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Must Employers Be Colorblind? Title VII Bars Intra-Racial Employment Discrimination, Walker v. Secretary of Treasury, I.R.S., 713 F. Supp. 403 (N.D. Ga. 1989)

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MUST EMPLOYERS BE COLORBLIND? TITLE VII BARS INTRA-RACIAL EMPLOYMENT DISCRIMINATION

Walker v. Secretary of Treasury, I.R.S., 713 F. Supp. 403 (N.D. Ga. 1989)

In *Walker v. Secretary of Treasury, I.R.S.*,[1] the United States District Court for the Northern District of Georgia expanded the coverage of Title VII of the Civil Rights Act of 1964 (Title VII)[2] to allow a light-skinned black person to sue her dark-skinned black supervisor for employment discrimination on the basis of color.[3] The *Walker* decision represents the first judicial recognition of pure color discrimination under Title VII.[4]

Tracy Walker, a light-skinned black person, was an employee of the Internal Revenue Service.[5] Walker's immediate supervisor, Ruby Lewis, was a dark-skinned black person.[6] Walker and Lewis suffered a poor working relationship from the beginning.[7] Walker eventually was terminated from her position upon the recommendation of Lewis, who alleged that Walker was tardy, lazy, and incompetent, and had a poor attitude.[8] Walker believed the actual reason for her termination was, *inter alia*,[9] Lewis' prejudice against light-skinned blacks.[10]

Walker filed suit under Title VII, alleging discrimination on the basis of color.[11] The defendant argued that Title VII provides no relief for

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1. 713 F. Supp. 403 (N.D. Ga. 1989).

2. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) [hereinafter Title VII] (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

3. 713 F. Supp. at 408.

4. The only other court to address the issue of color discrimination refused to recognize a cause of action under 42 U.S.C. § 1981. *See* Sere v. Board of Trustees, 628 F. Supp. 1543 (N.D. Ill. 1986); *infra* notes 54-58.

5. 713 F. Supp. at 404.

6. *Id.*

7. *Id.* Walker complained that Lewis scrutinized her behavior more carefully than the behavior of other employees. *Id.* Walker had gotten along very well with her former supervisor, Ms. Fite, and had received a favorable recommendation from her. Ms. Lewis, in contrast, frequently disciplined Walker for nonexistent or insubstantial problems. *Id.* Walker had complained to Sidney Douglas, the district Equal Employment Opportunity program manager for the I.R.S., about Lewis' treatment of her. *Id.*

8. *Id.* Walker was fired two weeks after complaining to the EEO officer. *Id.*

9. Walker claimed alternatively that the firing was retaliatory. *See infra* note 11.

10. 713 F. Supp. at 404. The court found evidence that Lewis might have resented white people and that she may have transferred this resentment to light-skinned black people. *Id.* at 404-05.

11. Walker also filed a retaliatory discharge claim under Title VII based on her having complained to the EEO officer. *Id.* at 405. *See supra* note 7. In addition, Walker alleged that her

color discrimination and, even if such an action is cognizable, it does not encompass discrimination by a dark-skinned person against a light-skinned person.[12] The trial magistrate recommended granting the defendant's motion for summary judgment on this issue.[13] The United States District Court for the Northern District of Georgia denied the motion and *held*: Title VII prohibits employment discrimination based on color between members of the same race.[14]

Courts have recognized actions for racial discrimination in the workplace under two federal statutes.[15] Title VII specifically prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."[16] Congress enacted Title VII primarily to protect

termination violated 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Administrative Procedure Act, 5 U.S.C. § 701. 713 F. Supp. at 405.

12. 713 F. Supp. at 405.

13. *Id.* Title VII vests United States district courts with jurisdiction over actions brought pursuant to the statute. *See* Title VII § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3) (1982). The *Walker* court initially referred the matter to a magistrate.

The defendant also requested summary judgment on the retaliation, § 1981, § 1983, and Administrative Procedure Act claims. 713 F. Supp. at 408-09. *See supra* note 11.

