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A Preferred Approach: How Minority-Owned Businesses Can Combat Union Discrimination

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A PREFERRED APPROACH: HOW MINORITY-OWNED BUSINESSES CAN COMBAT UNION DISCRIMINATION

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I. INTRODUCTION

Minority-owned businesses have historically been unsuccessful in obtaining relief against labor unions allegedly engaged in discriminatory treatment based on the minority status of the business owner. For example, in *Trustees of the Painters Union Deposit Fund v. Interior/Exterior Specialist Company*,[1] an Hispanic-owned company sued a labor union under 42 U.S.C. § 1981 of the Civil Rights Act for allegedly ordering audits of the company's books and records while not doing the same for similarly-situated, "white–owned" companies. In that case, the company was a painting contractor, solely owned by a Hispanic man. After five years of operation, the company's employees complained to the union that they were not receiving certain fringe benefit contributions from the company.[2] Subsequently, the union requested a comprehensive audit of the company. In response, the company filed a claim alleging that the union's ordering of comprehensive audits constituted discrimination under Section 1981 because the Union had not ordered audits of non-Hispanic-owned companies with similar business practices.[3] Among other evidence, the Hispanic owner obtained the testimony of various individuals, including the owner of another painting company who testified that, after he began to hire numerous Hispanic workers, he received a barrage of prevailing wage complaints from the Union.[4] On these facts, the Sixth Circuit considered whether the Union applied its contractual right under the applicable collective bargaining agreement to issue comprehensive audits in a discriminatory manner. This article will examine the viability of the causes of action available to plaintiff minority-owned businesses who believe labor unions have discriminated against them, like the plaintiff in *Painters Union*.

Minority-owned businesses that believe labor unions have discriminated against them have two viable causes of action. The first (and

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[1] 371 Fed. Appx. 654 (6th Cir. 2010).

[2] *Id*. at 656.

[3] *See id.* at 657.

[4] *See id.* at 658 (testifying that the Union had seldom contacted him during the first ten years of his business).

more likely to succeed) cause of action is bringing a claim against a union for discriminatory application of contractual provisions in the applicable collective bargaining agreement. The second cause of action available to minority-owned businesses is filing a claim against a union under the theory that the union's discriminatory conduct interferes with the business's ability to obtain and maintain commercial contracts. This is also known as "discriminatory interference with third-party contracts." This article not only provides a short background of the history of 42 U.S.C. § 1981, but it will also describe the recent case law under both causes of action available to minority-owned businesses.

The article concludes with an analysis of the viability of both theories, which shows that a minority-owned business is more likely to succeed on a claim that the contractual provisions of a collective bargaining agreement are being applied in a discriminatory manner than on a claim that a labor union's conduct is discriminatorily interfering with the minority owned businesses contracts. Both causes of action, however, may be viable to provide relief to minority-owned businesses that are aggrieved by the discriminatory conduct of labor unions.

II. BACKGROUND: SECTION 1981

A. Provisions of Section 1981

42 U.S.C. § 1981 provides as follows:

> (a) Statement of equal rights
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> 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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and 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.[5]

Generally, to establish a claim under 42 U.S.C. § 1981, a plaintiff must show that: (1) he is a member of a racial minority; (2) the defendant intended to discriminate against the plaintiff on the basis of race; and (3) the plaintiff was subjected to discrimination concerning one or more of the activities enumerated in Section 1981.[6] One of the activities protected by Section 1981 is contracting. The statute prohibits intentional race discrimination affecting "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[7]

Litigation involving 42 U.S.C. § 1981 most commonly involves the right to make and to enforce employment contracts.[8] In non-employment litigation, under Section 1981, claims have been pursued predominantly for conduct that prevented the formation of the contract, as opposed to conduct that affected the nature and quality of the contractual relationship.[9] At issue in many of the cases examined in this section are the types of conduct that affect minority-owned business' enjoyment of the benefits, privileges, terms, conditions, nature, and quality of the contractual relationship. Specifically, the article will analyze this possible cause of action as it applies to labor unions enforcing the terms of their collective bargaining agreements in a discriminatory manner.

42 U.S.C. § 1981 also offers relief when racial discrimination blocks the creation of contractual relationships.[10] A plaintiff asserting a claim under Section 1981 must, initially, identify an impaired contractual relationship under which the plaintiff has rights.[11] Such a contractual relationship need not already exist because Section 1981 protects the would-be contracting party along with those who have already made contracts.[12] Defendants are liable under Section 1981 when, for racially motivated reasons, they prevent individuals who "[*seek*] *to enter* into contractual relationships" from doing so.[13] 42 U.S.C. § 1981 not only

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[5] 42 U.S.C. § 1981 (1991).

[6] *See, e.g.*, Lauture v. Int'l Bus. Machines, 216 F.3d 258, 261 (2d Cir. 2000) (raising the issue of whether an at-will employee could sue for racially-discriminatory discharge under Section 1981).

[7] 42 U.S.C. §1981(b).

[8] *See, e.g.*, Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996) (citing Rivers v. Roadway Express, Inc., 511 U.S. 298 (1998)).

[9] *See id.*; *see also* Bobbitt v. Rage Inc., 19 F. Supp. 2d 512 (W.D. North Cal. 1998) (claiming the poor service they received at a franchised pizza restaurant was motivated by racially discriminatory animus).

[10] *See, e.g.*, Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 476 (2006) (determining whether a plaintiff who lacks any rights under an existing contractual relationship may bring suit under Section 1981).

[11] *Id.*

[12] *Id.*

[13] Runyon v. McCrary, 427 U.S. 160 (1976).

protects against the actions of contracting parties but also protects against the actions of third parties.[14] Tortious interference with third-party contract rights violates Section 1981 when the interference is racially motivated.[15] This cause of action has been recognized in the Second, Fourth, Seventh, and Tenth Circuits.[16] These courts have all held that defendants are liable under Section 1981 for interference with third-party contracts only when the defendant actually has the power or authority to prevent plaintiffs from contracting with a third party.[17] In these circumstances, courts require a demonstration "that the defendant both possessed: (1) sufficient authority to significantly interfere with the individual's ability to obtain contracts with third parties and (2) that the party actually exercised that authority to the individuals' detriment."[18] Additionally, a party must allege and identify particular and specific business opportunities that were lost due to discriminatory interference by a third-party before a claim for third-party interference can be stated.[19] The cases examined in this article, under this cause of action, will viewed through the lens of discriminatory conduct of labor unions.

