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EQUAL RIGHTS UNDER SOME JURISDICTIONS: HAMMOND V. KMART AND THE ENDORSEMENT OF DISCRIMINATION

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Cover Page Footnote

Candidate for J.D., University of Tennessee College of Law, 2016. Mr. Quevedo Gutierrez is from Palmdale, California and received his Bachelor of Arts in Political Science from California State University, Northridge.

**EQUAL RIGHTS UNDER SOME JURISDICTIONS:
HAMMOND V. KMART AND THE ENDORSEMENT OF
DISCRIMINATION**

Juan C. Quevedo Gutierrez*

Hammond v. Kmart Corp., 733 F.3d 360 (1st Cir. 2013)

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I. INTRODUCTION

Close your eyes and imagine yourself as an African-American woman.¹ You are in your late thirties and have two children.² You do not have a driver's license because you do not drive a car.³ Instead, you use an identification card issued to you by the State of Massachusetts for residents who do not drive.⁴ On November 21, 2012, one day before Thanksgiving, you take your children shopping for Christmas presents.⁵ You go to a Kmart store in Braintree, Massachusetts, because it is easily accessible by public transportation.⁶

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¹ The following scenario derives its facts directly from *Hammond v. Kmart Corp.* 733 F.3d 360, 361 (1st Cir. 2013).

² *Id.*

³ Petition for a Writ of Certiorari at 3, *Hammond*, 733 F.3d 360 (No. 13-998), 2014 WL 662136, at *3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

In addition, you shop at Kmart because you want to take advantage of Kmart's Layaway Program.⁷

Once your children have picked out their Christmas presents, you take their presents to the layaway counter.⁸ You had a rather uneventful experience shopping at Kmart until you hand your identification card to the Kmart sales clerk.⁹ To your surprise, the sales clerk barrages you with racist insults while putting your children's Christmas presents on layaway.¹⁰

Among many things, the sales clerk asks you if you are going to be "jumping the counter" to get what [you need]" and refers to your identification card as a "liquor ID."¹¹ After this conversation, imagine how you would feel with your children listening to every word the sales clerk has uttered. You—in this imaginary world—are a "porch monkey,"¹² and no one is reaching out to help you. Instead, even the courts—while not endorsing this type of behavior—find that the law is not on your side.¹³ But in an effort to avoid further incident in front of your children, you bite your tongue and proceed with the layaway purchase and hope that one day you will receive justice.¹⁴

Now open your eyes and realize that your imagination is the reality of Chenell Hammond (Hammond), the plaintiff in *Hammond v. Kmart Corp.*¹⁵ The sales clerk at Kmart harassed Hammond because she was an African-American woman.¹⁶ Hammond, who has experienced discrimination because of her race in retail stores, has few legal remedies. A circuit split regarding the scope of 42 U.S.C. § 1981 in the retail setting allowed Hammond's disparate treatment. The First,¹⁷ Fifth,¹⁸ Seventh,¹⁹ Eighth,²⁰ and Eleventh Circuits²¹ "have

⁷ *Id.* "In a layaway transaction a retailer agrees to hold merchandise, which a customer secures by making a deposit. The customer can retain the merchandise once the price is paid in full." *Hammond*, 733 F.3d at 361 n.1. See BLACK'S LAW DICTIONARY 968 (9th ed. 2009).

⁸ Petition for a Writ of Certiorari, *supra* note 3, at 4.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Hammond*, 733 F.3d at 361.

¹² *Id.*

¹³ See *id.* at 365.

¹⁴ Petition for a Writ of Certiorari, *supra* note 3, at 5.

¹⁵ 733 F.3d at 360.

¹⁶ *Id.* at 361.

