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CORPORATE IRRESPONSIBILITY: A RETURN TO THE BACK OF THE BUS

DAVID CULP*

This article analyzes when a business should be held liable for the racially-discriminatory acts of its employees under a 42 U.S.C. Section 1981 action. The article focuses on the Edith Perry case, in which an Afro-American brought a Section 1981 claim against Command Performance hair salon because a white hairdresser refused to “wash and set” her hair. As the white hairdresser engaged in a tirade, refusing to wash and set Edith’s hair, and as Edith began to cry, the manager of the salon did not reprimand the hairdresser, or terminate her, or direct her to wash and set Edith’s hair. After discussing the facts and tracking the procedural history of the case through the lower federal courts to Edith’s request in the Supreme Court for a Writ of Certiorari, the article examines the current state of *respondeat superior* and Section 1981 case law. Next, the article criticizes the Pennsylvania Federal District Court opinion of the Edith Perry case and decides that corporations should be held liable for the racially-discriminatory acts of their employees. The article concludes that judges need to interpret Section 1981 more liberally in order to fashion a remedy towards corporate responsibility and eradicating the badges of slavery.

I. THE CASE OF THE RELUCTANT HAIR DRESSER

A. *“I’m From New Hampshire, and I Don’t Deal with Blacks.”*

On October 12, 1987, a black man, Chris Perry, called the Command Performance hair salon, located in the King of Prussia Mall in a suburb of Philadelphia, Pennsylvania, in order to make a hair appointment for his wife, Edith Perry, who also is black. Mr. Perry called the hair salon and made a 12:00 p.m. appointment with the salon to have Edith’s hair washed and set.¹ After Edith arrived, the salon’s Assistant Manager and the only supervisor on duty that day, Helene Kugler, who is white, told Edith Perry that she was ill and asked Edith if she would mind having another hair stylist, Beth Abbott

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1. Trial Transcript, at 2-10, 2-39, Perry v. Command Performance (E.D. Pa., Mar. 27, 1991) (No. 89-2284) (testimony of E. Perry).

(white), do her hair.² Edith Perry said it would be fine.³

The Assistant Manager, Ms. Kugler, orally requested that the employee, Beth Abbott, do her hair. Ms. Abbott refused to do so, becoming loud and abusive, stating, "No, no, no, no! I don't do black hair! No, no, no, no! Not today!"⁴ When Edith told Ms. Abbott that she only wanted a wash and set like other patrons in the salon Ms. Abbott responded emphatically: "I just don't do black people's hair! Oh, no, I'm not going to do your hair. I'm from New Hampshire and I don't deal with blacks."⁵

The salon's employees could see that Edith was visibly upset. She started to cry. She asked to call the owner of Command Performance. She tried dialing the Security Department to have them page her husband in the shopping center so that he could take her home.⁶ Edith asked the employee, "How can you say that to me? All I wanted was a wash and set."⁷ Ms. Abbott replied, "I don't do black people's hair." Although Edith was crying, another patron, a white woman, told her, "Why don't you go to your own place?"⁸

At the time of the incident, the employee, Ms. Abbott, had over nine years of experience as a hair dresser, and she had provided services to over 22,000 patrons, but had never once provided services to a black person.⁹ She testified at a subsequent trial that she never intended to provide hair dressing services for a black person.¹⁰ In contrast, during the nine years she was a hair dresser, she never once denied a white person services.¹¹ Ms. Abbott was an extremely experienced, technically qualified hair dresser, who by her own admission was certainly capable of doing a wash and set on anyone's hair. In addition, she had performed services on all different types of hair—different textures, different styles, and different thickness, and was capable of performing work on all types of hair.¹²

2. *Id.* at 2-11, 2-40 to 2-41 (testimony of E. Perry); 3-30, 3-31 (testimony of H. Kugler).

3. *Id.* at 2-11.

4. *Id.* at 2-11, 2-118, 3-18, 3-33, Perry v. Command Performance (E.D. Pa., Mar. 27, 1991) (No. 89-2284) (testimony of E. Perry, B. Abbott, and H. Kugler). *See also* Trial Exhibit 13.

5. *See* Memorandum and Order, at 2, Perry v. Command Performance, No. 89-2284 (E.D. Pa., filed Nov. 22, 1989); *see also* Trial Transcript, Perry v. Command Performance (E.D. Pa., Mar. 27, 1991) (No. 89-2284) at 2-11, 2-12, 2-41, 2-42, 2-43, 2-47, 2-48 (testimony of E. Perry); 2-50, 2-51, 2-53, 2-54 (testimony of D. Certo); 2-64 (testimony of M. Glover, owner of Command Performance); 2-84 (testimony of R. Glover, owner of Command Performance); 2-116, 2-117, 2-118 (testimony of B. Abbott).

6. *Id.* at 2-11, 2-12.

7. *Id.*

8. *Id.* at 2-12 (testimony of E. Perry); 2-50 (testimony of D. Certo); 1-13 (testimony of D. Burton).

9. *Id.* at 2-103, 2-104, 2-109, 2-131, 2-132, (testimony of B. Abbott).

10. *Id.* at 2-133 (testimony of B. Abbott).

11. *Id.* at 2-131, 2-132 (testimony of B. Abbott).

12. *Id.* at 2-100, 2-101, 2-107, 2-108, 2-121 (testimony of B. Abbott), *See also* Trial Transcript, at 2-58, 2-59 (testimony of M. Glover); 3-32 (testimony of H. Kugler); 1-32, 1-35, 1-53 (expert testimony of M. Costalas.)

On October 12, 1987, however, Ms. Kugler, the assistant manager, who was in charge of supervising the salon, did not order or command Ms. Abbott to service Edith, nor did she offer to help Ms. Abbott service Edith.¹³ Pennsylvania law requires that a hair stylist perform services on all different types of hair and perform those services regardless of a patron's race or color.¹⁴ In addition, the hair salon solicited black patrons in its advertisements to induce them to frequent their salons, because its research showed that black patrons spent more money than whites at hair salon.¹⁵ The two owners of the salon, Richard and Meredith Glover, nevertheless, took no steps to insure that their hair dressers would do the hair of blacks and comply with the Pennsylvania law. The owners did not tell Ms. Abbott when she was hired that it actively solicited blacks, that a significant portion of its business at the salon was black, and that she would have to do their hair.¹⁶ Instead of taking steps to insure that all the hair dressers understood they would have to do the hair of blacks, the salon hired a black stylist, Pam, whose job was primarily to service the black clientele, and defendant salon steered most of its black clientele to Pam.¹⁷

In addition, Ms. Abbott had supposedly put the owners on notice that she did not wish to service blacks. The salon owners stated that Ms. Abbott had a racially-troubling incident with another black patron previous to her encounter with Edith,¹⁸ but at no time after the first incident did the owners discipline or order Ms. Abbott to serve all patrons regardless of color, in compliance with Pennsylvania law.¹⁹

Immediately after the incident, Edith Perry started to break out in hives. For several months she had insomnia; she would awaken at 2 a.m. and pace the floor.²⁰ This degrading incident at Command Performance brought back to her a time when she was five years old in Little Rock, Arkansas. She was holding her mother's hand at a bus stop waiting with a group of people. When the bus came, the driver stepped out and broadcast: "The bus is going

13. *Id.* at 2-13 (testimony of E. Perry); 2-118 (testimony of B. Abbott); 3-20, 3-21 (testimony of H. Kugler). A judge found that after Ms. Abbott refused to wash and set Edith's hair, Ms. Kugler did personally offer to service Edith. See Memorandum and Order, at 2-3, Perry v. Command Performance, No. 89-2284 (E.D. Pa. filed March 27, 1991). However, whether Ms. Kugler offered to wash and set Edith's hair is irrelevant to Ms. Abbott's refusal to service Edith because of race and color.