14. 713 F. Supp. at 408. In addition, the court denied the defendant's motion for summary judgment with respect to the Title VII retaliation claim. *Id.* The court, however, granted the defendant's motions with respect to the claims under § 1981, § 1983, and the Administrative Procedure Act. *Id.* at 409. Trial on the Title VII retaliation and color discrimination claims was set for January 30, 1990.

15. *See infra* notes 16, 21 and accompanying text.

16. Section 703(a) of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (1982).

Title VII proscribes two types of discriminatory employment practices: disparate treatment, which may be individual or systemic, and disparate impact. *See* Ward's Cove Packing Co. v. Atonio, 110 S. Ct. 38 (1989) (disparate impact); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (disparate treatment); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (disparate impact); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (disparate treatment); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disparate impact). Walker's allegations against Lewis gave rise to a claim of disparate treatment. *See Walker*, 713 F. Supp. at 404; *supra* note 10 and accompanying text.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court stated four elements of the prima facie case of disparate treatment racial discrimination under Title VII: (1) that the plaintiff is a member of a racial minority; (2) that he applied for and was qualified for a position with defendant employer; (3) that he was rejected; and (4) that the position remained open and the defendant continued to seek applications. *Id.* at 802. The Court ruled that proof of these elements raises a rebuttable presumption of racial discrimination, which the defendant can overcome only by offering a nondiscriminatory motive for his action. *Id.*

blacks from discrimination by whites.[17] In addition, 42 U.S.C. section 1981 generally guarantees freedom from racial discrimination.[18] Section 1981 evolved from the Civil Rights Act of 1866,[19] which was designed to protect the rights of former slaves.[20] The Supreme Court has interpreted its language, which grants to "[a]ll persons . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white persons . . . ," to proscribe racial employment discrimination as well.[21] Neither statute, however, explicitly defines "race";[22] nor does Ti-

17. Congressman Carleton J. King commented that:

> Enforced segregation has long deprived the Negro of rights and privileges, which in justice, are his. In the basic areas of education, employment, housing, and voting, oppressive conditions have prevented him from exercising his full human rights . . . . The bill does contain features, in my mind, that properly meet the needs and demands of the Negro.

H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the Supreme Court noted that Congress specifically geared the Act toward protecting against discriminatory practices by whites against blacks. Specifically, the Court found the congressional purpose behind Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees . . . ." *Id.* at 429-30. According to the Court, this goal is clear in the language of the statute. *Id.* at 429.

18. Section 1981, in pertinent part 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 . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1982).

Although § 1981 does not specifically proscribe "racial" discrimination, the Supreme Court has found it applicable to all racial discrimination with respect to private and public contracts. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (racial discrimination by private college); Runyon v. McCrary, 427 U.S. 160, 168, 174 (1976) (racial discrimination by private school). Unlike Title VII, however, § 1981 does not cover discrimination on the basis of sex, religion, or national origin. *Saint Francis*, 481 U.S. at 614 (Brennan, J., concurring); *Runyon*, 427 U.S. at 167; *Cf.* Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1230 (8th Cir. 1975).

19. Act of April 9, 1866, ch. 31, 14 Stat. 27. Congress enacted the Civil Rights Act of 1866 to effectuate the thirteenth amendment. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387 (1982).

20. 458 U.S. at 387.

21. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Johnson v. Railway Express Agency, Inc., 421 U.S. 424 (1975). The district court in Walker v. Secretary of Treasury, I.R.S., 713 F. Supp. 403 (N.D. Ga. 1989), explained that in an employment discrimination case, the same legal elements and facts may prove either a Title VII or a § 1981 claim. *See infra* note 63 and accompanying text.