¹⁷ See, e.g., *id.* at 362 (explaining that in order "[t]o state a claim under § 1981, a plaintiff must show that (1) she is a member of a racial minority; (2) the defendant discriminated against her on the basis of her race; and (3) the discrimination implicated one or more of the activities listed in the statute, including the right to make and enforce contracts").

added an extra-textual element to the plaintiff's burden of proof."²² According to these circuits, a defendant violates § 1981 only when his or her discriminatory conduct prevents the plaintiff from completing a transaction.²³ In contrast, according to the Third²⁴ and Sixth Circuits,²⁵ a defendant violates § 1981 when he or she treats the plaintiff in a markedly hostile manner during the course of the transaction, even if the plaintiff nevertheless completes the transaction.²⁶ Although the Third and Sixth Circuits may be outnumbered, their interpretations of § 1981 remain most faithful to its text²⁷ and to the Civil Rights Act of 1866.²⁸

¹⁸ See, e.g., *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358 (5th Cir. 2003) (citing *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001)) (explaining that in order to state a claim under § 1981 for discrimination in the retail setting, the plaintiff "must offer evidence of . . . an attempt to contract' . . . [which was] in some way . . . 'thwarted'").

¹⁹ See, e.g., *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (finding that the plaintiffs did not have an actionable claim under § 1981 because "[t]hey were denied neither admittance nor service").

²⁰ See, e.g., *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 853 (8th Cir. 2001) (affirming that the plaintiff failed to state a claim under § 1981 because the plaintiff had completed the purchase).

²¹ See, e.g., *Lopez v. Target Corp.*, 676 F.3d 1230, 1234 (11th Cir. 2012) (holding that a Hispanic customer cannot state a claim under § 1981 when he "was able to complete his transaction").

²² Petition for a Writ of Certiorari, *supra* note 3, at 2.

²³ *Id.*

²⁴ See, e.g., *Hall v. Pa. State Police*, 570 F.2d 86, 92 (3d Cir. 1978) (holding that it was enough to state a § 1981 claim when plaintiff "received disparate, and because it was based on race, disparaging treatment for which the record [offered] no justification").

²⁵ See, e.g., *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001) (holding that a plaintiff could claim a § 1981 violation in the retail setting by proving that he "received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory").

²⁶ Petition for a Writ of Certiorari, *supra* note 3, at 2-3.

²⁷ *Id.* at 2.

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, given 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.

42 U.S.C. § 1981 (2009).

²⁸ Civil Rights Act of 1866, 14 Stat. 27 (1866). "That all . . . citizens of the United States . . . , of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . 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 . . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." *Id.*

The purpose of this comment is to discuss how the United States Court of Appeals for the First Circuit is moving away from the meaning of 42 U.S.C. § 1981 and the Civil Rights Act of 1866. Part II will discuss the development of § 1981. Part III will discuss the First Circuit's *Hammond* case. Part IV will discuss court decisions contrary to *Hammond* and hypothesize as to how *Hammond* would have been resolved had the case been tried in the Third or Sixth Circuit. Finally, Part V will discuss why the approach in *Hammond* is unreasonable for analyzing a claim under §1981.

II. THE BIRTH OF 42 U.S.C. § 1981

Congress ratified the Thirteenth Amendment on December 6, 1865.²⁹ In response, Southern states enacted “Black Codes” designed to “recreat[e] conditions of slavery for newly freed African Americans through acts of private discrimination.”³⁰ Thus, Congress sought to “reconstruct[] Southern minds” to make them recognize “that the abolition of slavery had created an economic and social vacuum in the South.”³¹ As a result, Congress passed the Civil Rights Act of 1866.³² The Equal Rights Under the Law provision of the Act read in part:

[C]itizens of the United States . . . , of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . 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 persons and property, as is enjoyed by white citizens . . .

³³

Ultimately, the Equal Rights Under the Law provision of the Civil Rights Act of 1866 became today's 42 U.S.C. § 1981, outlining the right to contract, and 42 U.S.C. § 1982, outlining the right to

²⁹ U.S. CONST. amend. XIII.

³⁰ Charlotte H. Sanders, *Come Down and Make Bargains in Good Faith: The Application of 42 U.S.C. § 1981 to Race and National Origin Discrimination in Retail Stores*, 4 HASTINGS RACE & POVERTY L.J. 281, 285 (2007).

³¹ Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 548 (1989).

