

# H.R. ALERT\*

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## Can an Individual Supervisor or Employee Be Sued Directly for Racial Discrimination or Racial Harassment under Section 1981? Can an Individual Supervisor or Employee Be Sued for Retaliation under Section 1981? -- The United States Fifth Circuit Court of Appeal Says “Yes.”

Just last month, the United States Fifth Circuit Court of Appeal, which governs federal cases in Louisiana, Texas and Mississippi, issued a seminal decision which affects employers, supervisors and employees alike. In *Foley v. University of Houston System*, 2003 WL 751183 5th Cir. (Texas), the Fifth Circuit addressed claims of racial discrimination and retaliation urged by professors against the University of Houston System and several individual University officials and professors. In the course of reviewing the propriety of the district court’s pre-trial rulings on appeal, the Fifth Circuit reiterated that under 42 U.S.C. §1981, claims of racial discrimination and harassment are available against an individual supervisor or a fellow employee, as well as the employer. One of the corollary issues to be addressed by the Fifth Circuit on appeal was whether the claim of one professor that he was subjected to retaliation because he complained of race discrimination was also cognizable under Section 1981.

In a case of first impression for the Fifth Circuit since Congress amended the Civil Rights Act in 1991, the Fifth Circuit determined that an employee’s claim that he was subjected to retaliation because he complained of race discrimination is a cognizable claim under 42 U.S.C. §1981(b). The Fifth Circuit emphasized that in amending the Civil Rights Act in 1991, Congress expanded Section 1981 to include “the making,

performance, modification and termination of contract and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” See, 42 U.S.C. §1981(b). The Court further noted that its decision was in accord with other circuit courts that have reached the conclusion that Section 1981, as amended in 1991, now covers post-hiring retaliation claims that arise after November 21, 1991. See, *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-13 (11th Cir. 1998). Note: the Eleventh Circuit covers the states of Alabama, Florida and Georgia.

Employer Tip: For those of you doing workplace training, it is incumbent upon you to stress upon all managers, supervisors and employees that there is individual liability under Section 1981 for claims of racial harassment/discrimination and retaliation. Additionally, it is important to stress particularly to supervisors and managers that unlike Title VII, which has a statutory cap on compensatory and punitive damages, there is no statutory cap on damages under Section 1981. Hence, now more than ever, it is incumbent to educate employees in the workforce about racial harassment and retaliation and the possibility of exorbitant individual damages being assessed against them based on such claims.

## Does an Employee With a Facial Disfigurement Have a “Disability” under the ADA? — The EEOC Says “Yes.”

In a recent case that is generating much discussion, the Equal Employment Opportunity Commission (“EEOC”), filed a complaint just last month against McDonald’s Restaurant in Northport, Alabama under the Americans With Disabilities Act of 1990 (“ADA”) and the Civil Rights Act of 1991. In the lawsuit, the EEOC alleges that McDonald’s discriminated against a former employee, Samantha Robichaud, when it denied her the opportunity for promotion to a management position and then constructively discharged her due to a cosmetic disfigurement.

The former employee’s cosmetic disfigurement, referred to as Sturge Weber Syndrome, affects about 1 in 3,000 children at birth. The condition results in port wine stains that are caused by diluted capillaries under the skin. According to Ms. Robichaud’s doctors, her condition was one of the worst that they had ever

seen and was untreatable by laser surgery.

Ms. Robichaud had begun her employment at McDonald’s in Alabama in August of 2000 as a cook. According to Ms. Robichaud, her acceptance of that position was premised on an assurance that she would have the opportunity for promotion to management. In order to progress to a managerial position, an employee must show proficiency in handling several areas of the restaurant, including the front counter which serves customers. According to Ms. Robichaud, she was removed from the front counter because of her appearance. Ms. Robichaud further contends that she later questioned her manager about not being promoted. Ms. Robichaud alleges her manager allegedly indicated that she could never be in management because she would either make the babies cry or scare the customers off. Shortly after the

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H . R . A L E R T

A P R I L 2 0 0 3

*(continued from page 1)*

incident, Ms. Robichaud contends she was so distraught that she went home and never returned.

After her discharge, Ms. Robichaud filed a charge with the EEOC in Alabama. After receiving a cause determination, the EEOC pursued the action on her behalf. This is the first lawsuit the EEOC has filed in Alabama involving facial disfigurement. In her lawsuit the EEOC alleges that discrimination by McDonald's prompted a constructive discharge.

The case is unusual because the EEOC acknowledges that Ms. Robichaud is not physically disabled; that is, she can walk, talk and work. The crux of the EEOC's lawsuit, however, relies on the ADA section that protects workers from being regarded as having a disability. According to the EEOC and Ms. Robichaud,

McDonald's viewed her as having a disability (her cosmetic disfigurement) that disqualified her from ever becoming a manager.

Obviously, there are many hurdles that must be cleared by Ms. Robichaud in order to succeed. For example, why would McDonald's have hired her if they were going to discriminate against her? Secondly, under existing case law, Ms. Robichaud must show that she is substantially limited in a major life activity. In order to prove that her activity of "working" is substantially limited, Ms. Robichaud must show that she is limited from a broad class of jobs. In essence, the case may simply boil down to whether Ms. Robichaud can demonstrate that McDonald's, by not wanting to place her in a visible managerial position, was excluding her from a broad range of managerial jobs. The EEOC stated it instituted this suit to educate employers that the ADA requires a focus on what people can do, not how they are perceived. This is a seminal case and we are monitoring it for all of our readers. Stay tuned.

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**H.R. ALERT**

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