14. *Id.* at 2-68 (testimony of M. Glover); 2-92 (testimony of R. Glover); 1-27 to 1-29 (testimony of M. Costalas).

15. *Id.* at 2-155.

16. *Id.* at 2-107, 2-109, 2-129 (testimony of B. Abbott); 2-91, 3-8, 3-9, 3-12, 3-13 (testimony of R. Glover); 3-22, 3-23 (testimony of H. Kugler); 2-72 (testimony of M. Glover).

17. *Id.* at 2-111 (testimony of B. Abbott, who testified that Pam did a "large majority of the Black clientele" and that about "90 per cent of her clientele was Black." *Id.* at 2-69 (testimony of M. Glover, who testified that Edith should have been referred to Pam.)

18. *Id.* at 2-71 to 2-73 (testimony of M. Glover); 2-165, 3-2 (testimony of R. Glover). Ms. Abbott denied that such an incident ever took place.

19. *Id.* at 2-168, 3-3, 3-10, 3-11 (testimony of R. Glover); 3-23 (testimony of H. Kugler).

20. *Id.* at 2-15, 2-16 (testimony of E. Perry).

to be very crowded today; all you niggers step back and let the white people on." Edith just stood there, until her mom tugged at her and said, "Come on, Edith. Let's go": "My mother took my hand and my sister's hand and she proceeded to move—step back and I looked at my mother and I said, 'Mommy, what are niggers?' My mother said, "'Quiet, I'll tell you later.'"²¹ Edith looked around and noticed that the only people moving back were of the same color as she was. It was the first sting of racial discrimination Edith had ever felt, and although Edith is in her fifties, that morning still cuts to her soul and her eyes still fill with tears whenever she discusses that moment when she was five in Little Rock.²²

After the Command Performance incident on October 12, 1987, Edith underwent medical treatment for her physical problems and sought therapy with a psychiatrist.²³ She had trouble working and lost a major client for her travel agency, of which she was the President and owner.²⁴

After the incident, the owners sent a gift certificate to Edith, telling her that the salon had made a mistake and that it should have "made arrangements for you to be served by Pam . . ." the black hair dresser.²⁵ The owners also sent a gift certificate to the white woman who had shouted at Edith, "Why don't you go to your own place?!" They sent the gift certificate to the white patron, they said, because "it was good business."²⁶

B. Edith Fights Back

Edith brought an action in the federal district court for the Eastern District of Pennsylvania against the hair salon, alleging that it had violated her civil rights under 42 U.S.C. Section 1981 by denying her service at the salon. Section 1981 states that "all persons . . . shall have the same rights to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens."²⁷ Edith Perry in her complaint alleged that defendant violated Section 1981 when its employee, Beth Abbott, failed to provide her with hair

21. *Id.* at 2-15.

22. The author of this article was the attorney for Edith Perry, and during the three years this case was in litigation Edith spoke to me many times of the incident in Little Rock, Arkansas when she was a little girl. In each instance, Edith fought back tears as she told her story.

23. Trial Transcript, at 2-16 to 2-18 (testimony of E. Perry); 1-10 to 1-14 (testimony of D. Burton).

24. *Id.* at 2-8, 2-21 (testimony of E. Perry).

25. Trial Exhibit 10, letter dated October 14, 1987.

26. Trial Transcript, at 2-80 (testimony of M. Glover); 3-13 (testimony of R. Glover).

27. 42 U.S.C. Section 1981 (1982). Section 1981 is based on the Civil Rights Acts of 1866 and 1870. *See, e.g.*, discussion of the history of Section 1981 in the Supreme Court's decision of *General Building Contractor's Assoc. v. Pennsylvania*, 458 U.S. 375, 383-88 (1982). Edith Perry's complaint was filed March 30, 1989. *See* Docket Entries, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. 1989).

styling services (a wash and set) because of her race and color.²⁸ She also requested that the court take pendent jurisdiction for a claim she filed for the intentional infliction of emotional distress.²⁹

C. Defendant's Motion Wins the Day but not the Week

Defendant filed a Motion for Summary Judgment, requesting that the trial court dismiss Edith Perry's 42 U.S.C. Section 1981 claim.³⁰ On November 22, 1989, the district court granted defendant's Motion for Summary Judgment, dismissing Edith's Section 1981 action.³¹ District Court Judge James McGirr Kelly found controlling the 1989 Supreme Court decision of *Patterson v. McLean Credit Union*.³² In *Patterson*, a black woman alleged that after being hired by her employer, her employer racially harassed her, failed to promote her, and then discharged her, all because of her race.³³ The Supreme Court held that as to the racial harassment charge her action was properly dismissed by the district court.³⁴ The Supreme Court held that racial harassment relating to the conditions of employment does not fall within the proscriptions of Section 1981, which provides that "all persons . . . shall have the same right . . . to make and enforce contracts as is enjoyed by white citizens," because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with one's right of access to legal process to enforce contract obligations.³⁵ The Supreme Court held that Section 1981 cannot be construed as a general proscription of discrimination in all aspects of contract relations.³⁶ The Court held that the "right . . . to make . . . contracts . . . extends only to the formation of a contract" such that Section 1981's prohibition encompasses the discriminatory refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms.³⁷ That right does not extend, the Supreme Court said, to conduct by

28. Plaintiff's Complaint, at 1-6, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. 1989).

29. *Id.* at 1, 6-7.

30. As noted in the Docket Entries, Defendant's Motion for Summary Judgment was filed July 28, 1989. *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. 1989).

31. See Memorandum and Order, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa., filed Nov. 22, 1989).

32. 491 U.S. 164 (1989).

33. *Id.* at 169.

34. *Id.* at 169-70, 171.

35. *Id.* at 171, 176-78.

36. *Id.* at 176.