B. History and Intent of Section 1981

During the Reconstruction Era, and pursuant to the Thirteenth Amendment, Congress enacted the Civil Rights Act of 1866, which provided the guarantees now codified in 42 U.S.C. § 1981.[20] Congress intended for the Civil Rights Act to counter discrimination faced by the recently freed slaves.[21] After the passage of the Fourteenth Amendment,

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[14] *See* Ginx, Inc. v. Soho Alliance, 720 F. Supp. 2d 342 (S.D.N.Y 2010) (citing Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2001)).
[15] *See, e.g.*, Muhammad v. Oliver, 547 F.3d 874, 878 (7th Cir 2008).
[16] See *supra* footnotes 18, 19, 43, 134, 150 and accompanying text.
[17] *Ginx*,720 F. Supp. 2d at 357.
[18] Harris v. Allstate Ins. Co., 300 F.3d 1183, 1197 (10th Cir. 2002).
[19] *See Ginx*, 720 F. Supp. 2d at 357; *see also* Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 – 68 (10th Cir. 1988) (holding that vague and conclusory allegations of lost business opportunities are insufficient to state a claim under §1981); Morris v. Office Max, Inc., 89 F.3d 411 (7th Cir. 1996) (holding that a claim under Section 1981 had to allege an actual loss of contract interest, not merely the possible loss of future contract opportunities).
[20] Note that the original language of the Civil Rights Act of 1866 did not contain the phrase "all persons" but rather "citizens, of every race and color."
[21] *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) ("Congress instead acted to protect the freedmen from intentional discrimination by those whose object was to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.") (internal citations omitted); Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 835 (9th Cir. 2006).

Congress reenacted the text of the 1866 Act in the Enforcement Act of 1870.[22]

After Congress passed the Enforcement Act, 42 U.S.C § 1981 "underwent nearly a century of desuetude during which debate regarding its scope and meaning was generally subsumed by the controversy surrounding the newly ratified Fourteenth Amendment's Equal Protection Clause."[23] The statute did not gain traction as a tool in remedial litigation because there was "lingering uncertainty regarding the scope of the statute and the extent of Congress's authority to prohibit discrimination divorced from state action."[24] Subsequently, the Supreme Court reinvigorated the statute from its prior existence "as a device to augment the remedies for previously recognized forms of discrimination, to a litigation tool in its own right with unparalleled theoretical coverage."[25]

In *Jones v. Alfred H. Mayer Co.*, the Supreme Court interpreted a companion statute, 42 U.S.C. § 1981, to encompass and to prohibit racial discrimination in purely private transactions.[26] The *Jones* Court held that the right to "inherit, purchase, lease, sell, hold, and convey real and personal property" is secured against interference from both governmental and private actions.[27]

In *Runyon v. McCrary*, the Court explicitly came to the same result under Section 1981. The issue in *Runyon* was whether Section 1981 prevents "private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes."[28] The plaintiffs, parents of African American children, had sought to enter into contractual relationships with the schools. "Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments."[29] The Court held that the schools' refusal to admit them "amount[ed] to a classic violation of § 1981."[30] The Court emphasized that Congress had the right to reach private acts of discrimination in the private school setting because of its power under the Thirteenth Amendment to enact legislation to combat racial

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[22] *Kamehameha Sch.*., 470 F.3d at 835.
[23] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 416 F.3d 1025, 1032 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006).
[24] *Id.* (declaring that "governmental action" was required in a suit based on the Civil Rights Act of 1866).
[25] *Id.*; *see* Runyon v. McCreary, 427 U.S. 160, 170 (1976); Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 423 (1968).
[26] *Jones*, 392 U.S. at 423-24.
[27] *Id.* ("[W]hen Congress provided in § 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.").
[28] *Runyon*, 427 U.S. at 160.
[29] *Id.* at 172.
[30] *Id.*

discrimination.[31] *Runyon*, then, involved a straightforward case of discrimination, not a remedial policy. Accordingly, *Jones* and *Runyon* finally dispensed with the state action requirement and held that the Civil Rights Act of 1866 reached purely private acts of discrimination by virtue of Congress' power under section two of the Thirteenth Amendment.[32]

In *Patterson v. McLean Credit Union*,[33] the Supreme Court indicated that the analysis under Title VII should be the same as Section 1981 claims brought against private employers.[34] In *Patterson*, the plaintiff brought a Section 1981 suit against her former employer alleging that the employer harassed her, failed to promote her, and fired her on account of her race.[35] The Court discussed the similarities and differences between Section 1981 and Title VII and held that the Title VII burden-shifting system of proof, established in *Texas Department of Community Affairs v. Burdine*[36] and *McDonnell Douglas Corp. v. Green*,[37] applied to the instant case.[38] Under the burden shifting system, the plaintiff first must establish a prima facie case of discrimination by coming forward with evidence that an employer considered race in its employment decisions.[39] After a prima facie case is established, the burden then shifts to the employer to provide a legitimate, non-discriminatory reason for the decision.[40] If a legitimate non-discriminatory reason exists, then the burden shifts back to the plaintiff to show that the justification provided was pretextual and that the plan is invalid.[41] Since *Patterson*, 42 U.S.C. § 1981 has become a powerful weapon in the fight to eradicate discrimination.

C. Application of Current Case Law in Suits Brought by Minority-Owned Businesses

Both causes of action under 42 U.S.C. § 1981 are applicable to a wide range of union conduct. Examples of union conduct could include, but would not be limited to, a union's enforcement of wage policies, distribution of letters of good standing, issuance of audits, and any other contractual requirements under a collective bargaining agreement. In

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[31] *Id.* at 170-71.
[32] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 416 F.3d 1025, 1033 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006).
[33] 491 U.S. 164, 186 (1989), *superseded by statute on other grounds*.
[34] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.
[35] Patterson v. McLean Credit Union, 491 U.S. 164, 169 (1989).
[36] 450 U.S. 248, 252–53 (1981).
[37] 411 U.S. 792, 802 (1973).
[38] *Patterson*, 491 U.S. at 186.
[39] *Id.*; *see also* Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987).
[40] *Patterson*, 491 U.S. at 187.
[41] *Id.*

theory, both causes of action would intersect and be used in conjunction with each other to remedy this type of discriminatory union behavior. Although no case law currently exists (in the context a minority business owner suing a union) in which the lawyers have argued under both theories,[42] one could imagine circumstances where both causes of action could be used.