³² Sanders, *supra* note 30, at 285.

³³ Civil Rights Act of 1866, 14 Stat. 27 (1866).

purchase, hold, and sell real and personal property.³⁴ The principal purpose of the Civil Rights Act of 1866 was to give “real content to the freedom guaranteed by the Thirteenth Amendment.”³⁵

Years later, courts held that § 1981 not only covers public acts of discrimination, but also private acts of discrimination. For example, in *Runyon v. McCrary*, Michael McCrary and Colin Gonzales, two African-American students, sued Russell and Katheryne Runyon, the proprietors of a private school, for denying them admission to the private school based on the students’ race.³⁶ The United States District Court for the Eastern District of Virginia granted injunctive relief for the students and awarded their parents compensatory damages.³⁷ The United States Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the district court’s holding,³⁸ and the United States Supreme Court affirmed.³⁹ The central question for the Court was “whether § 1981 prohibit[ed] private, commercially operated, nonsectarian schools from denying admission to prospective students because they are [African-American].”⁴⁰ In answering the question in the affirmative, the Court held that the argument “that § 1981 does not reach private acts of racial discrimination . . . is wholly inconsistent with . . . the legislative history of § 1 of the Civil Rights Act of 1866.”⁴¹ For that reason, the Court held that § 1981 reaches private conduct.⁴²

But in 1989, the Supreme Court restricted the definition of § 1981’s use of the phrase “make and enforce” contracts.⁴³ For example, in *Patterson v. McLean Credit Union*, Brenda Patterson, a female African-American employee, sued McLean Credit Union (McLean) for employment discrimination based on her race.⁴⁴ The United States District Court for the Middle District of North Carolina agreed with McLean that a claim for racial harassment was not

³⁴ Sanders, *supra* note 30, at 286.

³⁵ Abby Morrow Richardson, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM 119, 123 (2005) (citing *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 433 (1968)).

³⁶ 427 U.S. 160, 164 (1976).

³⁷ *Id.* at 166.

³⁸ *Id.*

³⁹ *Id.* at 186.

⁴⁰ *Id.* at 168.

⁴¹ *Id.* at 173.

⁴² *Id.*

⁴³ *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (restricting racial harassment claims in an employment setting from being recognized under § 1981).

⁴⁴ *Id.* at 169.

actionable under § 1981.⁴⁵ The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision.⁴⁶ Similarly, the Supreme Court affirmed the appellate court's dismissal of Patterson's racial harassment claim as not actionable.⁴⁷ In this case, Patterson alleged that McLean harassed her, failed to promote her, and ultimately fired her because of her race.⁴⁸ Therefore, the question was whether a victim of work-place racial harassment could file a claim under § 1981.⁴⁹ In answering this question, the Court stated that "[t]he most obvious feature of [§ 1981] is the restriction of its scope forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone."⁵⁰ Therefore, "[w]here an alleged act of discrimination does not involve the impairment of [making or enforcing a contract], § 1981 provides no relief."⁵¹ In other words, "the harassment and discrimination that [Patterson] suffered fell outside § 1981's coverage because it took place after the initial formation of the employment contract,"⁵² and "postformation conduct does not involve the right to make [or enforce] a contract."⁵³

In response to "[Patterson]'s narrow construction of the nation's oldest and most important civil rights statutes,"⁵⁴ Congress passed the Civil Rights Act of 1991.⁵⁵ Specifically, Congress added subsections (b) and (c) so that 42 U.S.C. § 1981 now reads:

(a) Statement of equal rights

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

. . . .

(b) "Make and enforce contracts" defined

For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and

⁴⁵ *Id.* at 169-70.

⁴⁶ *Id.* at 170.

⁴⁷ *Id.* at 189.

⁴⁸ *Id.* at 169.

⁴⁹ *Id.* at 170.

⁵⁰ *Id.* at 176 (citing 42 U.S.C. § 1981 (2009)).

⁵¹ *Id.*

⁵² Sanders, *supra* note 30, at 290.

⁵³ *Patterson*, 491 U.S. at 177.