37. *Id.* at 176-77.

the employer after the contract relation has been established.³⁸ In the *Perry* case, District Court Judge Kelly held that the racial discrimination was conduct which took place after the contract with Edith was entered into, and since the racial harassment was “post-formation conduct,” Section 1981 did not prohibit such behavior.³⁹

Edith Perry appealed the district court’s dismissal of her Section 1981 action to the Third Circuit Court of Appeals, and on August 30, 1990, a three-member panel of the Third Circuit reversed the district court and remanded the case for trial.⁴⁰

In reversing Judge Kelly and remanding the case for trial, the panel noted the Supreme Court’s ruling in *Patterson* that Section 1981 “prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms.”⁴¹ The panel held that the matter must be remanded to the district court to more fully develop the record on the issue of when the contract was actually entered into, and

In addition, even if the district court concludes that Ms. Perry entered into a contract with Command Performance at the time the appointment was made, the court must give the parties an opportunity to present evidence as to whether that contract was grounded on discriminatory terms, *i.e.*, to provide services only if a hairdresser were available who would be willing to wash and set a black patron’s hair. Because it is possible to conclude from this record that a white woman with an appointment to see Ms. Kugler would have been provided services by Ms. Abbott, or at least would not have been denied services on the basis of her race. . . .⁴²

D. Trial: Letting the Company Off the Hook

The subsequent trial extended over parts of three days—February 12, February 21, and February 22, 1991.⁴³ At the conclusion of the trial the

38. *Id.* That part of the Supreme Court’s opinion on the “right to . . . enforce contracts” was overturned by Congress with the passage of the 1991 Civil Rights Act. The *Patterson* Court had held that the “right to . . . enforce contracts” meant only that private persons could not “impede [a black person’s] access to the courts . . .” to enforce contract rights. 491 U.S. at 177 (material in brackets added) Congress amended Section 1981 to make it clear that the word “enforce” encompasses racial harassment. Section 1981 now provides that “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.” 42 U.S.C. § 1981(b) (1991).

39. See Memorandum and Order, at 3-5, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa., filed Nov. 22, 1989).

40. *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990). The case was decided by a three member panel—District Court Justice Anne Thompson, and Circuit Court Justices Delores Sloviter and Carol Mansmann. The panel was the first all-female panel to hear a case in the Third Circuit.

41. *Id.* at 101 (quoting from *Patterson*, 109 S. Ct. at 2392).

42. *Id.* at 102.

43. See Docket Entries, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. 1989).

parties filed Proposed Findings of Facts and Conclusions of Law.⁴⁴ Subsequently, on March 27, 1991, Judge Kelly entered judgment on the case.⁴⁵ In his Memorandum and Order, Judge Kelly found that “Ms. Abbott was an experienced hairstylist” and that “the procedure to be performed on Plaintiff was a ‘wash and set’ which is a basic procedure that should be able to be performed by any experienced hairstylist regardless of the type of hair of the customer.”⁴⁶ Accordingly, Judge Kelly made a finding that Ms. Abbott’s declination to wait on Plaintiff was because of Plaintiff’s race.⁴⁷ Judge Kelly also found that the “Defendant did not admonish or otherwise punish Ms. Abbott for her failure to wait on Plaintiff.”⁴⁸ (In point of fact, at the trial Ms. Abbott had testified that the owners told her not to worry, that the incident with Edith Perry was no reflection on her.)⁴⁹ Nevertheless, Judge Kelly refused to hold Command Performance responsible for the actions of its employee (Ms. Abbott), stating that there “is no evidence of racial animus on the part of Defendant’s officers or managers,” noting that the owners “actively sought black customers.”⁵⁰ The court also held that the acts of Ms. Abbott, a non-supervisory employee of Defendant, should not extend to Defendant salon under a doctrine of *respondeat superior* since Ms. Abbott “did not have a relationship to Defendant such that the deliberate acts of Ms. Abbott were the deliberate acts of Defendant. Thus, liability for the acts of Ms. Abbott should not extend to Defendant through agency principles under Section 1981.”⁵¹ The result was that even though Judge Kelly found Ms. Abbott’s actions racially motivated, Edith was left without any recovery, as by the time suit was filed, Ms. Abbott had left Command Performance and moved to another state, and the salon said they had no idea where she was.⁵² After the statute of limitations had expired as against Ms. Abbott, and a few months prior to trial, Defendant salon miraculously said it had finally located Ms. Abbott,

44. *Id.*

45. Memorandum and Order, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. filed March 27, 1991).

46. *Id.* at Findings of Fact #8, 9.

47. *Id.* at Findings of Fact #10.

48. *Id.* at Findings of Fact #14.

49. Trial Transcript, at 2-128 (testimony of B. Abbott).

50. Memorandum and Order, at Findings of Fact #15, 16, 17, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. filed March 27, 1991).

51. *Id.* at Conclusion of Law #13.

52. This author had several discussions with Michael Carr, attorney for the defendant, as to Ms. Abbott’s whereabouts, but he stated that the owners of Command Performance did not know where she was; that she had moved out of state. In addition, the author filed interrogatories for defendant to answer, and in its answer defendant listed Ms. Abbott’s former address in Pennsylvania as her “last known address.”

but at that point she could not be sued.⁵³

II. EMPLOYER RESPONSIBILITY AND DISCRIMINATION

Edith Perry's case raises questions as to when an employer is to be held responsible for the racially discriminatory actions of its employees. Is a corporation to be let off the hook, for example, simply because it solicits blacks, even if it treats blacks as second class citizens and puts them in the back of the bus or only lets them order food for take-out while all the white folk get to sit at nice tables with white linen and expensive decor? The extent to which a business should be held liable for the racially-discriminatory acts of its employees is not an issue that can easily be ignored if our country expects blacks or other minorities to be full-fledged members of our society.

A. *A Step Backward*

An article in the Philadelphia Inquirer, dated June 9, 1993, discussed a racial discrimination suit brought by an African-American against his employer, the Philadelphia Electric Company (PECO), which raised the same issue of a corporation's responsibility for racial discrimination by its employees.⁵⁴ In that case the Afro-American lost his suit against the Philadelphia Electric Co. despite evidence that one supervisor taped a photograph of a Ku Klux Klansman on the back of his office door and that a noose was hanging in the workplace.⁵⁵ The federal jury found that the employee had not proved that PECO created a hostile work environment, but in an unusual move, the jurors issued a statement from the jury box after delivering their verdict, stating that the jurors believed "there was evidence of racial discrimination by some employees" of PECO.⁵⁶ Nevertheless, similar to what Judge Kelly had done in the Perry case, the jury did not attribute that discrimination to the employer.⁵⁷

I am reminded of what happened to friends of ours who were vacationing last summer at a lake in Maine; they are a biracial couple with four wonderful young children; the husband, who is black, is an Assistant United States Attorney. The couple had rented a cottage on the lake. Within a

53. On September 27, 1990, defendant's counsel, Michael Carr, wrote a letter to this author, informing me that they had finally located Ms. Abbott, who now lived in Delaware. Edith's complaint had been filed on March 30, 1989, so for one and one-half years defendant did not know the whereabouts of Ms. Abbott. The statute of limitations expired on October 13, 1989, two years after the incident on October 13, 1987. Trial on the case started on February 12, 1991.