22. Modern dictionaries provide an array of definitions for the term "race." In its broadest sense, "race" is "a family, tribe, people, or nation belonging to the same stock" or "a class or kind of people unified by community of interests, habits, or characteristics." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 969 (1985). Some definitions of "race" focus on physiological characteristics: "a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1870 (1986). In addition, "race" has been partitioned into three categories—caucasian, negroid, and mongoloid—with several subdivisions. *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d

tle VII provide a definition of "color."[23]

Although most racial employment discrimination suits involve black plaintiffs and white defendants,[24] the Supreme Court has interpreted both statutes to protect whites from discriminatory employment practices. In *McDonald v. Santa Fe Trail Transportation Co.*,[25] white employees sued their white employer based on the employer's preferential treatment of black workers.[26] While both black and white employees had stolen goods from the employer, the employer terminated only the white employees. In holding that white persons can maintain a Title VII discrimination claim,[27] the Court emphasized that Title VII is not limited by its terms to discrimination against any particular race.[28] In response to the section 1981 claim,[29] the Court relied upon the actual language of the statute, as well as its history, in concluding that it too protects whites.[30]

Subsequent courts have struggled to define the term "race" outside the black and white context. Several courts have considered whether certain ethnic groups qualify for protection under Title VII or section 1981.[31] In

ed. 1970). *Cf.* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (acknowledging caucasian, negroid, and mongoloid races).

23. "Color," as a description of human skin tone, is generally synonymous with "complexion" or "tint." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 447 (1986). In addition, "color" can have racial connotations, referring to "skin pigmentation other than white, characteristic of race (as of the Negro race) [or] the members of a race or group with such pigmentation." *Id.* The perceptive definition of "color" is: "the aspect of the appearance . . . that may be described and specified in terms derivable wholly from one's perceptions." *Id.*

24. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

25. 427 U.S. 273 (1976).

26. *Id.* at 276.

27. *Id.* at 278-79.

28. *Id. See supra* note 16. The Court also quoted its prior decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971). *McDonald*, 427 U.S. at 273. Although *Griggs* involved black employees, the Court there indicated that Title VII proscribes "[d]iscriminatory preference for any group, minority or majority." *Griggs*, 401 U.S. at 431. In addition, the *McDonald* Court pointed out that the prima facie case set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which required proof that the plaintiff is a member of a racial minority, does not limit Title VII's protection to minorities. *McDonald*, 427 U.S. at 279 n.6.

29. 427 U.S. at 286.

30. *Id.* at 286-87. Unlike Title VII, § 1981 does not specifically prohibit "racial" discrimination, but rather guarantees to "all persons" the same protection "as is enjoyed by white citizens." *See supra* note 18. The Court rejected a mechanical construction of the phrase "white citizens," focusing on the statute's application to "all persons." 427 U.S. at 286-87. The legislative history of the Civil Rights Act of 1866, the precursor to § 1981, confirmed this broad reading. *Id.*

31. *See generally* Kaufman, *A Race by Any Other Name: The Interplay Between Ethnicity,*

Manzanares v. Safeway Stores, Inc.,[32] the Tenth Circuit considered whether a Mexican-American employee can state a cause of action for racial discrimination under section 1981.[33] The employee in *Manzanares* alleged that his white coworkers received preferential treatment from the employer.[34] In recognizing the cause of action, the court rejected an interpretation of section 1981 that would limit "race" to a technical or restrictive meaning.[35] Rather, the court placed Mexican-Americans within the scope of "all persons," who may be perceived as distinguishable from "white citizens" under section 1981.[36] The Fifth Circuit, in *Jatoi v. Hurst-Euless-Bedford Hospital Authority*,[37] similarly permitted a person of East Indian origin to state a claim for relief under section 1981 based on his membership in a group "commonly perceived to be 'racial' because it is ethnically and physiognomically distinct."[38]

In contrast, the United States District Court for the Eastern District of New York, in *Ibrahim v. New York State Department of Health*,[39] ruled that an Arab plaintiff cannot state a cause of action for racial discrimina-

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National Origin and Race for Purposes of Section 1981, 28 ARIZ. L. REV. 259 (1986); Annotation, *Applicability of 42 USCS § 1981 to National Origin Employment Discrimination Cases*, 43 A.L.R. FED. 103 (1979).

32. 593 F.2d 968 (10th Cir. 1979).