⁵⁴ Richardson, *supra* note 35, at 129.

⁵⁵ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (2009)).

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.⁵⁶

In a later memorandum, Congress stated that “[t]he list set forth in subsection (b) is illustrative only, and should be given broad construction to allow a remedy for any act of intentional discrimination committed in the making or the performance of a contract.”⁵⁷ In other words, the list in subsection (b) “should only be a starting point, a floor, rather than a ceiling.”⁵⁸

III. *HAMMOND V. KMART*

Although Congress negated the holding of *Patterson* with the Civil Rights Act of 1991, courts continue to interpret § 1981 in the retail setting as if Congress had never amended it.⁵⁹ Specifically, courts are narrowly interpreting § 1981 by “focusing exclusively on the ‘make and enforce’ clause and acknowledging only a few actionable privileges, benefits, terms, and conditions under subsection (b).”⁶⁰ Specifically, courts have added an extra-textual element to the plaintiff’s burden of proof by requiring that the defendant’s discriminatory conduct prevented the plaintiff from completing a transaction.⁶¹

In *Hammond v. Kmart Corp.*, Hammond filed a lawsuit against Kmart Corporation (Kmart), bringing a § 1981⁶² claim of racial discrimination.⁶³ The United States District Court for the District of Massachusetts granted Kmart’s motion to dismiss, holding that Hammond “fail[ed] to make any factual averments to support a claim that the store clerk’s comments, described as ‘racially demeaning, insulting, rude, and discriminatory,’ precluded [Hammond] from making or enforcing her layaway contract with Kmart.”⁶⁴ The United

⁵⁶ 42 U.S.C. § 1981 (2009).

⁵⁷ 137 CONG. REC. 29,046 (1991).

⁵⁸ Sanders, *supra* note 30, at 305.

⁵⁹ Petition for a Writ of Certiorari, *supra* note 3, at 21.

⁶⁰ Sanders, *supra* note 30, at 295.

⁶¹ See *supra* notes 17-22 and accompanying text.

⁶² 42 U.S.C. § 1981 (2009).

⁶³ 733 F.3d 360, 361 (1st Cir. 2013).

⁶⁴ *Id.* at 362.

States Court of Appeals for the First Circuit affirmed the district court's decision, holding that to state a § 1981 claim, "the alleged discrimination must interfere in some way" with a contractual relationship.⁶⁵ The facts in *Hammond* are not disputed: Hammond entered into and performed a contract with Kmart while a Kmart's sales clerk barraged Hammond with racist insults.⁶⁶ In affirming *Hammond*'s dismissal, the First Circuit noted that the pivotal question was whether Hammond "was actually denied the ability either to make, perform, enforce, modify, or terminate a contract, or to enjoy the fruits of a contractual relationship, by reason of race-based animus."⁶⁷ Answering this question, the court held that Hammond did not "allege that [she] was unable to complete her layaway transaction . . . [or] that the Kmart's sales clerk refused to help Hammond, forced Hammond to use something other than the normal layaway procedure, or otherwise contracted with Hammond on different terms than other customers."⁶⁸ In other words, "[t]here is no claim that Hammond did not receive the purchases she had placed on layaway."⁶⁹ The First Circuit explained that a § 1981 claim "must allege the actual loss of a contract interest."⁷⁰ Because Hammond alleged only discriminatory treatment during the course of an otherwise successfully completed contract, the First Circuit found that the district court properly dismissed Hammond's complaint.⁷¹

The First Circuit acknowledged that "[t]he scope of § 1981's coverage has changed over time."⁷² Specifically, the court noted that Congress amended § 1981 in 1991 to negate the holding of *Patterson*, which had interpreted § 1981 to prohibit discrimination only in the making and enforcement of contracts, and not in the performance of contracts.⁷³ The court pointed out that the Civil Rights Act of 1991 amended the statutory phrase "make and enforce contracts" to include the "performance" of contracts, as well as the "enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."⁷⁴ Although the amendment expanded the coverage of § 1981, the court nevertheless concluded that this statutory language was

⁶⁵ *Id.* at 364 (citing *Garrett v. Tandy Corp.*, 295 F.3d 94, 101 (1st Cir. 2002)).