54. Susan Caba, *African American Worker Loses Suit Against PE*, PHILADELPHIA INQUIRER, June 9, 1993, at B1.

55. *Id.*

56. *Id.*

57. *Id.*

couple of days of their arrival, the mother was on her dock with two of her kids, and she saw several men pile out of a pick-up truck a few cabins down from where they were staying and saw them go into the cabin. A few moments later they emerged with white sheets and hoods; they got into a boat, and they steered the boat in the direction of my friends. The white sheets buzzed their dock, eyes peering from slitted hoods. They motored past the dock, almost hitting it. The mother was frightened and quickly brought her two children inside the cabin, and they spent the rest of their vacation in fear and looking over their shoulders, as the white sheets had intended. I do not raise the racial incident with my friends for other than what it shows: that, as we know, racial discrimination has not gone away, that the promise of such civil rights acts as the 1866 Section 1981 Act is just that: it's still a promise and not a reality. And the question still remains: To what extent will the courts, or should the courts, hold a business or corporation liable for the racially-motivated acts of its employees that serves to make second class citizens of blacks and other minorities, whether they be yellow-skinned, or handicapped, or Jewish, or gay.

In this regard, was Judge Kelly's decision in Edith Perry's case a proper decision—or should the corporation have been held responsible for what happened on October 12, 1987? For Edith Perry and her attorneys, the answer to the question was simple—Edith Perry filed an appeal of Judge Kelly's decision to the Third Circuit Court of Appeals.⁵⁸ Nevertheless, in September 1991, a three-member panel of the Third Circuit, without an opinion, affirmed the District Court's decision that the Defendant hair salon had not discriminated, despite a finding that its employee had.⁵⁹ Edith Perry and her attorneys filed for a Writ of Certiorari to the United States Supreme Court, asking the Court to grant certiorari to give guidance to lower courts as to when a business should be held liable for the racially-discriminatory actions of its employees and seeking a reversal of the Perry District Court decision that Command Performance was not civilly liable for the incident of October 12, 1987.⁶⁰

The Supreme Court denied Edith Perry's Petition for a Writ of Certiorari.⁶¹ As a result, the Supreme Court has not clarified the issue of when an employer will be held responsible for the actions of its employees. The Supreme Court has never definitively spoken, for example, as to whether the *respondeat superior* doctrine is applicable in a Section 1981 action to hold a business vicariously liable for the racially-discriminatory actions of its employees.

58. Perry v. Command Performance, No. 91-1283 (3d Cir. filed May 24, 1991).

59. *Id.*

60. 60 U.S.L.W. 3443 (Dec. 11, 1991) (No. 91-896).

61. 112 S. Ct. 1166 (1992), *cert. denied*, 60 U.S.L.W. 3567, --- 3578 (U.S. Feb. 24, 1992).

B. *Respondeat Superior and Section 1981 Actions*

Although the Supreme Court has never definitively spoken, at times in the Court's history several justices have seemingly acknowledged their acceptance of the *respondeat superior* doctrine in Section 1981 actions. Thus, in 1989 in *Jett v. Dallas Independent School District*,⁶² Justices Brennan, Marshall, Blackmun, and Stevens in a dissenting opinion stated that in a Section 1981 action a local governmental body could be held liable under the doctrine of *respondeat superior*.⁶³ The five Justices who comprised the majority in *Jett* did not find *respondeat superior* applicable to a governmental body, but did not express an opinion as to whether the doctrine was applicable to a private employer or business.⁶⁴

Earlier Supreme Court cases have flirted with whether and to what extent the doctrine of *respondeat superior* is applicable to certain types of civil rights cases. Thus, in 1986 in *Meritor Savings Bank, FSB v. Vinson*,⁶⁵ Justice Rehnquist, writing for the majority, held that in Title VII cases, where an "employer" is defined to include any "agent" of the employer, the employer may be vicariously liable in some instances but not in others.⁶⁶ Section 1981 has no such limiting language as does Title VII as to an "agent."⁶⁷ As a result, if the *respondeat superior* doctrine is applied in a Section 1981 context, the question is raised as to how broad "vicarious liability" should be.

Another Supreme Court decision prior to *Jett* which flirts with the *respondeat superior* doctrine is the 1982 decision of *General Building Contractors Association, Inc. v. Pennsylvania*, in which Justice Rehnquist, writing for the majority, analyzed a Section 1981 case and partially considered the applicability of the *respondeat superior* doctrine to such an action.⁶⁸ In the *General Bldg.* case, several black individuals representing a class of racial minorities brought, *inter alia*, a Section 1981 action against a union, trade associations and construction industry employers. Plaintiffs alleged the defendants had discriminated against blacks in hiring. Under a negotiated labor contract, the trade associations and employers had delegated their hiring to the union, which ran an exclusive hiring hall.⁶⁹ The District Court found that the union "in administering the system '[had] practiced a

62. 491 U.S. 701 (1989).

63. *Id.* at 740.

64. *Id.* at 705-39.

65. 477 U.S. 57 (1986).

66. *Id.* at 73.

67. Unlike Title VII, Section 1981 does not address the question of who is an "employer" or "agent" at all, but merely provides that "all persons...shall have the same right to make and enforce contracts...as enjoyed by white citizens." 42 U.S.C. § 1981 (1982).

68. 458 U.S. 375 (1982).

69. *Id.* at 378-80.

pattern of intentional discrimination.”⁷⁰ In addition, the district court held that although the employers and trade associations did not intentionally discriminate against minority workers and were not aware of the union’s discriminatory practices, they were nevertheless liable under Section 1981—at least for the purpose of imposing an injunctive remedy.⁷¹ “The [district] court reasoned that liability under Section 1981 requires no proof of purposeful conduct on the part of any defendant.”⁷² The Court of Appeals affirmed.⁷³ But the Supreme Court reversed.⁷⁴ Writing the majority opinion, Justice Rehnquist held that liability may not be imposed under Section 1981 without proof of intentional discrimination.⁷⁵

Since the district court had found that the employers and trade associations had not engaged in intentional discrimination, the Court held they were not liable on that basis. Justice Rehnquist then analyzed whether liability against the employers and trade associations could be vicariously imposed.⁷⁶ Justice Rehnquist reasoned that it could not, since the union was not the agent or servant of the employers or trade associations.⁷⁷ In the Court’s opinion, however, Justice Rehnquist stops short of holding that the *respondeat superior* doctrine is applicable in a Section 1981 action. Justice Rehnquist, for example, writes that “[e]ven if the doctrine of *respondeat superior* were broadly applicable to suits based on Section 1981, therefore, it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship.”⁷⁸ At another point in the opinion, Justice Rehnquist similarly writes that “on the assumption that *respondeat superior* applies to suits based on Section 1981 . . .” it is not applicable on the facts of this case.⁷⁹ Justice Rehnquist never definitely states that the *respondeat superior* doctrine applies to a Section 1981 action, nor if it applies, how broadly the doctrine should be interpreted.