This article will use the following hypothetical as a vehicle for the purposes of analysis. A union discriminatorily refuses to supply a letter of good standing to a shipping company because its owner is African American (assume the company needs a letter of good standing to be hired by third parties). Under the first cause of action, the shipping company would have relief under 42 U.S.C. § 1981, if it could prove that the union refused to supply the letter because of racial animus. The owner of the shipping company would have relief under the second cause of action if it proved that that the union's discriminatory refusal to supply the letter interfered with its ability to make contracts with third parties. This hypothetical will be explored further in Part IV of this article.

III. RECENT CASE LAW

A. Challenges to Contractual Provisions

At issue in the cases examined in this section of the article is conduct that affects the enjoyment of the benefits, privileges, terms, conditions, nature, and quality of the contractual relationship.

In *Trustees of the Painters Union Deposit Fund v. Interior/Exterior Specialist Company*, the trustees of a union fund brought an action seeking fringe benefits against a union-painting contractor and a non-union painting contractor.[43] The contractors impleaded the union, alleging discrimination and defamation claims and sought restitution for overpayment of the fringe benefits.[44]Interior/Exterior Specialist Company ("IES") was a Hispanic-owned, union painting contractor with Mr. Llamas as its sole shareholder, officer, and director. The Llamas Group ("TLG") was a non-union, painting contractor founded in 1999 by Mr. Llamas' wife as the sole shareholder, officer, and director.[45] In 1998, IES and Painters District council No. 22 of the International Brotherhood of Painters and Allied Trades ("The Union") concluded a collective bargaining agreement ("CBA") that required IES to pay a set fringe benefit amount to the Painters Union Deposit Fund ("The Fund") for every hour that IES painters worked.

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[42] In *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 45 F.2d 906 (7th Cir.1991), an individual *member* of the union sued under both theories.

[43] Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist Co., 371 Fed. Appx. 654 (6th Cir. 2010).

[44] *Id.* at 654.

[45] *Id*. at 656.

In 2003, IES employees complained that they were not receiving fringe benefit contributions, and the Union requested a comprehensive audit of IES.[46] Additionally, in 2003, the Union filed a National Labor Relations Board charge against IES and TLG. The Union alleged that for six months IES and TLG had worked as an illegal, double-breasted operation and failed to pay CBA required wages and fringe benefits.[47] In February 2004, the Fund sued IES for alleged collective bargaining violations and for failure to pay fringe benefits. Additionally, they sought a court mandated, comprehensive audit of IES's books and records to determine the amount owed.[48] IES filed a counterclaim alleging that the Union's ordering of comprehensive audits constituted discrimination under 42 U.S.C. §1981 because the Union had not ordered audits of non-Hispanic owned companies with similar business practices.[49]

Mr. Llamas supported his discrimination claim with the testimony of various individuals, including other contractors. In support of Mr. Llamas claims, Mr. Balatzis, an owner of a non-union painting company, testified that the Union seldom contacted him during his first ten years in business. After he hired Hispanic workers, however, contact from the union increased, and he received a "barrage of prevailing wage complaints."[50] Additionally, Robert Kennedy, the union manager, testified that Mr. Llamas had previously notified the Union that other union-painting contractors had related non-union companies, which Mr. Llamas alleged gave them a competitive advantage over IES. Furthermore, other union-contractors testified that they owned related non-union companies, but the Union had not ordered comprehensive audits of their companies.[51] These other contractors also testified that, to their knowledge, union employees had not complained about their payment practices.[52]

The district court found that IES's 42 U.S.C. §1981 claim was insufficient because the Union would have ordered comprehensive audits of IES, regardless of IES' Hispanic ownership, due to employee complaints about IES's failure to pay fringe benefits.[53] The district court also concluded that the Union had not ordered comprehensive audits of other firms because their employees did not complain about their wages and

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[46] *Id*.
[47] A double-breasted operation is a condition where an employer operates two closely related companies—one with a union contract and one without. Under such operation, the employer will normally assign most of the work to the non-union segment of his two companies.
[48] *Trustees of Painters Union Deposit Fund*, 371 Fed. Appx. at 656.
[49] *Id*.
[50] *Id.* at 658.
[51] *Id*.
[52] *Id*.
[53] *Id*.

noted that the Union does not aggressively enforce the CBA without employee complaints. The Sixth Circuit affirmed and held that the Union did not violate 42 U.S.C. § 1981 when it ordered comprehensive audits of IES but not of non-Hispanic union contractors with closely related non-union companies. The court reasoned that the Union did not order comprehensive audits of other entities allegedly engaged in double breasting because it received no employee complaints about those entities.[54]

In *Carpenters Health and Welfare Fund of Philadelphia v. KIA Enterprises*,[55] the plaintiffs, Carpenters Health and Welfare Fund ("The Union"), sued Kia Enterprises ("Kia") to collect payments allegedly owed to them under a collective bargaining agreement and related trust agreements (collectively the "CBA").[56] Kia, an African-American owned business, filed a counterclaim, alleging that in seeking to collect the payments allegedly owed by Kia, the Union violated 42 U.S.C. § 1981.