⁶⁶ *Id.* at 361.

⁶⁷ *Id.* at 362 (emphasis omitted) (citing *Garrett*, 295 F.3d at 100-01).

⁶⁸ *Id.* at 364.

⁶⁹ *Id.*

⁷⁰ *Id.* at 365 (citing *Garrett*, 295 F.3d at 102).

⁷¹ *Id.* at 366.

⁷² *Id.* at 362.

⁷³ *Hammond*, 733 F.3d at 362-363.

⁷⁴ *Id.* at 363 (citing 42 U.S.C. § 1981(b) (2009)).

not broad enough to encompass the discriminatory comments the sales clerk made to Hammond.⁷⁵

The ramifications of the district court's decision upon victims of discrimination are clear. As mentioned before, to state a § 1981 claim, the alleged discrimination has to interfere in some way with the right to make and enforce a contract.⁷⁶ The requirement of interference wrongly fails to focus on the victim of discrimination and rather focuses on the person discriminating. For example, if Hammond decided not to place her children's Christmas presents on layaway because of racial epithets, although the sales clerk was willing to place them on hold, albeit in a hostile manner, could Hammond have stated a claim under § 1981? Courts have answered that question in the negative. For example, in *Arguello v. Conoco, Inc.*, where a sales clerk barraged the plaintiffs with racist insults, the court held that the plaintiffs could not recover under § 1981 because the plaintiffs voluntarily chose not to make the purchase.⁷⁷ Therefore, when the sales clerk barraged Hammond with racist insults, she had two options: (1) voluntarily walk away and lose the opportunity to bring a lawsuit, or (2) proceed with the layaway purchase and face humiliation. To state a § 1981 claim, Hammond had to allege that the Kmart sales clerk prevented her from completing her layaway transaction, "refused to help [her], forced [her] to use something other than normal layaway procedure, or otherwise contracted with [her] on different terms than other customers."⁷⁸

IV. OTHER CIRCUIT COURTS

Other circuit courts have held that "discriminatory harassment of a contractual customer violates § 1981 whether or not such harassment 'blocks' or 'thwarts' the formation of a contract."⁷⁹ For example, in *Christian v. Wal-Mart Stores, Inc.*, Lois Christian, an African-American customer, sued Wal-Mart Stores, Inc. (Wal-Mart) for accusing her of shoplifting and asking her to leave the store.⁸⁰ The United States District Court for the Northern District of Ohio granted summary judgment for Wal-Mart.⁸¹ However, the United States Court

⁷⁵ *Id.* at 364.

⁷⁶ *Id.* at 365.

⁷⁷ 330 F.3d 355, 359 (5th Cir. 2003).

⁷⁸ *Hammond*, 733 F.3d at 364.

⁷⁹ Reply Brief for Petitioner at 2, *Hammond*, 733 F.3d 360 (No. 13-998), 2014 WL 1260528, at *2.

⁸⁰ 252 F.3d 862, 864 (6th Cir. 2001).

⁸¹ *Id.* at 866.

of Appeals for the Sixth Circuit reversed the district court's grant of summary judgment for Wal-Mart.⁸² In doing so, the Sixth Circuit held that to establish a § 1981 claim, a plaintiff must prove that:

- (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 received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.⁸³

Therefore, § 1981 claims in the Sixth Circuit may survive when an employee subjects a customer to race discrimination, regardless of whether the discrimination prevents the customer from completing a transaction.⁸⁴ The Sixth Circuit noted that this is the most useful test for courts when evaluating claims of race discrimination because it accounts "for situations in the commercial establishment context in which a plaintiff cannot identify other similarly situated persons" outside of the protected class.⁸⁵