33. *Id.* at 969. The Tenth Circuit addressed the issue on appeal from the trial court's granting the defendant's motion to dismiss. *Id.*

34. *Id.* The plaintiff, a Mexican-American, complained of unlawful employment practices when his employer, Safeway Stores, discharged him for alleged theft. The plaintiff eventually was acquitted of the charges and reinstated to his position, but he lost his seniority and did not receive backpay. In contrast, the employer merely suspended white employees who admitted stealing company property. *Id.* The plaintiff categorized himself as a person "of Mexican-American descent" and the suspended white employees as "Anglos." *Id.*

35. *Id.* at 971. The court cited McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) and Johnson v. Railway Express Agency, Inc., 421 U.S. 424 (1975) for this proposition. *Manzanares*, 593 F.2d at 970-71. The court also found the dictionary useful in defining "race" as "a class of individuals with common characteristics, appearances, or habits." *Id.* at 971 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986)).

36. *Id.* at 970. According to the Tenth Circuit, § 1981 protects "groups" from being "measured against the Anglos as the standard." *Id.* Given the factual circumstances and the geographical region (the Southwest), the court concluded that the group of Mexican-Americans "is of such an identifiable nature that the treatment afforded its members may be measured against that afforded the Anglos." *Id.*

37. 807 F.2d 1214, *reh'g denied*, 819 F.2d 545 (5th Cir. 1987).

38. *Id.* at 1218. The court rejected the defendant's arguments that § 1981 does not protect East Indians, who are technically caucasian. *Id.* (citing Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 115 (5th Cir. 1986)). Although the plaintiff alleged national origin and alienage discrimination, the court determined that an Indian may recover for racial discrimination regardless of the characterization in the pleadings. *Id.*

39. 581 F. Supp. 228 (E.D.N.Y. 1984).

tion under section 1981.[40] The court reasoned that, because the Arab ethnic group is not technically a race, section 1981 does not protect Arabs.[41] Rather, the court labeled discrimination against a person of Arab descent national origin discrimination, which section 1981 does not proscribe.[42]

In *Saint Francis College v. Al-Khazraji*,[43] the Supreme Court resolved the dispute over ethnicity by granting an Iraqi plaintiff protection from racial discrimination under section 1981.[44] The plaintiff in *Saint Francis*, a college professor, claimed that a white administrator at the college denied his request for tenure because he was an Arab.[45] Although the Court noted that, under modern precepts, an Arab is a member of the caucasian race,[46] the Court looked to the definition of "race" prevalent

40. *Id.* at 232. The plaintiff in *Ibrahim* alleged that the defendant failed to promote him to a fiscal analyst position based on his age, race, and national origin in violation of Title VII and 42 U.S.C. §§ 1981 and 1983. *Id.* at 230.

41. *Id.* at 231.

42. *Id. See also* Anooya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984) (§ 1981 does not protect Iraqi plaintiff); Saad v. Burns Int'l Sec. Serv., Inc., 456 F. Supp. 33 (D.D.C. 1978) (discrimination against Arab not racial discrimination); Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977) (Slav not protected by Title VII). *Cf.* Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986) (Jews are not a "racially distinct group" for purposes of racial discrimination under § 1982), *rev'd*, 481 U.S. 615 (1987). In *Shaare Tefila*, the Fourth Circuit specifically ignored the fact that the defendants perceived Jews to be racially distinct. 785 F.2d at 526-27.

43. 481 U.S. 604 (1987).

44. *Id.* at 613.

45. *Id.* at 606. Al-Khazraji alleged discrimination on the basis of religion, national origin, and/or race. He sued under, *inter alia*, Title VII and § 1981. *Id.* The district court dismissed the Title VII claim as barred by Pennsylvania's statute of limitations, but permitted the § 1981 claim for racial discrimination. Al-Khazraji v. Saint Francis College, 523 F. Supp. 386, 388, 390 (W.D. Pa. 1981). Subsequently, on defendant's motion for summary judgment, the district court held that plaintiff alleged only religious and national origin discrimination and, alternatively, even if he alleged racial discrimination, § 1981 does not protect persons of Arabian descent. Al-Khazraji v. Saint Francis College 43 Fair Empl. Prac. Cas. (BNA) 1302 (W.D. Pa. 1985). On appeal, the Third Circuit held that, because Al-Khazraji alleged his "membership in a group that is ethnically and physiognomically distinctive," he may state a racial discrimination claim under § 1981. Al-Khazraji v. Saint Francis College 784 F.2d 505, 517 (3d Cir. 1988).