Kia claimed that the Union, in pursuing their claim under the CBA, "acted in furtherance of and pursuant to their long-standing pattern and practice of discriminating and retaliating against Minority Business enterprises and minority members of the carpenters union; particularly African American business and union members."[57] The counterclaim alleged numerous, specific discriminatory actions by the Union. First, it alleged that the Union submitted a formal demand for payment to Liberty Mutual Insurance Company as the first step in submitting an unsubstantiated claim against Kia's performance bond.[58] Second, the counterclaim alleged that the plaintiffs pressured the School Reform Commission of the City of Philadelphia ("SRC") to refuse to make timely payments for money owed to Kia.[59] Third, it alleged that the plaintiffs did not similarly pressure the SRC with respect to non-minority-owned businesses that owe the plaintiffs money.[60] Fourth, the counterclaim alleged that the plaintiffs discriminated against Kia by auditing Kia's books and records, including those that had no relation to work covered by the CBA.[61] Finally, Kia claimed that the plaintiffs made similar unjustified demands of another minority-owned company but did not make similar demands of non-minority-owned businesses.[62]

The court held that Kia failed to sufficiently plead specific facts to

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[54] *Id.*
[55] Civ. No. 09-116, 2009 WL 2152276, at *1 (E.D. Pa. July 15, 2009).
[56] *Kia Enterprises*, Civ. No. 09-116, at *1.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at *2, *3 (finding Kia attempted "to 'nidge' its allegations of discrimination across the 'line from conceivable to plausible' . . . . [H]owever, [it] offers no specific facts in support . . . .").
[62] *Id.* at *1.

support its counterclaim that the pension funds disparately treated minority and non-minority businesses in violation of 42 U.S.C. § 1981.[63] The court acknowledged that the plaintiffs began the process of making a claim against Kia's performance bond, sought to persuade a city agency to withhold payments to Kia, and demanded to audit Kia's books and records; however, it noted that these actions were entirely consistent with a lawful attempt by the plaintiffs to collect unpaid CBA obligations that they were owed. Citing the *Iqbal* standard for pleadings, the court reasoned that Kia's allegations alone were not sufficient to suggest actionable wrongdoing.[64] Additionally, Kia's allegation that the plaintiffs took similar steps against other minority-owned businesses was also entirely consistent with lawful actions by the plaintiffs to collect unpaid CBA payments.[65] The court emphasized that Kia did not plead sufficient, additional facts to push its allegations of discrimination across the "line from conceivable to plausible."[66] Indeed, the court was not persuaded because Kia failed to identify particular instances of disparate treatment. Thus, the court held that the allegations were merely "legal conclusions couched as factual allegations," and in order to prevail, Kia would need to plead its allegations with more specificity.[67]

B. Comparator Cases and Their Applicability to Employer-Union Discrimination Cases

The logic employed in the above cases is similar to cases in the employment context in which violations of legitimate employer expectations are met with disparate treatment based on race.[68] For example, in *Curry v. Menard*, an African-American cashier violated the store's progressive disciplinary policy.[69] The policy provided that each cashier's register would be counted at the end of the day.[70] The amount counted would then be compared to a master computer printout.[71] The first time a cashier's register count deviated from the printout by three dollars or more, the cashier would receive a written warning.[72] If this happened two more times, it would result in the termination of the cashier.[73] The plaintiff in

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[63] *Id.*
[64] *Id.* at *2.
[65] *Id.*
[66] *Id.* at *3.
[67] *Id.* (citing Ashcroft v. Iqbal, 29 S. Ct. 1937 (2009)).
[68] Curry v. Menard, Inc., 270 F.3d 473 (7th Cir. 2001).
[69] *Id.* at 475.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 476.

Curry admitted that she violated the progressive disciplinary policy by being overdrawn and should have been terminated.[74] She maintained, however, that two, non-African-American cashiers with similar violations were not terminated.[75] From January 1, 1997 to December 31, 1998, the plaintiff was the only cashier terminated for violating the store's progressive discipline policy; but, if the employer strictly enforced its own policy, sixteen other cashiers should have been terminated in that same time period.[76] The issue before the court was whether the employer applied its legitimate employment expectations in a discriminatory manner. The court held that there was sufficient evidence of discrimination for the plaintiff to survive summary judgment.

Other analogous factual scenarios to unions discriminatorily applying the terms of collective bargaining agreements involve franchisors applying the terms of their standard franchise agreement in a discriminatory manner.[77] In *Elkhatib v. Dunkin Donuts, Inc.*, the Seventh Circuit applied the *McDonnell Douglas*[78] framework to a case in which a franchisor applied a contractual provision of the franchise agreement in a racially discriminatory manner.[79] In *Elkhatib*, the plaintiff was an Arab franchisee who refused to handle pork products (specifically the ham and bacon in Dunkin Donuts' breakfast sandwiches) despite entering into a franchise agreement that required all franchisors to carry Dunkin Donuts' full breakfast line.[80] The plaintiff claimed that the handling of these products was forbidden to members of the Arab race by tradition and custom.[81] For over twenty years, the plaintiff owned multiple franchises. During that entire time, Dunkin Donuts did not require him to serve pork products.[82] In 2002, the plaintiff wanted to relocate one of his stores and renew his franchise agreement.[83] Dunkin Donuts did not allow the plaintiff to relocate his store or renew his franchise agreement, however, because of his failure

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] See *supra* Section III(C)(1) (analyzing further *Curry v. Menard* in the context of unions).
[78] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Supreme Court held that a plaintiff could make out a prima facie claim of racial discrimination by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*
[79] 493 F.3d 827 (7th Cir. 2007).
[80] *Elkhatib*, 493 F.3d at 828 (noting Dunkin Donuts introduced its breakfast sandwiches in 1984, which included a choice of ham, cheese, bacon, and sausage, almost five years after Elkhatib began his franchise).
[81] *Id.*
[82] *Id.*
[83] *Id.*

to carry Dunkin Donuts' full breakfast sandwich product line.[84] Based on Dunkin Donuts' conduct, the Seventh Circuit held that the plaintiff established a prima facie case of racial discrimination under 42 U.S.C. § 1981 because Dunkin Donuts applied the franchise provision in a racially discriminatory manner.[85]

The plaintiff established his case by showing that Dunkin Donuts allowed similarly-situated franchisees to carry less than the full product line without consequences.[86] Dunkin Donuts explained that the reasons the *other* franchisees did not carry the breakfast products were because of lease issues, space issues, and customer preferences.[87] They noted that one of those franchises did not carry breakfast sandwiches because its lease prohibited it from serving sandwiches; another did not carry any breakfast sandwiches because it lacked space for the toaster oven; and the third did not carry any pork products because it sought to meet the demand in the area for a kosher establishment.[88]