Similarly, the Third Circuit has held that a customer can bring a § 1981 claim if the customer experienced discrimination, even if the customer successfully completed the transaction.⁸⁶ For example, in *Hall v. Pennsylvania State Police*, Arthur Hall, an African-American man sued the Pennsylvania State Police Department and a local bank for implementing a policy in which they targeted only African-American customers for their concerted program of photographing "suspicious-looking" individuals.⁸⁷ The United States District Court for the Eastern District of Pennsylvania dismissed Hall's discrimination claim.⁸⁸ The United States Court of Appeals for the Third Circuit reversed the district court's holding.⁸⁹ In doing so, the Third Circuit held that, although the police department's discriminatory program did not prevent the plaintiff from completing his banking transactions, he nevertheless stated a claim against the bank under § 1981 because he received disparate and disparaging treatment that was based on race for which the record offers no

⁸² *Id.* at 880.

⁸³ *Id.* at 872.

⁸⁴ *Id.*

⁸⁵ *Id.* at 871.

⁸⁶ See *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978).

⁸⁷ *Id.* at 88.

⁸⁸ *Id.*

⁸⁹ *Id.* at 92.

justification.⁹⁰ Although the disparate treatment did not thwart the plaintiff from entering into a contract with the bank, the plaintiff's "disparaging treatment [based on race] for which the record offers no justification," was enough to state a claim under § 1981.⁹¹

A. District Courts

Other courts have also found that a § 1981 claim exists when the customer forms a contract, but with unequal privileges, benefits, terms, or conditions. For example, in *Williams v. Cloverleaf Farms Dairy, Inc.*, Rathea Williams, an African-American woman, sued Cloverleaf Farms Dairy, Inc. (Cloverleaf), because Cloverleaf violated her right to buy items free from race discrimination.⁹² The United States District Court for the District of Maryland found for Williams.⁹³ In this case, Williams attempted to make a purchase but was met with racial slurs instead.⁹⁴ After some delay, another cashier completed Williams's sale.⁹⁵ In doing so, the district court held that "[a]lthough Williams was eventually able to purchase items from another cashier, the Court refuses to find that this delay in completing the transaction, coupled with alleged racial attack, is insufficient as a matter of law to establish a violation of § 1981."⁹⁶ In other words, "the combination of the delay and the racial slurs constituted an alteration in the contract's terms and conditions."⁹⁷

Although *Williams* is persuasive, rather than authoritative, for the First Circuit, it nonetheless has merit. For example, ten years before *Williams*, the Supreme Court decided *Patterson v. McLean Credit Union*.⁹⁸ In *Patterson*, Justice Brennan, concurring, viewed post-formation discriminatory conduct as a demonstration that a contract was not really made on equal terms.⁹⁹ Justice Brennan provided the following example:

[I]f an employer offers a black and a white applicant for employment the same written contract, but then tells the

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 78 F. Supp. 2d 479, 482-83 (D. Md. 1999).

⁹³ *Id.* at 485.

⁹⁴ *Id.* at 483.

⁹⁵ *Id.* at 485.

⁹⁶ *Id.*

⁹⁷ Sanders, *supra* note 30, at 298.

⁹⁸ 491 U.S. 164 (1988).

⁹⁹ *Id.* at 207-08 (Brennan, J., concurring).

black employee that her working conditions will be much worse than those of the white hired for the same job because “there’s a lot of harassment going on in this workplace and you have to agree to that,” it would have to be concluded that the white and black had not enjoyed an equal right to make a contract.¹⁰⁰

Connecting Justice Brennan’s hypothetical to retail contracts, Charlotte H. Sanders, a professor of law at Georgia State University College of Law, suggests that “because it is nearly impossible to make a purchase without interacting with some store personnel, the quality of the service provided by that personnel must then be part of the customer’s contract with the store.”¹⁰¹ Therefore:

[t]he retail store analog to Justice Brennan’s hypothetical job offer is a circumstance in which a retailer states to customers, “you can make purchases in my store, but if you are African American, Latin[American], or Asian American, you will have to suffer racial harassment in order to do so.”¹⁰²

B. Application

If Hammond had lived in the Third or Sixth Circuits,¹⁰³ the outcome of her case would have been different. Analyzing Hammond’s case under the Sixth Circuit test, it is easy to conclude that Hammond meets the first two prongs of the test.¹⁰⁴ First, as an African-American woman, she is a member of a protected class.¹⁰⁵ Second, there is no trouble concluding that Hammond made herself available to enter into a contractual relationship for services ordinarily

¹⁰⁰ *Id.* at 208.