46. 481 U.S. at 610 n.4, 613. According to the Court, "[t]here is a common popular understanding that there are three major races—Caucasoid, Mongoloid, and Negroid." *Id.* at 610 n.4. *See, e.g.*, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1484 (2d ed. 1970) ("many ethnologists now consider that there are only three primary divisions, the Caucasian (loosely, *white race*), Negroid (loosely, *black race*), and Mongoloid (loosely, *yellow race*)") (emphasis in original). The Court, however, seemed hesitant to accept this tripartite division as the controlling modern definition of "race." *See* 481 U.S. at 610 n.4 (noting the arbitrariness of racial classifications and "[c]lear-cut categories") (citing numerous biologists and anthropologists).

Using this three-part definition of "race," the defendants argued that an Arab is a member of the caucasian race, and § 1981 does not cover discrimination claims between caucasians. *Id.* at 609-10.

when Congress enacted section 1981.[47] Citing nineteenth century dictionaries[48] and excerpts from the legislative history,[49] the Court determined that ethnicity or ancestry may serve as the basis for a section 1981 claim.[50] According to the Court, the statute protects a person who " 'is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.' "[51] In addition, the Court indicated that a "distinctive physiognomy" is not necessary to state a claim for relief under section 1981.[52]

Most lower court decisions preceding *Saint Francis* involved racial dis-

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The college distinguished McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), in which the Court allowed white workers to sue their white employer, because *McDonald* involved preferential treatment of blacks. *Id.* at 609. *See supra* notes 25-30 and accompanying text.

47. 481 U.S. at 610-13. As the Court stated, "[p]lainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law." *Id.* at 610. At least one commentator has noted that the Court's reliance on contemporary sources is misplaced, given that the statute's ultimate authority lies in the thirteenth amendment. *See* Note, *Redefining Race in* Saint Francis College v. Al-Khazraji *and* Shaare Tefila Congregation v. Cobb: *Using Dictionaries Instead of the Thirteenth Amendment*, 42 VAND. L. REV. 209, 221 (1989) [hereinafter Note, *Redefining Race*].

48. The *Saint Francis* Court found numerous dictionaries and encyclopedias dating from 1830 to 1887 that support a broad definition of "race" relating to stock, lineage, or ancestry. *Saint Francis*, 481 U.S. at 610-11. According to the Court, "[i]t was not until the 20th century that dictionaries began referring to the Caucasian, Mongolians, and Negro races, or to race as involving divisions of mankind based upon different physical characteristics." *Id.* at 611 (citations omitted).

49. Because § 1981 evolved from the Voting Rights Act of 1870 and the Civil Rights Act of 1866, *see supra* note 19 and accompanying text, the Court examined the congressional debates of these acts. 481 U.S. at 612-13. Statements of individual legislators convinced the Court that "race" includes Scandinavians, Chinese, Latins, Spanish, Anglo-Saxons, Jews, Mexicans, Blacks, Mongolians, Germans, and Gypsies. *Id.* at 612. For an argument that the Court may have taken statements out of context, see Note, *Redefining Race*, *supra* note 47, at 215 & n.47.

50. 481 U.S. at 613. For a discussion and criticism of this holding, see Kaufman & Schwartz, *Civil Rights in Transition: Sections 1981 and 1982 Cover Discrimination on the Basis of Ancestry and Ethnicity*, 4 TOURO L. REV. 183 (1988); Note, *Redefining Race*, *supra* note 47; Comment, Saint Francis College v. Al-Khazraji: *Cosmetic Surgery or a Fresh Breadth for Section 1981?*, 16 PEPPERDINE L. REV. 77 (1988); Comment, *Discrimination—Ancestry—An Unpersuasive Expansion of 42 U.S.C. Section 1981 to Include Discrimination Based on Ancestry*, Saint Francis College v. Majid Ghadon Al-Khazraji, 12 SUFFOLK TRANSNAT'L L.J. 197 (1988).