The court emphasized that the franchises identified as comparators were identical in all relevant respects in that they all failed to carry part or all of the breakfast line of products despite the requirement in their franchise agreement that they do so.[89] Accordingly, the court did not accept Dunkin Donuts' explanation.[90] It concluded that the franchise provision was absolute in its terms and did not indicate that exceptions would be made for any reason.[91] The court held that there was no meaningful distinction, for the purposes of the "similarly situated" inquiry, between franchisees that refused to carry breakfast sandwiches because of lease and space issues and the plaintiff.[92] The court further articulated that the similarly-situated requirement should not be applied mechanically or inflexibly; rather, it is a flexible, common-sense inquiry that seeks to determine whether there are enough common features between the individuals to allow a meaningful comparison.[93] The Seventh Circuit cautioned against an overly technical or rigid interpretations of this requirement when it stated:

> It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement

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[84] *Id* at 828-829.
[85] *Id.* at 832.
[86] *Id*.
[87] *Id*. at 833.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id*. at 832.
[92] *Id*.
[93] *Id.* (citing Humphries v. CBOCS West, Inc., 474 F.3d 387, 404-05 (7th Cir. 2007)).

> that requires near one-to-one mapping between employees-distinctions can always be found in particular job duties or performance histories or the nature of the alleged transactions . . . but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation-recall that the plaintiff need not *prove* anything at this stage.[94]

Thus, the court held that Elkhatib's claim should survive summary judgment because there was sufficient evidence for the jury to find pretext.[95]

To guide other courts facing similar cases, the *Elkhatib* court held that in these circumstances, the plaintiff (a minority business owner) can establish a prima facie case of discrimination by producing evidence that: (1) he belonged to a protected class; (2) he met the franchisor's legitimate expectations with regard to the franchise agreement; (3) he suffered an adverse action; and 4) similarly-situated non-protected individuals were treated more favorably.[96] Once the plaintiff meets that burden, the traditional *McDonnell Douglas* burden-shifting process would commence.[97]

C. Discriminatory interference with Third-Party Contracts

This section of the article analyzes the issue of racial discrimination as a blocking mechanism to the creation of contractual relationships. Specifically, this section examines factual scenarios in which a defendant discriminatorily interferes with a plaintiff's ability to obtain contracts with third parties.

1. Union Context

In *Daniels v. Pipefitters' Ass'n Local Union No. 597*,[98] the defendant union, Local Union No. 597, operated a job referral service pursuant to a collective bargaining agreement. Even though the job referral system was a significant source of jobs for union members, the Local deprived Daniels,

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[94] *Id.* at 831.
[95] *Id.* at 833.
[96] *Id.* at 830.
[97] *Id.*
[98] 945 F.2d 906 (7th Cir. 1991).

an African-American member of the Local, of referral opportunities.[99] As a result, he alleged that the union racially discriminated against its African-American members in making referrals, violating of 42 U.S.C. § 1981.

In district court, Daniels produced evidence showing not only that Local 597 had a long history of discriminatory policies but also that the referral system itself violated Section 1981. First, he showed that the agents of Local 597 who were responsible for giving out work to union members maintained a blacklist that included the names of many African-American union members.[100] To hide their actions, those agents gave out work assignments to white union members through back door phone calls and meetings.[101] Second, Daniels introduced expert testimony demonstrating that black members of Local 597 received fewer job referrals than they should relative to their population.[102] Third, a fellow African American union member testified that the agents of the union once told him that a contractor had no need for Local 597 workers, but when he and six fellow members showed up to the construction site, they were immediately hired.[103] Fourth, Daniels testified that he witnessed the agents of the union making discriminatory referrals in plain sight.[104] While he stood around waiting for an assignment, he heard union agents giving out referrals over the telephone and observed favored (white) union members going into the back room to receive referrals.[105] Finally, he showed that Local 597 actively obstructed him from obtaining employment at a construction job by refusing to submit a *pro forma* letter of recommendation.[106] Because Daniels did not have the letter, the employer required him to undergo aptitude testing.[107] Based on the defendants conduct, Daniels argued, *inter alia*, that the defendant interfered with his right to contract with third parties through improperly discriminating against him on the basis of his race. The district court concluded that Local 597's job referral service was the primary mechanism through which contractors hired union employees; accordingly, the court held that "[i]n essence, no referral meant no job and no opportunity for union members to enter into employment contracts with employers."[108]

The union appealed from a jury verdict in Daniels' favor, arguing that it did not interfere with Daniels' right to make contracts because its "referral

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[99] *Id.* at 911-912.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 911.
[103] *Id.* at 912.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 914.

service was nothing more than a mechanism to encourage union members to find employment."[109] Additionally, the union argued that "[o]bstructing someone's right to contract *with others* is . . . unactionable under [Section] 1981."[110] The Seventh Circuit rejected both of these arguments and reasoned that:

> This kind of race-based impediment to contract formation constitutes exactly the sort of racially discriminatory interference with the right to contract that remains actionable under § 1981. To hold otherwise would impose a sort of § 1981 privity of contract requirement that would effectively protect third parties such as labor unions from § 1981 liability . . . . Local 597 is not an unrelated third party whose interference with the contract bears an attenuated or haphazard connection to contracting between its members and the employer. On the contrary, Local 597 is the necessary intermediary and conduit connecting job opportunities to job referrals.[111]

Accordingly, the court held that the union violated Section 1981 when it intentionally deprived Daniels of his ability to enter into contracts with employers.[112]

2. Other Contexts

The following cases do not involve union conduct but could be used, by analogy, to aid minority business owners who feel they have been aggrieved by discriminatory union conduct.