Two justices concurring in the Court’s opinion do note the applicability of the *respondeat superior* doctrine in a Section 1981 action. Concurring in Justice Rehnquist’s opinion, Justice O’Connor, with whom Justice Blackmun joined, noted that after the case has been remanded to the district court, “nothing in the Court’s opinion prevents the respondents from litigating the question of the employers’ liability under § 1981 by attempting to prove the

70. *Id.* at 381 (quoting *Pennsylvania v. Local 542, Int’l Union of Operating Engineers*, 469 F. Supp. 329, 370).

71. *Id.* at 381-82.

72. *Id.* at 382.

73. *Id.*

74. *Id.*

75. *Id.* at 91 (quoting *Pennsylvania v. Local 542, Int’l Union of Operating Engineers*, 469 F. Supp. at 407).

76. *Id.* at 391-95.

77. *Id.* at 392.

78. *Id.* (emphasis added.)

79. *Id.* at 395 (emphasis added).

traditional elements of *respondeat superior*.⁸⁰

Although Justice Rehnquist does not necessarily embrace the *respondeat superior* doctrine in Section 1981 actions and although Justice O'Connor apparently does, both Justice Rehnquist and Justice O'Connor in *General Building* do at least provide guidance on the traditional elements of *respondeat superior*. Thus, in *General Building*, Justice Rehnquist states that the "doctrine of *respondeat superior*, as traditionally conceived and as understood by the District Court . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant."⁸¹

In *General Building*, both Justice Rehnquist and Justice O'Connor stated that the *respondeat superior* doctrine has been applied when the employer or principal has some degree of control over the activities of another.⁸² Justice Rehnquist further defined the doctrine traditionally applied as follows:

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service."⁸³

If a court were to apply traditional *respondeat superior* principles to Edith Perry's case, then Defendant Command Performance should have been held vicariously liable for the actions of its employee, Beth Abbott. In Edith's case there can be no question but that Ms. Abbott was an agent and servant of her employer, defendant hair salon, and that said defendant "controlled or had the right to control the conduct" of Ms. Abbott, and also had the right to control the conduct of its Assistant Manager, Ms. Kugler. Yet not once did the owners of defendant hair salon ever direct that Ms. Abbott had to service all patrons of the salon regardless of their race or color, even though such was a requirement of the Pennsylvania state licensing laws, and even though defendant salon actively solicited black customers, because, as the owner of the salon testified at trial, their research indicated that blacks spent more money at hair salons than whites.⁸⁴

In deciding Edith Perry's case, however, neither the District Court nor the Third Circuit Court of Appeals followed the *respondeat superior* principles enunciated by Justices Rehnquist and O'Connor in *General*

80. *Id.* at 404.

81. *Id.* at 392.

82. *Id.* at 392, 403-04.

83. *Id.* See also *Longo v. Pennsylvania Electric Co.*, 618 F. Supp. 87 (W.D. Pa. 1985), which notes that the hallmark of a master-servant relationship is that the master has the right to control the result of the work and to direct the manner in which the work shall be accomplished.

84. Trial Transcript, at 2-155 (testimony of R. Glover).

Building Contractors Association, as the District and Circuit courts misinterpreted the “agency” relationship in that case and totally ignored the employment relationship.⁸⁵ The Third Circuit affirmed without opinion. Interestingly and inconsistently, the District Court in its first opinion on this case, dated November 22, 1989, found that Beth Abbott was an “agent” of Defendant hair salon.⁸⁶

The District Court’s and the Third Circuit’s failure to address the vicarious liability issue in Edith Perry’s case is inconsistent with how several other federal courts had handled similar situations, and it would have been helpful for the Supreme Court to have taken certiorari to provide uniform criteria to the courts for construing Section 1981 actions. In Edith’s case, the District Court and Third Circuit simply failed to apply a *respondeat superior* doctrine to Edith Perry’s situation.

Despite the District Court’s and Third Circuit’s rulings in Edith’s case, several other jurisdictions and circuit courts have held that the doctrine of *respondeat superior* is applicable to Section 1981 cases to hold an employer vicariously liable for the actions of its employee.⁸⁷

In *Jones v. Local 520, International Union of Operating Engineers*,⁸⁸ for instance, a Southern District of Illinois federal court noted that, “There is nothing in Section 1981 to lead a court to believe that *respondeat superior* is inapplicable to actions brought under the statute, and every court which has engaged in a meaningful analysis of the issue has so held.”⁸⁹ In fact, in *Haugabrook v. Chicago*,⁹⁰ in holding that the *respondeat superior* doctrine is applicable to a Section 1981 action, a Northern District of Illinois federal court analyzed that the unequivocal language of Section 1981, as well as its

85. See District Court’s Conclusion of Law #11, wherein the district court held that “there is no basis for . . . (*respondeat superior*) liability without, at the least, an agency relationship,” citing a different section of Justice Rehnquist’s opinion in the *General Building Contractors Association* case. Memorandum and Order, at Conclusion of Law #11, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. filed March 27, 1991). (Material in parenthesis added). Judge Kelly cited to page 395 of Justice Rehnquist’s opinion, 458 U.S. at 395.

86. Memorandum and Order, at Conclusion of Law #6, 9; *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. filed Nov. 22, 1989).

87. *E.g.*, *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990); *Zaklana v. Mt. Sinai Medical Center*, 842 F.2d 291 (11th Cir. 1988); *Springer v. Seaman*, 821 F.2d 871 (1st Cir. 1987); *Floyd-Mayers v. American Cab Co.*, 732 F. Supp. 243 (D.D.C. 1990); *Malone v. Schenk*, 638 F. Supp. 423 (C.D. Ill. (1982); *Jones v. Local 520, International Union of Operating Engineers*, 524 F. Supp. 487 (S.D. Ill. 1981); *Croswell v. O’Hara*, 443 F. Supp. 895 (E.D. Pa. 1978). The Ninth Circuit has not considered the issue of whether the *respondeat superior* doctrine is applicable in a Section 1981 action. The closest the Ninth Circuit has been to considering the issue is in dicta in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), in which a three-member panel held that *respondeat superior* doctrine is not applicable in 42 U.S.C. Section 1983 actions. The Ninth Circuit based its holding as to Section 1983 on the United States Supreme Court’s opinion in *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978). In dicta, however, the Ninth Circuit panel noted that “the general rule regarding actions under civil rights statutes is that *respondeat superior* applies,” citing specifically to private actions under 42 U.S.C. § 1981. 857 F.2d at 566.