51. 481 U.S. at 613 (quoting the Third Circuit opinion, 784 F.2d 505, 517 (1986)).

52. *Id.* According to the Court, Al-Khazraji would state a § 1981 claim by proving, on remand, "that he was subjected to intentional discrimination based on the fact that he was born an Arab . . . ." *Id.*

The Court emphasized, however, that a claimant must prove that the basis of the discrimination was ethnicity, rather than religion or national origin. *Id.* In a concurring opinion, Justice Brennan pointed out the difficulty in legally distinguishing ancestry, which falls under the rubric of racial discrimination, and national origin, which is not covered by § 1981. *Id.* at 614 (Brennan, J., concurring). As Brennan explained, ancestry and national origin may be "identical as a factual matter." *Id.* Moreover, the two concepts "overlap as a legal matter" under Title VII. *Id.*

crimination claims predicated on ethnicity or ancestry.[53] In *Sere v. Board of Trustees*,[54] however, the United States District Court for the Northern District of Illinois addressed for the first time discrimination on the basis of color. In *Sere*, a Nigerian black employee claimed that his American black supervisor, who had lighter skin, discriminated against him because of his darker color.[55] The court held that color-based discrimination is not actionable under section 1981.[56] Although the court recognized the possibility that intra-racial color discrimination may exist,[57] it was reluctant to engage in "the unsavory business of measuring skin color."[58]

The United States District Court for the Northern District of Georgia, in *Walker v. Secretary of Treasury*,[59] became the first court to recognize a discrimination claim based on color. Relying primarily on the *Saint Francis* decision,[60] the court held that a light-skinned black employee may state a cause of action under Title VII against her dark-skinned black supervisor.[61]

53. *See supra* notes 32-42 and accompanying text.

54. 628 F. Supp. 1543 (N.D. Ill. 1986).

55. *Id.* at 1546.

56. *Id. See also* Waller v. International Harvester Co., 578 F. Supp. 309 (N.D. Ill. 1984). In *Waller*, the United States District Court for the Northern District of Illinois refused to recognize a black plaintiff's cause of action for color discrimination under § 1981, which applies only to race discrimination. *Id.* at 314. The employee had complained of disparate treatment in the promotion and job classification process. However, in Vigil v. City and County of Denver, 15 Empl. Prac. Dec. (CCH) ¶ 8000 (D. Colo. 1977), the court allowed a Mexican-American to bring a claim based on color discrimination. In determining that § 1981 applied to cases of color discrimination, the court remarked that "skin color may vary significantly among individuals, who are considered 'blacks' or 'whites'." *Id.* ¶ 8000. Similarly, the United States District Court for the District of Columbia acknowledged the possibility of a Puerto Rican plaintiff's color discrimination claim. Felix v. Marquez, 24 Empl. Prac. Dec. (CCH) ¶ 31,279 (D.D.C. 1980). Although the court recognized widespread color-based discrimination in Puerto Rico, it noted that color discrimination cases are rare because they usually are mixed with race discrimination claims. Still, the court disagreed with the defendant's general assertion that color discrimination is not a claim upon which relief can be granted. *Id.* ¶ 31,279.

57. The court found that color-based discrimination may exist among members of the same race, but held that the plaintiff did not establish that such discrimination formed a basis for recovery under § 1981. 628 F. Supp. at 1546.

58. The court remarked, "[t]his court refuses to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit." *Id.*

59. 713 F. Supp. 403 (N.D. Ga. 1989).

60. *See supra* notes 43-52 and accompanying text.

61. 713 F. Supp. at 408. The court noted that "Title VII is the exclusive remedy for federal employment discrimination law suits." *Id.* at 405 (citing Brown v. GSA, 425 U.S. 820 (1976)).