In *Vakharia v. Swedish Covenant Hospital*,[113] the plaintiff, Vakharia, was an anesthesiologist who alleged that the defendant hospital violated 42 U.S.C. § 1981 when it interfered with her ability to contract with patients. The hospital maintained a system where anesthesiologists were the sole mechanism to obtain patients was through assignment by the hospital and referrals by staff surgeons.[114] During a two-year period, the hospital reduced the quantity and quality of Vakharia's caseload, removed her from a "first call" schedule, baselessly classified her as a junior anesthesiologist (which confined her to a limited number of relatively simple types of procedures), and ultimately suspended her.[115] She argued that these actions interfered with her ability to make contracts with prospective patients and

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[109] *Id.*
[110] *Id.*
[111] *Id.* at 914-15.
[112] *Id.* at 915.
[113] 765 F. Supp. 461, 471 (N.D. Ill. 1991).
[114] *Id.* at 468.
[115] *Id.* at 471-72.

were taken because of her color, race, national origin, age, and sex in violation of Title VII of the Civil Rights Act of 1964 and Section 1981 of the 1866 Civil Rights Act.[116] The court acknowledged that Section 1981 prohibits "discriminatory interference by a third party with the exercise of the right to make contracts."[117] The court concluded that the alleged interferences (e.g., limiting the number of patients) "all seem to fall easily within the rubric of proscribed conduct" and allowed Vakharia's § 1981 claim to proceed past a motion to dismiss.[118]

In *Phelps v. Wichita Eagle-Beacon*,[119] the defendant newspaper ran two stories about Phelps, a local white attorney who often represented black clients. The articles discussed Phelps' tendency to bring lawsuits shortly after alleged incidents and settling them for a fraction of the amount sought. Critics of Phelps were quoted in the article as stating that he brought "strike suits" for "nuisance value."[120] Subsequently, Phelps sued the newspaper, alleging that the story (which Phelps viewed as hostile) "interfered with his 'prospective business opportunities'" in violation of Section 1981.[121] The district court dismissed the claim noting that the plaintiff did not allege that he was deprived of an interest protected by Section 1981.[122] The Tenth Circuit affirmed and emphasized that the plaintiff did not allege any specific losses, noting that the cases supporting the plaintiff's theory all involved the actual loss of employment or other contract interests.[123] The Tenth Circuit held that vague and conclusory allegations are insufficient to state a deprivation of the right to make and enforce contracts under Section 1981.[124] It noted that the plaintiff had the same right as others to enter into contracts with those who wish to contract with him.[125] Furthermore, the court articulated that even if the newspaper defamed him and, thus, arguably made him less attractive to some who otherwise might want to contract with him, the defamation does not deny him the basic *right* to contract.[126]

In *Morrison v. American Board of Psychiatry & Neurology, Inc.*,[127] Morrison, an African American female, sued the American Board of Psychiatry and Neurology ("The Board") under Section 1981 alleging that

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[116] *Id.* at 463.
[117] *Id.* at 470.
[118] *Id.* at 471-72.
[119] 886 F.2d 1262 (10th Cir. 1989).
[120] *Id.* at 1266.
[121] *Id.* at 1267.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] 908 F. Supp. 582, 583 (N.D. Ill. 1996).

the Board discriminated against her on racial grounds by denying her certification in psychiatry. In its defense, the Board contended that it constructed, administered, and evaluated the only examinations for board certification in psychiatry in the United States. Accordingly, they controlled a psychiatrist's eligibility for employment and staff privileges at many hospitals and other health organizations.[128]

After failing both parts of the oral examination on her first try, in April 1993, Morrison passed the live patient portion of the exam, but failed the video portion.[129] Both of the examiners for that video portion were white males. Another candidate for certification, a white female, made the same differential and incorrect diagnosis in the video portion as Morrison. She received board certification while Morrison did not.[130]

Morrison claimed that the Board discriminated against her on race-based grounds throughout her entire attempt to become board certified. First, she claimed that because the Board required her to submit a photograph prior to the examination (and thus see that she was an African American female), they were able to assign her to a more difficult examination facility, biased examiners, and more difficult patient profiles.[131] Second, she claimed that the Board failed her while passing a similarly-situated white applicant (the psychiatrist who made the same diagnosis).[132] Finally, she claimed that the Board's use of a subjective evaluation system facilitated racial biases into the examination.[133]

Morrison alleged that certification "is a large, if not the primary factor which patients consider and many hospitals require in choosing or hiring a physician."[134] Accordingly, she claimed her denial of certification discriminatorily interfered with her right to make contracts with prospective clients under Section 1981.[135] Specifically, she alleged that because of the Board's discriminatory conduct: 1) she would not be considered for employment in large hospitals and HMO's that require psychiatrists to be board certified; 2) her current salary is lower than it would have been if she was certified; and 3) her expertise will be called into question from future employers and potential patients.[136] The Board argued that these allegations were insufficient because "Morrison ha[d] not alleged that the Board ha[d] interfered with her efforts to make a specific contract, as contrasted with assertions of 'lost economic opportunities' that are too speculative to be recognized under Section 1981" and because the "Board [did] not have the kind of 'active control' over Morrison's ability to

[128] *Id.* at 582.
[129] *Id.* at 583.
[130] *Id.*
[131] *Id.* at 584.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 583.
[135] *Id.* at 584.
[136] *Id.*

contract that is needed to call Section 1981 into play."[137]

The court rejected these arguments and upheld Morrison's right to proceed: "Morrison has alleged more than abstract or pie-in-the-sky lost economic opportunities. She says expressly that without Board certification she will suffer the identifiable harm of being unable to contract with the many medical facilities that require Board certification."[138] The court distinguished *Phelps* as involving a "speculative assertion" that "contrasts sharply with the Morrison allegations that . . . many medical facilities and private patients make Board certification a prerequisite to employment."[139] Citing *Daniels*, the Board countered that it did not have the same ability as the unions job referral service that was described as a necessary intermediary. Instead, the Board argued that it is an "unrelated third party whose interference with the contract bears an attenuated or haphazard connection to contracting between Morrison and future employers."[140] The court dismissed that argument and emphasized that, for the purposes of rule 12(b)(6), Morrison's allegations were sufficiently specific at the current stage of litigation.[141]

In *Shirkey v. Eastwind Community Development Corp.*,[142] a church affiliated nonprofit organization denied Shirkey, a white minister, the position of community developer. He challenged his non-hiring under Section 1981 against three defendants, the National Division of the General Board of Global Ministries of the United Methodist Church ("National"), the Baltimore-Washington Conference of the United Methodist Church ("Conference"), and the Eastwind Community Development Corporation ("Eastwind").[143] During his time as a minister, Shirkey's community development work helped create Eastwind, a non-profit corporation whose goal was to promote economic development and quality of life in East Baltimore. The community served by that project was predominately African-American.[144] Fifty percent of Eastwind's Board of Directors were members of the Methodist church, while the other fifty percent were residents of the surrounding community.[145] After Eastwind's founding in 1990, it sought funding for a community developer position from National through a program known as the "Community Developer's Program."[146] Eastwind received funding by completing a written application for the