88. 524 F. Supp. 487 (S.D. Ill. 1981).

89. *Id.* at 492.

90. 545 F. Supp. 276 (N.D. Ill. 1982).

legislative history, "manifests Congress' purpose to enact sweeping legislation implementing the thirteenth amendment to abolish all the remaining badges and vestiges of the slavery system."⁹¹

If employers are not held liable for the actions of their employees in carrying out job-related functions, then those badges and incidents of slavery will not be fully abolished, and the vestiges of that caste system will remain, forever a part of this country's fabric. It means that Edith Perry and other blacks can be forced to wait outside a restaurant to be serviced by that restaurant or that she can be forced in a hair salon to be served only by a black hairdresser when other hairdressers are available but who refuse to serve her because she is black. And yet these employees are all performing functions or duties for their employer.

In factual situations similar to Edith Perry's, courts in jurisdictions other than the Third Circuit have held employers liable under the doctrine of *respondeat superior* for the actions of their employees. In *Malone v. Schenkz*,⁹² an Illinois federal district court held that an employer, who owned a tavern, was vicariously liable when his employee refused to sell a black woman a lottery ticket because of her race.⁹³ The district court rejected defendant's argument that if the employee refused to sell the plaintiff lottery tickets because of her race, such a refusal was not within the scope of his authority.⁹⁴ In so holding, the court cited to numerous other cases where a principal was held liable in instances where an agent refused to rent or sell because of race.⁹⁵ Similarly, in Edith Perry's case, Ms. Abbott refused to sell hair dressing services to Edith because of her race, and it would have been proper for the court to have held the hair salon responsible under the *respondeat superior* doctrine.

In another case, *Floyd-Mayers v. American Cab Co.*,⁹⁶ the District of Columbia District Court also discussed the parameters of the *respondeat superior* doctrine. In that case black prospective passengers had brought a Section 1981 action against a taxi cab company alleging that certain drivers refused to pick up blacks and transport them to their destination.⁹⁷ Despite defendant taxicab company's argument that the drivers were outside the scope of their employment, the court refused to grant defendant taxicab company's motion for summary judgment.⁹⁸ In the *respondeat superior* doctrine, the court noted that an employee's act is within his or her employment "if the purpose of the act is, at least in part, to further the employer's business and

91. *Id.* at 280.

92. 638 F. Supp. 423 (C.D. Ill. 1985).

93. *Id.* at 425.

94. *Id.* at 425-26.

95. *Id.* at 425.

96. 732 F. Supp. 243 (D.D.C. 1990).

97. *Id.* at 244.

98. *Id.* at 246.

if the act is not unexpected in view of the employee's duties."⁹⁹ In further discussing the "foreseeability" or "expectation" prong of this test, the court held that, for vicarious liability to attach, the employee's tortious act must be "at least incidental to the conduct authorized by the employer."¹⁰⁰

Based on the legal criteria discussed above, the *Floyd-Mayers* court held there was sufficient evidence for reasonable jurors to find that the drivers committed the alleged acts of discrimination, at least in part, for the purpose of furthering the company's business—that those acts of discrimination were incidental to their job functions as drivers.¹⁰¹ The court noted that the company had offered no evidence that the drivers were acting as anything other than the company's drivers when the discriminatory acts occurred or that the drivers did not intend to further the company's business by hiring out their taxicabs.¹⁰² "Moreover," the court held, "a reasonable factfinder could conclude that the discriminatory acts were a foreseeable aspect of the taxicab drivers' duties."¹⁰³

Similarly, in Edith Perry's case, Ms. Abbott was employed by defendant hair salon when she committed her discriminatory acts. And these acts were "incidental to conduct authorized by the employer," since the employer authorized Ms. Abbott to perform hair styling services, and the discrimination was as to her refusing to provide such services, just as in *Floyd-Mayers*, the taxicab drivers were authorized to drive cabs and the refusal to provide services was therefore incidental to their job functions. In both cases, the discriminatory acts "were a foreseeable aspect of the employees' duties." Just as in *Floyd-Mayers* cab drivers picked who would ride in their cabs on the basis of race, in *Perry*, Ms. Abbott chose who she would serve on the basis of race.

Similar to the District of Columbia District Court's rationale in *Floyd-Mayers* is the First Circuit Court of Appeals opinion in *Springer v. Seaman*.¹⁰⁴ In *Springer*, the First Circuit reversed a district court's dismissal of a Section 1981 claim against the Postal Service.¹⁰⁵ Plaintiff, a black postal clerk, alleged he had been terminated from the Postal Service on the basis of his race when two white employees brought to the attention of the Postal Service false charges against him. After investigation by the Postal Service, the plaintiff was discharged.¹⁰⁶ Although the plaintiff did "not allege racial animus on the part of the Postal Service itself," he asserted that the Postal Service was liable for its employees' actions under the *respondeat superior* doctrine, and that the employees' racial animus was therefore

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 247.

104. 821 F. 2d 871 (1st Cir. 1987).

105. *Id.* at 882.

106. *Id.* at 873-75.

imputed to their employer.¹⁰⁷ The First Circuit concurred, holding that the district court's granting of a motion for summary judgment was improper, since the employees had "made their allegedly false accusations of Springer (the plaintiff) in their capacities as Postal Service employees."¹⁰⁸ In *Perry* Ms. Abbott was also operating in her capacity as a hairdresser employed by defendant company when, on the basis of racial animosity, she refused to perform a wash and set on a black woman, Edith Perry.

In yet another case, *Haugabrook v. Chicago*,¹⁰⁹ a federal district court for the Northern District of Illinois held that a corporate employer may be held liable on the theory of *respondeat superior* under Section 1981.¹¹⁰ In that case, a black plaintiff alleged he was wrongfully arrested, searched, kidnapped and beaten by Chicago police officers.¹¹¹ On the basis of the evidence, the court held that it "[could not] conclude that . . . the City knew or should have known of any alleged violent propensities of" the officers.¹¹² Nevertheless, the court held that the City could be held strictly liable on plaintiff's Section 1981 claim under the doctrine of *respondeat superior*, the court noting that there was "ample authority . . . for the proposition that private corporate defendants may be held liable on a *respondeat superior* basis under section 1981 for the racially discriminatory conduct of their employees."¹¹³

On the facts of her case, it is unjust that Edith Perry was denied a remedy against the salon under Section 1981. It would be helpful if the Supreme Court, at some point in the near future, were to provide the federal courts with guidance on the applicability and parameters of the *respondeat superior* doctrine to Section 1981 cases, as it would likely provide for greater uniformity in decisions.

C. Employer liability outside respondeat superior: Authorizing, condoning, and preventing racial discrimination

In Edith Perry's case, even if Ms. Abbott's racially-discriminatory actions were not imputable to her employer-salon under the *respondeat superior* doctrine in a Section 1981 action, defendant hair salon should

107. *Id.* at 880.