In *Walker*, the court rejected the employer's argument that under Title VII, color is synonymous with race.[62] Because the elements for establishing claims under Title VII and section 1981 are identical,[63] the court first analyzed the legislative intent of section 1981.[64] Citing *Saint Francis*, the court found that Congress intended section 1981 to protect against ancestral and ethnic discrimination.[65] In particular, the court emphasized the Supreme Court's statement that a claim of racial discrimination does not require distinctive physical characteristics.[66] The court thus concluded that, because "[a] person's color is closely tied to his ancestry," color can engender perceptions that the *Saint Francis* Court recognized as actionable under section 1981.[67]

In addition, the *Walker* court specifically addressed the scope of Title VII. The court interpreted the plain meaning and purpose of the statute as evidence that race and color are not synonymous.[68] The court also noted that the Supreme Court has referred repeatedly to the protection from discrimination based on race *and* color.[69] Based on the statutory language and judicial interpretation of Title VII, the court decided that,

62. *Id.* The defendant argued that the term "color" in Title VII "has generally been interpreted to mean the same thing as race." *Id.* (quoting Defendant's Memorandum in Support of Motion for Summary Judgment at 8).

The defendant specifically relied on two decisions, Felix v. Marquez, 24 Empl. Prac. Dec. ¶ 31,279 (D.D.C. 1980) and Vigil v. City and County of Denver, 15 Empl. Prac. Dec. ¶ 8000 (D. Colo. 1977), to support its argument. *See supra* note 56. The *Walker* court, however, interpreted these cases differently. The court read *Felix* as recognizing the possibility of a color discriminaiton claim. The court similarly highlighted the *Vigil* decision as supportive of its own. In fact, the court quoted language in *Vigil* emphasizing that courts should focus on the motive behind discrimination. 713 F. Supp. at 406-07.

63. 713 F. Supp. at 405. (citing Lincoln v. Board of Regents, 697 F.2d 928 (11th Cir. 1983) and Caldwell v. Martin Marietta Corp., 632 F.2d 1184 (5th Cir. 1980)). For a discussion of the elements of a prima facie case under Title VII and § 1981, see *supra* notes 16, 21 and accompanying text.

64. 713 F. Supp. at 405-06.

65. *Id.* at 406. The *Walker* court quoted the Supreme Court's identification of section 1981's purpose as " 'the protection of citizens of the United States in their enjoyment of certain rights without discrimination on account of race, *color*, or previous condition of servitude.' " *Id.* at 405 (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (emphasis added by court)).

66. *Id. See supra* note 52 and accompanying text.

67. The *Walker* court stated that, because it is linked to ancestry, a person's color "could result in his being perceived as a 'physiognomically distinctive sub-grouping of homo sapiens,' which in turn could be the subject of discrimination." *Id.* (quoting *Saint Francis*, 481 U.S. at 613).

68. *Id.* Relying on prior Supreme Court decisions, the court identified Title VII's purpose as assuring equal employment opportunities by eradicating discriminatory treatment "on the basis of race, *color*, religion, sex, or national origin." *Id.* (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added by court)).

69. *Id.* at 405.

unless Congress and the Supreme Court acted redundantly, " 'race' is to mean 'race', and 'color' is to mean 'color'."[70]

The court in *Walker* also refuted the employer's argument that, even if a color discrimination claim is cognizable, Title VII does not protect a light-skinned person from discrimination by a dark-skinned member of the same race.[71] Because the Court in *Saint Francis* recognized distinctions among members of the caucasian race,[72] the *Walker* court reasoned that it should similarly acknowledge distinctions among blacks. As the court stated, "[i]t would take an ethnocentric and naive world to suggest that we can divide caucasians into many sub-groups but some how [sic] all blacks are part of the same sub-group."[73]

Although the *Walker* court acknowledged the Illinois district court's concern in *Sere*[74] that allowing color discrimination claims would create difficulties for courts in measuring differences in skin pigmentation,[75] it rejected this as a valid basis for denying a cause of action.[76] The court instead deemed color differentiation an appropriate question for the factfinder.[77]

The *Walker* court correctly held that a light-skinned black employee may bring a cause of action under Title VII against a dark-skinned black employer. On first inspection, however, the court's reliance on *Saint Francis* appears misplaced in two respects. Only through a careful reanalysis of *Walker*'s implications can one justify the result doctrinally. First, the court in *Walker* ignored that *Saint Francis* involved a race discrimination claim rather than a claim based on color.[78] Had Walker alleged racial discrimination, the court appropriately might have relied on

70. *Id.* at 406.