¹⁰¹ Sanders, *supra* note 30, at 314 (footnote omitted).

¹⁰² *Id.*

¹⁰³ The Third Circuit comprises the States of Delaware, New Jersey, and Pennsylvania. *Court Locator*, U.S. COURTS, http://www.uscourts.gov/court_locator.aspx (last visited March 30, 2015). The Sixth Circuit comprises the States of Kentucky, Michigan, Ohio, and Tennessee. *Id.*

¹⁰⁴ *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001) (identifying the first two prongs in a commercial establishment case as: “(1) plaintiff is a member of a protected class; [and] (2) plaintiff sought to make or enforce a contract for services ordinarily provided by the defendant”).

¹⁰⁵ *Hammond v. Kmart Corp.*, 733 F.3d 360, 362 (1st Cir. 2013) (“It is undisputed that Hammond, an African-American, is a member of a racial minority.”).

provided by Kmart.¹⁰⁶ Therefore, the remainder of the analysis will focus on the third part of the Sixth Circuit test: whether Hammond received services in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory.¹⁰⁷

Here, Hammond was at Kmart with her two children.¹⁰⁸

In order to place several items on layaway, she needed to give the sales clerk her identification card, which indicated she lived in Roxbury, Massachusetts, a part of Boston which has a high percentage of African-American residents. Upon receiving this identification card, the white sales clerk asked if Hammond would be “jumping the counter to get what she needed because she is from Roxbury.” The clerk also labeled the identification card [as] a “liquor ID.”¹⁰⁹

The clerk then commented that she used to live near Roxbury, “but had to move because of ‘porch monkeys’ in that area.”¹¹⁰ “Hammond was ‘humiliated and deeply offended’ by the [clerk’s] comments, which she believed reflected the sales clerk’s belief that [Hammond] was ‘poor, inferior and violent . . . because she is African American.’”¹¹¹ The facts show that Hammond raised a genuine issue of fact that she received services in a markedly hostile manner. Further, the clerk’s treatment of Hammond was hostile and objectively discriminatory because it was profoundly contrary to the financial interests of Kmart and far outside of widely accepted business norms.

Kmart may argue, however, that the clerk had legitimate, non-discriminatory reasons for uttering racial epithets towards Hammond. For example, Kmart may argue that the clerk suspected that Hammond would “jump the counter.”¹¹² But that argument fails because Hammond can prove that she was a victim of intentional

¹⁰⁶ *Id.* at 361.

¹⁰⁷ *Christian*, 252 F.3d at 872 (providing the third prong: “(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”).

¹⁰⁸ *Hammond*, 733 F.3d at 361.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² This justification is used for illustrative purposes and is not intended to exhaust all of the possible justifications Kmart may have raised.

discrimination by showing that (1) Kmart's stated reason had no basis in fact, (2) the stated reason was not the actual reason, and (3) that the stated reason was not sufficient to explain the clerk's actions.¹¹³ First, the clerk had no basis in fact because Hammond did not "jump the counter." Second, it is reasonable to believe that the clerk did not actually believe that Hammond would "jump the counter" because the clerk took no further action, such as calling the police or security. Third, the fact that Hammond is from Roxbury was not sufficient to believe that Hammond would "jump the counter." Therefore, once we eliminate Kmart's justifications, discrimination may well be the most likely alternative explanation, especially since Kmart was in the best position to explain its actions but failed to do so.

Analyzing Hammond's case under the Third Circuit test,¹¹⁴ it is clear that Hammond received disparaging treatment based on race for which the record offers no justification. Hammond was an African-American woman, and the clerk began barraging Hammond upon discovering that she resided in Roxbury.¹¹⁵ Further, as described above, the record in *Hammond* offers no justification for Hammond's disparate treatment. Thus, because § 1981 obligates Kmart to extend the same treatment to Hammond as enjoyed by white citizens, Hammond would have stated a § 1981 claim in the Third Circuit.