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[137] *Id.* at 587.
[138] *Id.* at 588.
[139] *Id.*
[140] *Id.* at 589.
[141] *Id.*
[142] 941 F. Supp. 567 (D. Md. 1996).
[143] *Id.* at 569.
[144] *Id.* at 570.
[145] *Id.*
[146] *Id.*

project, having it approved by the Conference, and finally submitting it to National's office of community developers. In April of 1991, Shirkey approached a board member of Eastwind and expressed interest in applying for the position of community developer. The board member told Shirkey that he could not apply for the position of community developer because National required the position to be filled by an African-American as a condition for their funding. As a result, Shirkey was not considered for the position, and Eastwind ultimately hired an African-American. In response, Shirkey brought a claim under 42 U.S.C. § 1981, alleging that he was denied the opportunity to apply for the community development position with Eastwind due to racially restrictive criteria developed by National, approved by the Conference, and implemented by Eastwind.[147]

National argued that it is not an appropriate defendant under Section 1981 because Shirkey and National did not share an employer/employee relationship.[148] Citing *Daniels* and *Vakharia*, the court rejected this argument and emphasized that Section 1981 has been applied where there is no direct employer/employee relationship.[149] The court noted that as long as the discriminating entity interfered with the plaintiff's ability to enter into an employment contract on the basis of race, an employer/employee relationship was not required.[150] While Eastwind and National were different corporate entities, the policy at issue in this case was directly attributed to National; therefore, the court concluded that National's liability was not predicated on any employer/employee relationship but, rather, hinged on whether or not National intentionally impeded Shirkey's ability to apply for the community developer position.[151] Based on the evidence, the court held that National could not credibly claim an attenuated relationship between Eastwind's implementation of the community developers program and National's policies.[152]

In *Harris v. Allstate Ins. Co.*,[153] the plaintiff Orlando Harris, an African American man, owned "SPI," a business that repaired smoke, fire, and water damage to property in Oklahoma City. Defendant, Allstate, was an insurer who had a program for referring its insured to approved vendors for repair services.[154] When one of Allstate's insured's needed an emergency repair service, Allstate would allow the insured to choose from a list of vendors who provided that service. According to SPI, the insured rarely had a preference. In that circumstance, Allstate would choose the vendor.[155] SPI was on Allstate's list, but allegedly received a disproportionately low

[147] *Id.* at 569.
[148] *Id.*at 573.
[149] *Id.* at 573-74.
[150] *Id.*
[151] *Id.* at 574.
[152] *Id.*
[153] 300 F.3d 1183 (10th Cir. 2002).
[154] *Id.* at 1185.
[155] *Id.*

number of the referrals.[156] Harris alleged, *inter alia*, that Allstate violated Section 1981 when it failed to administer its referral program free of racial bias and that Allstate's discriminatory refusal to give referrals to SPI precluded SPI from forming contracts with Allstate's insured.[157]

The Tenth Circuit compared the decisions in *Phelps*, *Daniels*, *Vakharia*, *Morrison*, and *Shirkey* to the facts present in this case.[158] The court noted that in *Daniels*, the union's job referral service was described as the "necessary intermediary and conduit connecting job opportunities to job referrals."[159] In this case, however, SPI presented no evidence that placement on AllState's list was a necessary requirement for SPI to enter into contracts with Allstate's customers. As such, the court found that *Daniels*, *Morrison*, and *Vakharia* were distinguishable because, unlike Allstate, the defendants in those cases were actually in a position to interfere with the plaintiff's ability to make third party contracts.[160] The court articulated that relief is available under Section 1981 when a plaintiff demonstrates that the interfering party discriminatorily uses its authority to preclude the business from securing a contract with a third party and that it "both possessed sufficient authority to significantly interfere with the individual's ability to obtain contracts with third parties, and that the party actually exercised that authority to the individuals detriment."[161] The court held that the plaintiff's claim did not meet either of those requirements because the complaint alleged that he did not receive the *benefit* of insurer's referrals (as opposed to the insurer exercising its authority to the plaintiff's *detriment*).[162] Additionally, the court held that the defendant did not possess sufficient authority to significantly interfere with the plaintiff's ability to obtain contracts with third parties because being on the referral list was not a necessary requirement for the plaintiff to enter into contracts with Allstate's insured.[163]

In *Ginx, Inc. v. Soho Alliance*,[164] the plaintiff was an African American business-woman who owned a restaurant called Lolas. For nineteen years, Lolas operated out of one location in Manhattan; however, in 2008, it lost its lease and attempted to move to Soho.[165] Subsequently, the plaintiff picked out a location in Soho, signed a lease, and applied for a liquor license. Shortly thereafter, twenty-two community groups, including the

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[156] *Id.*
[157] *Id.*
[158] *Id.* at 1195-97.
[159] *Id.* at 1196.
[160] *Id.* at 1195-97.
[161] *Id.* at 1197.
[162] *Id.*
[163] *Id.*
[164] 720 F. Supp. 2d 342 (S.D.N.Y. 2010).
[165] *Id.* at 345.

defendants, challenged Lolas' application to serve liquor.[166] After reviewing the evidence presented in opposition to the application, including unanimous opposition by public officials (community board members and a state senator, assemblyperson and councilmember), the testimony of a traffic expert, and photos of traffic jams along Watts Street (the street where Lola's would operate), the board in charge of approving the license denied Lola's application.[167] Plaintiff alleged that defendants discriminatorily interfered with their right to contract with future customers when they challenged Lolas' license application.[168] Under the *Harris* framework, the court held that the defendants did not interfere with the plaintiff's right to contract under Section 1981 because the defendants did not have the power make the decisions that would interfere with the plaintiff's ability to contract (only a court of law could have that power).[169] Additionally, the court emphasized that a party must allege and identify particular and specific business opportunities that were lost due to discriminatory interference by a third-party before a claim for third-party interference can be brought.[170] Accordingly, the court dismissed the plaintiff's Section 1981 claim because the plaintiffs failed to identify any specific contracts that the defendant's alleged interference prevented them from entering.[171]