108. *Id.* at 881.

109. 545 F. Supp. 276 (N.D. Ill. 1982).

110. *Id.* at 281.

111. *Id.* at 277.

112. *Id.* at 278. The *Haugabrook* case involved a Section 1981 claim brought against a municipality, the City of Chicago. *Id.* at 276-77. The District Court held that a municipality may be held liable on the theory of "*respondeat superior*." Although the United States Supreme Court later held in 1989 in *Jett v. Dallas Independent School District* that a local governmental body would not be held liable under a doctrine of *respondeat superior* in a Section 1981 case, the *Haugabrook* court's reasoning is still applicable to a private defendant. *See supra* notes 62-64.

113. *Id.* at 281.

nevertheless have been held liable to Edith Perry on her section 1981 claim since the owners of defendant salon and the Assistant Manager on duty were themselves directly involved in that discrimination. They authorized and condoned those actions and participated in the discriminatory process. The supervisor, Ms. Kugler, never ordered Ms. Abbott to wash and set Mrs. Perry's hair, and the salon owners knowingly created a situation that promoted and encouraged racial discrimination.

Universally, courts which have not applied a *respondeat superior* doctrine to a case, finding the doctrine inapplicable on the law or the facts, have nevertheless held that the employer may still be held liable. For example, in *Hunter v. Allis-Chalmers Corp., Engine Div.*,¹¹⁴ the Seventh Circuit held that in a Title VII and Section 1981 action, an employer could be held liable under the *respondeat superior* doctrine for those intentional wrongs of his employees that are in furtherance of the employer's business.¹¹⁵ Also, the employer is directly liable, independently of *respondeat superior*, for an employee's intentional acts, even if not in furtherance of the employer's business, that the employer could have prevented by reasonable care in hiring, supervising, or if necessary firing the tortfeasor.¹¹⁶ Thus, the court held that an employer who has reason to know of discrimination is blameworthy if he condones the activity and does nothing.¹¹⁷ In this regard, the court held that failure to take reasonable steps to prevent discrimination can make the employer liable if management-level employees knew, or in the exercise of reasonable care should have known, of the discrimination.¹¹⁸ Under the second basis of liability, the "employer's liability thus is not strict, as it would be under *respondeat superior*; his only duty is to act reasonably in the circumstances."¹¹⁹

Other courts have applied an analysis as to employer liability that is similar to the Seventh Circuit's analysis in *Hunter*. Thus, in a Title VII action, *Huddleston v. Roger Dean Chevrolet, Inc.*,¹²⁰ in which a female employee claimed she was constructively discharged as a result of a hostile work environment caused by sexual harassment, the Eleventh Circuit held that the employer would be liable if "the employer knew or should have known of the harassment and failed to take prompt action to remedy the violation."¹²¹

Both the *Hunter* and *Huddleston* courts, therefore, apply a similar rationale, finding that the employer is liable if management-level or supervisory employees are aware of the discrimination, or should be aware

114. 797 F.2d 1417 (7th Cir. 1986).

115. *Id.* at 1421.

116. *Id.* at 1422.

117. *Id.*

118. *Id.* at 1421.

119. *Id.* at 1422.

120. 845 F.2d 900 (11th Cir. 1988).

121. *Id.* at 902, 904.

of said discrimination, and condone such actions by doing nothing about it or by failing to take prompt remedial action. Similarly, in *Cain v. Chicago*,¹²² a Section 1981 case where a black man was shot by Chicago police officers, an Illinois District Court held that the city was subject to Section 1981 liability on a *respondeat superior* basis and further held that the police superintendent could also be held liable if he “had direct knowledge or had approved of the defendant police officers’ conduct.”¹²³

What the above-cited cases show is that supervisors and management cannot sit idly by, with blinders on, while other employees violate a person’s civil rights. Management and supervisory employees must act reasonably under the circumstances, and they cannot condone or foster racial discrimination. To do so is an “affirmative link” that makes the employer liable for civil rights violations of its employees.

Even if one does not apply the *respondeat superior* doctrine to Edith Perry’s case, the Assistant Manager and supervisor at defendant salon, Ms. Kugler, and the owners of defendant salon, the Glovers, condoned and fostered racial discrimination, and, therefore, they are the affirmative link that should have made defendant salon liable for the actions of Ms. Abbott under Section 1981.

For example, the Assistant Manager and only supervisor at defendant hair salon, Ms. Kugler, asked Ms. Abbott to do a wash and set on Edith Perry’s hair, since Ms. Kugler wasn’t feeling well.¹²⁴ Ms. Abbott’s response was loud and swift: “No, no, no, no! I don’t do black hair. No, no, no, no! Not today!”¹²⁵ Ms. Abbott further responded: “I just don’t do black people’s hair! Oh, no, I’m not going to do your hair! I’m from New Hampshire and I don’t deal with blacks!”¹²⁶

The Assistant Manager’s response to her employee, Ms. Abbott, was to condone and authorize Ms. Abbott’s racial discrimination against Edith Perry. For example, the Assistant Manager admitted at trial that a wash and set is a routine hair procedure and further admitted she knew that Ms. Abbott was an experienced hair dresser, and as a result assumed Ms. Abbott had done all types of hair.¹²⁷ The Assistant Manager also acknowledged that she certainly believed that Ms. Abbott was capable of performing a wash and

122. 619 F. Supp. 1228 (N.D. Ill. 1985).

123. *Id.* at 1229, 1233. See also *Lee v. Wyandotte County*, 586 F. Supp. 236 (D.C. Kan. 1984), which held that former county jail inmates could recover for Section 1981 violations against the county if they could demonstrate the existence of a requisite “affirmative link” between the county and at least one of the county employees alleged to have violated the inmates’ rights; and *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1430 (D.C. Cir. 1988), which held that an international union may be held liable if it knowingly authorizes or approves of the local union’s acts.

124. Trial Transcript, at 2-10, 2-11 (testimony of E. Perry); 2-114 (testimony of B. Abbott).

125. *Id.* at 2-11 (testimony of E. Perry); 3-18, 3-33 (testimony of H. Kugler); 2-64 (testimony of M. Glover); 2-84 (testimony of R. Glover).

126. *Id.* at 2-116 to 2-118 (testimony of B. Abbott); 2-11, 2-12, 2-41, 2-42, 2-47 (testimony of E. Perry); 2-50, 2-51, 2-53, 2-54 (testimony of D. Certo).

127. *Id.* at 3-28, 3-29 to 3-30.

set on Edith's hair, and she further acknowledged she knew that Pennsylvania law required a hairdresser to service all patrons regardless of whether they are white or black.¹²⁸

Nevertheless, despite knowing all of these facts, the Assistant Manager, after Ms. Abbott's racial tirade, did not order Ms. Abbott to do the wash and set on Edith Perry's hair.¹²⁹ In failing to so order and direct Ms. Abbott, the Assistant Manager condoned and authorized Ms. Abbott's racial discrimination against Edith Perry. The fact is, the Assistant Manager should have offered Ms. Abbott a choice: either do a wash and set for Edith Perry or be terminated from her employment.

