitations. *Id.* at 726. For these reasons, the court concluded that Illinois’s two-year statute of limitations, not the four-year period in Section 1658, applied to the plaintiffs’ Section 1981 employment discrimination claims. See *id.* at 728.

The Seventh Circuit’s holding deepened an existing circuit split over the applicability of Section 1658’s catchall statute of limitations to Section 1981 suits authorized by the 1991 Civil Rights Act. The *Jones* opinion explicitly endorsed an earlier decision from the Third Circuit, *Zubi v. AT&T*, 219 F.3d 220 (2000), but directly conflicted with a more recent Tenth Circuit case, *Harris v. Allstate Ins. Co.*, 300 F.3d 1183 (2002).

This case has important implications for all employers subject to Section 1981. The Supreme Court will decide whether employment discrimination lawsuits brought under Section 1981 are subject to a four-year federal statute of limitations or to the generally shorter, but sometimes longer, limitations periods borrowed from state law.

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