71. *Id.* at 407. The *Walker* court treated this argument in essentially the same manner as the defendant's first argument.

72. *See supra* note 46 and accompanying text.

73. 713 F. Supp. at 407-08. The court pointed out that "[t]here are sharp and distinctive contrasts among native black African peoples (sub-Saharan) both in color and in physical characteristics." *Id.* at 408.

74. Sere v. Board of Trustees, 628 F. Supp. 1543 (N.D. Ill. 1986). *See supra* notes 54-58 and accompanying text.

75. 713 F. Supp. at 408. The court characterized the difficulty in differentiating skin color as "genuine and substantial." *Id.* (citing *Sere*, 628 F. Supp. at 1546).

76. *Id.*

77. *Id.*

78. *See supra* notes 11, 45 and accompanying text. The *Walker* court found *Saint Francis* "the most relevant case to the law suit," but never specifically noted that the plaintiff in *Saint Francis* alleged racial discrimination.

Saint Francis without explaining the difference. Instead the court appeared summarily—and disingenuously—to link race and color.

Second, the Supreme Court in *Saint Francis* interpreted section 1981, rather than Title VII.[79] In doing so, the Court broadened the definition of "race" to its nineteenth century meaning.[80] The *Walker* court, having found the elements under both statutes "identical,"[81] concluded that *Saint Francis* "definitively"[82] resolved the Title VII issue. This comparison disregards the more limited definition of "race" that the *Saint Francis* Court recognized as controlling in modern society[83]—the time period in which Congress enacted Title VII.[84] By forgetting the potentially different meanings of "race" under section 1981 and Title VII, the *Walker* court seemed to compare apples and oranges.

Notwithstanding these inconsistencies, the decision in *Walker* likely involved greater insight than first appears. Title VII defines "race" in a much more limited fashion than does section 1981, but Title VII prohibits color discrimination as well. The *Walker* court may have held implicitly that the terms "race" and "color" in Title VII encompass much or all of section 1981's proscriptions. Thus, the court was not at all disingenuous in analogizing the two statutes. While stating that "color" means "color," the district court undoubtedly recognized the potential for abuse in allowing Title VII claims based solely on color.[85] It therefore limited the cause of action to discrimination based on perceived ethnic or ancestral characteristics, though it left a more thorough drawing of this line to future courts.[86]

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79. *See supra* notes 11, 44 and accompanying text.

80. *See supra* notes 47-50 and accompanying text.

81. 713 F. Supp. at 405.

82. *Id.* at 406.

83. *See supra* note 46.

84. Congress enacted Title VII in 1964, nearly 100 years after the enactment of the Civil Rights Act of 1866, upon which § 1981 is based. *See supra* notes 16-21 and accompanying text.

85. *See* 713 F. Supp. at 408. For example, a claim of pure color discrimination, without ethnic or racial undertones, would include a claim by a sun-tanned person against a fair-skinned person of the same race. This is obviously ridiculous, and such an anomalous result is probably not what Congress intended in enacting Title VII.

86. The court explained in only one sentence the connection between color and racial perceptions:

> A person's color is closely tied to his ancestry and could result in his being perceived as a 'physiognomically distinctive sub-grouping of homo sapiens', which in turn could be the subject of discrimination [although] it is not even required that a victim of discrimination be of a distinctive physiognomical sub-grouping . . . .

Id. at 406. Unfortunately, this was all the court said in limiting the cause of action it recognized. It is not clear that the fact pattern in *Walker* constitutes a cognizable Title VII claim. The opinion

In *Walker*, the Atlanta district court strove to eliminate disparity within Title VII's prohibitions by allowing blacks the same right as whites to claim intra-racial discrimination. While *Walker*'s analysis is opaque and its limiting principles ill-defined, the court correctly carried the *Saint Francis* holding into the broader-reaching Title VII context.

Amy Weinstein

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makes clear that the court only disposed of a summary judgment motion by the defendant. *Id.* at 408. The plaintiff will still have to meet whatever limits the court has placed on her claim.