V. UNREASONABLE APPROACHES TO § 1981

Courts that interpret § 1981 narrowly do so out of fear that, without limits, § 1981 will become a "generalized anti-discrimination law that would regulate a wide variety of private behavior."¹¹⁶ In *Hammond*, for example, the First Circuit held that § 1981 "does not provide a general cause of action for race discrimination."¹¹⁷ According to the First Circuit, "to state a [§ 1981] claim a plaintiff must initially identify an impaired 'contractual relationship,' . . . under which the plaintiff has rights."¹¹⁸ Otherwise, the First Circuit states, "§ 1981 would become a catch-all remedy to racial discrimination,

¹¹³ See *Christian*, 252 F.3d at 879.

¹¹⁴ See *Hall v. Pa. State Police*, 570 F.2d 86, 91 (3d Cir. 1978) (stating it is enough to state a § 1981 claim when plaintiff "received disparate, and because it was based on race, disparaging treatment for which the record [offered] no justification").

¹¹⁵ *Hammond*, 733 F.3d at 361.

¹¹⁶ *Sanders*, *supra* note 30, at 301.

¹¹⁷ *Hammond*, 733 F.3d at 364 (citing *Green v. Dillard's, Inc.*, 783 F.3d 533, 538 (8th Cir. 2007)).

¹¹⁸ *Id.* (emphasis omitted) (additional internal quotations omitted) (citing *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006)).

‘produci[ng] satellite . . . litigation of immense scope.’¹¹⁹ However, Congress negated the holding of *Patterson* and amended § 1981 to prohibit discrimination in all aspects of contracting.¹²⁰ And “[r]ead literally, the statute prohibits only discrimination in the making and performance of contracts, so is not a catch-all remedy to racial discrimination.¹²¹ In addition, and as mentioned in *Christian v. Wal-Mart Stores, Inc.*, the defendant can shift the burden of proof back to the plaintiff by showing that the defendant had a legitimate and non-discriminatory reason for acting the way it did.¹²² Thus, although courts’ attention to limiting § 1981 may be reasonable, “courts have responded to a reasonable fear in an unreasonable way.”¹²³

VI. CONCLUSION

The decision in *Hammond* endorses discrimination. *Hammond* acknowledges that there is discrimination in the world, and that it is best not to address it. But it is those that discriminate that deserve our contempt. America has gained very little by not confronting discrimination. It is only when we confront discrimination that it wilts in the power of justice. The *Hammond* decision not only reflects the view of a circuit fearful of creating satellite litigation, and a case ignored by the Supreme Court in its denial of certiorari,¹²⁴ but it also reflects a precedent, setting the terms for appropriate behavior in the First Circuit. How will Kmart advise its employees to treat its customers of African-American, Latin American, or Asian American descent, or any other racial minority in the future? How will other department stores advise their employees? How many more *Hammonds* will have to deal with discrimination without legal remedies? This decision permits discrimination to continue without redress for millions of American consumers who are racially profiled, harassed, or, like *Hammond*, simply required to endure painfully substandard service so that they may be able to purchase toys for their kids.

¹¹⁹ *Id.* (citing *Domino’s Pizza*, 546 U.S. at 479).

¹²⁰ See discussion *supra* Part II.

¹²¹ Petition for a Writ of Certiorari, *supra* note 3, at 23.

¹²² 252 F.3d 862, 879 (6th Cir. 2001) (providing that “[a]fter the defendant produces evidence of its non-discriminatory reason for its action, the presumption of discrimination falls away and the production burden shifts back to the plaintiff, who must prove by a preponderance that the defendant’s stated reason was not its true reason, but was a pretext for discrimination”).

¹²³ *Sanders*, *supra* note 30, at 302.

¹²⁴ *Hammond*, 733 F.3d 360, *cert. denied*, 134 S. Ct. 1889 (2014).