IV. ANALYSIS

The *Kia* and *Painters Union's* decisions suggest that 42 U.S.C. § 1981 can be applied to a broad spectrum of union behavior. While the plaintiff did not succeed in either case, both decisions indicate that minority owned businesses have relief when labor unions apply contractual provisions of collective bargaining agreements or union policies in a discriminatory manner. In *Painters Union*, the court ruled in favor of the defendant union because (1) the union had a legitimate reason to audit the plaintiff's books (it received employee complaints), and (2) it did not receive employee complaints from similarly situated white owned businesses.[172] Similarly, in *Kia*, the court held that the union's conduct (such as the ordering of audits) toward minority owned businesses were entirely consistent with lawful actions by the union to collect unpaid CBA payments.[173] In both cases, the minority business owner failed because of insufficient evidence. The

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[166] *Id*. at 346.
[167] *Id.*
[168] *Id*. at 351.
[169] *Id*. at 358.
[170] *Id*. at 360.
[171] *Id*. at 362.
[172] Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist Co., 371 Fed. Appx. 654, 660 (6th Cir. 2010).
[173] Carpenters Health and Welfare Fund of Philadelphia v. Kia Enter., 2009 WL 2152276, at *3 (E.D. Pa. 2009).

implication is that *with* sufficient evidence, a minority owned business would have a viable claim under Section 1981 against a labor union. Accordingly, if the union in *Painters Union* had not received employee complaints and still audited the minority owned business, or if the union received employee complaints from white owned businesses and did not proceed with an audit, the plaintiff would have had a much greater chance at success. Similarly, if the minority business owner in *Kia* had alleged that the union was treating white owned businesses differently, the result may have been more favorable to the plaintiff.

Returning to the hypothetical presented in the background section of the Article (a union discriminatorily refusing to supply a letter of good standing to a shipping company because its owner is African American),[174] the owner would succeed on his claim if he brought evidence that: 1) the union did not have a legitimate reason to deny him the letter, and 2) other similarly situated white owned businesses received letters. Alternatively, the minority business owner would likely succeed on his claim if he brought evidence that: 1) the union *did* have a legitimate reason to deny him the letter, or 2) they did not enforce the policy behind the denial against similarly situated white owned businesses. The framework of this analysis in practice would be similar to the test articulated by the Seventh Circuit in *Elkhatib*.[175]

While *Elkhatib* involved a franchise agreement and not a collective bargaining agreement, the case is still instructive for several significant reasons. Indeed, the facts are analogous because the minority-business owner of the Dunkin Donuts franchise would replace the hypothetical shipping company owner in the analysis. Likewise, corporate Dunkin Donuts replaces the union in the analysis because it discriminatorily applied the terms of a standard (franchise) agreement to a minority-owned business when it terminated the company's agreement because the owner refused to carry pork products. In addition to being factually analogous, the case was significant because it was decided at the summary judgment phase, rather than on a motion to dismiss.[176] In *Elkhatib*, unlike in *Kia* and *Painters Union*, the plaintiff produced evidence that Dunkin Donuts allowed similarly situated white-owned franchises to carry less than the full breakfast line. Accordingly, the *Elkhatib* court found that there was sufficient evidence for a jury to find pretext.

Under the *Elkhatib* framework, the hypothetical shipping-company owner would have to produce evidence that: (1) he belonged to a protected class; (2) he met the labor union's legitimate expectations with regard to

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[174] *Supra* Part II(C).

[175] 493 F.3d 827, 830 (7th Cir. 2007).

[176] At the summary judgment phase, a court makes a more substantive decision based on more than just the pleadings.

the collective bargaining agreement; (3) he suffered an adverse action; and (4) similarly-situated non-protected white business owners were treated more favorably.[177] Subsequent to such a showing, the traditional *McDonnell Douglas* burden-shifting process would control.[178]

Unlike the cause of action for discriminatory application of contractual provisions, plaintiffs have succeeded against unions under Section 1981 for discriminatory interference with third party contracts. While *Daniels* involved an individual member of a union and was decided early in the evolution of this cause of action, nothing subsequent has been decided that would prevent it from being used in the minority business owner-union context.

Returning to the hypothetical shipping company owner, the *Harris* framework would be applied in the following way: the hypothetical plaintiff would have relief under Section 1981 if he demonstrated that the union possessed 1) sufficient authority to significantly interfere with the ability of his shipping company to obtain contracts with third parties and 2) that the Union actually exercised that authority to the individuals detriment. Similar to the psychiatrist in *Valkharia* who needed board certification to practice psychiatry, if the owner of the trucking company showed that the letter of good standing was a requirement to be hired by outside contractors, he would meet the first prong of this framework. After meeting that burden, like the plaintiff in *Daniels* and unlike the plaintiff in *Ginx*, the owner of the trucking company would need to allege specific contracts that were lost as a result of the interference by the union.

A review of the case history suggests that a minority owned business is more likely to succeed on a claim that the contractual provisions of a collective bargaining agreement are being applied in a discriminatory manner than on a claim that a labor union's conduct is discriminatorily interfering with the minority owned business' contracts. While the individual plaintiff in *Daniels* succeeded on his claim, to date no case law exists where a minority-owned business has brought a discriminatory interference with contract claim against a union. Indeed, other than the guidance provided by *Daniels* and the cases under different factual circumstances, a minority business owner has sparse legal authority to bring his or her claim under this cause of action. Conversely, a minority business owner has stronger legal footing to bring a discriminatory application of contractual provisions claim based on the decisions in *Kia*, *Painters Union* and *Elkahatib*.

V. CONCLUSION

The purpose and intent of 42 U.S.C. § 1981 was to eradicate racial discrimination. Indeed, the Supreme Court in *Runyon* made it clear that

[177] 493 F.3d at 830.
[178] *Id.*

remedies should be available to private acts of discrimination. Allowing unions to discriminate against minority owned business by applying the terms of collective bargaining agreements in a discriminatory manner or by interfering with a minority owned business' ability to contract with third parties is repugnant to the meaning and intent of Section 1981. Thus, these two causes of action should provide relief to minority business owners who find themselves being discriminated against by labor unions.