The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2016
PHILADELPHIA, WEDNESDAY, OCTOBER 12, 2016 VOL 254 • NO. 72 An ALM Publication

EMPLOYMENT LAW

A Viable 'Race' Discrimination Claim Under Section 1981

BY SID STEINBERG
Special to the Legal

Most claims of national origin discrimination are brought under Title VII or the Pennsylvania Human Relations Act (PHRA)—both of which specifically prohibit discrimination in that regard. In a nonemployment setting, such as where an individual is an independent contractor, or when a potential plaintiff has missed the limitations periods for Title VII and the PHRA, a claim under 42 U.S.C. Section 1981 may be a fallback position. But Section 1981, which is a post-Civil War statute addressing "racial" discrimination in the making of contracts, is not a perfect fit for a national origin claim. This distinction was addressed in the recent case of *Mandalapu v. Temple University Hospital*, No. 15-5977, 2016 U.S. Dist. 133122 (E.D. Pa. Sept. 27).

INDIAN-BORN RESIDENT

Dr. Rao Mandalapu was a fourth-year urology resident at Temple University Hospital beginning in July 2011. Mandalapu was born in India where he was a board-certified surgeon. The court noted that Mandalapu "retains a discernible Indian accent." In order to practice in the United States, he was required to complete a five-year accredited residency program. The accrediting body requires that the fourth- and fifth-year residency years be completed in the same program. Mandalapu completed his first three years of residency at another institution and moved to Temple for his final two years. He was one of two residents beginning in July 2011—the other being a Caucasian American.

Mandalapu's complaint alleges that during his fourth-year residency, he was "subjected to discriminatory comments and jokes about his accent" and that he complained about this treatment to the residency program director. The director allegedly responded that some of the physicians in the department were "hesitant to have him work with their patients because of his accent."

PROMOTION RESCINDED

Nevertheless, Mandalapu was promoted to his fifth and final residency year in April 2012 and he signed a contract for this term. According to the complaint, he received no negative feedback during his fourth year (his first at Temple). In May, however, Mandalapu's supervising physicians submitted evaluations for the first four months of his fourth-year residency. That is, in May 2012, he was evaluated for the period from July to October 2011. The program's supervisor met with Mandalapu in May 2012 to discuss his poor evaluations and to advise that he would not be promoted and would not receive credit for his work in the 2011-2012 period. Shortly thereafter, Temple advised Mandalapu that he was being terminated "due to poor performance."

SID STEINBERG *is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at ssteinberg@postschell.com.*

Mandalapu was ultimately allowed to resign from the program but, according to the complaint, the director reneged on his promise of a positive recommendation and inaccurately reported him to the Federation of State Medical Boards.

Mandalapu brought suit, claiming discrimination and retaliation against the hospital and a number of the individual physicians under Section 1981. Temple moved to dismiss the Section 1981 claims on the grounds that the complaint asserts only "national origin discrimination based upon [Dr. Mandalapu's] accent which is not actionable under Section 1981."

SECTION 1981 APPLIES TO RACE DISCRIMINATION

The court began its consideration by reviewing the specific language of the statute, which provides, in relevant part, that "all persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." It noted that "although Section 1981 does not itself use the word 'race,' the Supreme Court has construed the section to forbid all 'racial' discrimination in the making of ... contracts," as held in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). "Race discrimination" in this context has been defined by the Supreme Court as limited to "intentional discrimination solely because of an individual's ancestry or ethnic characteristics." Accordingly, the court cited St. Francis in finding that "only if a plaintiff can prove that he was subjected to intentional discrimination based on the fact that he was born into a particular ethnic group, rather than solely on the place or nation of his origin will he have made out a case under Section 1981."

Temple's argument was based primarily on the recent decision in *Kamara v. Horizon House*, No. 13-6728, 2015 U.S. Dist. LEXIS 169215 (E.D. Pa. Dec. 18, 2015), in which the court granted summary judgment to the defendant where a black male of Liberian origin brought a Section 1981 claim based upon "discriminatory comments about his accent and about the fact that he was born in Africa." In *Kamara*, the court found that the plaintiff's "accent is the result of being born outside the United States, not the result of his ethnic or ancestral origin."

Section 1981, which is a post-Civil War statute addressing 'racial' discrimination in the making of contracts, is not a perfect fit for a national origin claim.

The *Mandalapu* court found that the Kamara decision was idiosyncratic and that, "at least in certain circumstances, one's accent may be characteristic of ethnicity as well as national origin." As such, the court refused to dismiss the Section 1981 claims, as to do so would have required it to find that the alleged discrimination was based on Mandalapu's "place of birth [which would not be prohibited by Section 1981] rather than his Indian ethnicity and ancestry [which would be prohibited]."

DOES SECTION 1981 PROTECT ONLY IDENTIFIABLE ACCENTS?

The court's distinction between the facts of *Mandalapu* and those presented by *Kamara* raises the question of whether Section 1981 accent claims are viable where the accent in question is easily identifiable as being of a particular ethnicity. That is, the Liberian accent referenced in *Kamara* may have been identified as being of an unidentifiable African nation—but not of any distinct ethnicity. In contrast, in *Mandalapu*, according to the complaint, there was no question but that the Hospital and its physicians identified Mandalapu's accent as distinctly Indian, which would be both his place of birth and his ethnicity.

Secondly, it is notable that Mandalapu's evaluation for the first four months of his residency was not delivered until after he had already been rehired for the second year of his residency—some seven months later. While this case is at its earliest stage, this is sure to be an issue as it proceeds. The case seems to present the classic "put the toothpaste back in the tube" scenario for the hospital as a seven-months-late evaluation resulting in an adverse action may look inherently suspicious. As we have often written, prompt and accurate performance evaluations are an employer's strongest evidence against pretext. •