Michael Costales, a hairdresser with over 32 years of experience in the field and the owner of a hair salon, testified at trial that Ms. Abbott should have been immediately dismissed from her employment and that he would probably have called the State Board of Cosmetology in Harrisburg and reported her.¹³⁰ Instead, the Assistant Manager on duty, Helene Kugler, sat idly by and did nothing. If Ms. Kugler had ordered her employee to do Edith Perry's hair and then terminated her if she refused, Edith would never have sued.¹³¹ Instead, Ms. Kugler ratified Ms. Abbott's racial discrimination and failed to act "reasonably in the circumstances."¹³² As outlined in *Huddleston v. Roger Dean Chevrolet, Inc.*,¹³³ the Assistant Manager knew of the discrimination "and failed to take prompt action to remedy the violation."¹³⁴ Thus, defendant hair salon should have been held liable under Section 1981 for the racially-discriminatory actions of its agents, Ms. Abbott and the Assistant Manager, and for the Assistant Manager's condoning and authorizing Ms. Abbott's discrimination against Edith Perry.

In addition, defendant hair salon is liable to Edith under Section 1981 for Ms. Abbott's refusal on the basis of race to service Edith Perry, since the salon owners and assistant manager knowingly created a situation that promoted and encouraged racial discrimination. Although defendant hair salon actively solicits the business of blacks through advertising to induce them to frequent their salons, the owners took no steps to insure that their

128. *Id.* at 3-28, 3-30, 3-22.

129. *Id.* at 2-13 (testimony of E. Perry); 2-118 (testimony of B. Abbott); 3-20, 3-21 (testimony of H. Kugler).

130. *Id.* at 1-21, 1-32, 1-33.

131. Many times as the litigation progressed, Edith told this author she would never have sued if Helene had ordered Beth to do her hair or Beth had been terminated. There was some discrepancy at the trial as to whether Helene Kugler offered to do Edith's hair *after* Beth refused. But that inquiry misses the point. The point is that Edith was treated as a second-class citizen that day in October 1987 when Ms. Abbott refused to serve her because she was black. Once again, as when she was five, she was forced to go to the back of the bus. Beth Abbott racially humiliated Edith Perry that day, and the Assistant Manager and owners of the salon sat idly by and did nothing—absolutely nothing.

132. See *Hunter v. Allis-Chalmers Corp.*, Engine Dir, 797 F.2d at 1422, discussed *supra* notes 112-117.

133. 845 F.2d 900 (11th Cir. 1988).

134. *Id.* at 904.

hairdressers would do the hair of blacks and comply with the Pennsylvania law.

The owners solicit black patrons not out of any kindness to blacks but because their research showed that black patrons spent more money than whites at hair salons. An owner of defendant salon, Mr. Glover, testified at trial that they solicit black customers "because it's good business. Black clientele, and there are statistics, spend disproportionate to their population percentage, if you will, of the overall population. They tend to have higher average tickets . . . and they tend to return on a more frequent basis. It's good business."¹³⁵

Despite advertisements attempting to lure blacks to defendant salon, the owners and Assistant Manager did not supervise its personnel to make sure blacks were not treated like second-class citizens once they arrived at the salon. The owners and assistant manager did not tell Ms. Abbott when she was hired that defendant salon actively solicited blacks, that a significant portion of its business was black, and that she would have to comply with the Pennsylvania law requiring her to do their hair.

Instead of taking steps to insure that all the hair dressers understood they would have to do the hair of blacks, defendant salon hired a black stylist, Pam, whose job was primarily to service the black clientele, and defendant salon steered most of its black clientele to Pam.¹³⁶ For example, after Ms. Abbott refused to perform a wash and set for Edith Perry, an owner, Mrs. Glover, wrote a letter to Ms Kugler, the Assistant Manager, telling the Assistant Manager that she should have offered Edith "an appointment with Pam on Tuesday. . . ."¹³⁷

Thus, the pervasive atmosphere and policy at defendant hair salon was that not all hairdressers had to service black customers, since hopefully the salon could find one hairdresser who would be willing to serve a black even though others would not. Simply stated, the owners and the assistant manager knowingly condoned and created a situation that promoted and encouraged racial discrimination and allowed the seeds of discrimination to prosper.

That the owner condoned and created a situation that promoted racial discrimination can also be seen in their response to Ms. Abbott's refusal to serve Edith Perry because Edith is black. As the district court found, "defendant hair salon did not admonish or otherwise punish Ms. Abbott for

135. Trial Transcript, at 2-155 (testimony of R. Glover).

136. *Id.* at 2-111 (testimony of B. Abbott); 2-69 (testimony of M. Glover).

137. Trial Exhibit 14. *See also* M. Glover letter to E. Perry where Ms. Glover steers Edith to Pam, telling Edith that "Helene should have called you to advise she was ill and not going to be able to take customers, and knowing that Beth was not yet experienced with textured hair, made arrangements for you to be served by Pam." Trial Exhibit 10. The 'textured hair' argument proffered by Command Performance was also a sham, as Judge Kelly found when he held that a wash and set is a simple procedure and that Ms. Abbott was an experienced hair dresser and certainly capable of performing such a procedure on Edith. *See* Memorandum and Order, at Findings of Fact #8,9 (E.D. Pa. filed March 27, 1991.)

her failure to wait on Plaintiff.”¹³⁸ Ms. Abbott, in fact, testified that after her refusal to give Edith her wash and set, the owners told her, “Don’t worry. Don’t worry about anything,” that the refusal to serve Edith “would not reflect on you in any way.”¹³⁹

Not only did Ms. Abbott discriminate against Edith Perry, but the actions of the Assistant Manager and the owners implicated defendant salon directly in the discrimination. They condoned, tolerated, authorized, and were a part of that discrimination, so that even if the doctrine of *respondeat superior* were considered not applicable to Ms. Abbott’s actions, the actions of the Assistant Manager and the owners were an “affirmative link in the violation of Edith Perry’s civil rights.”

That the defendant salon should have been held liable on the facts of the instant case is clearly implied by the rationale of the above-cited cases, such as *Hunter, Huddleston, Cain, Lee and Berger*. See also *Levendos v. Stern Entertainment*,¹⁴⁰ in which in a Title VII action the Third Circuit adopted a rationale similar to the *Hunter-Huddleston, Cain* line of cases. In *Levendos*, the court quoted with approval from the Supreme Court’s decision in *Vinson*,¹⁴¹ in which the Supreme Court held that “the mere existence of a grievance procedure and a policy against discrimination. . . .” does not insulate the employer from liability.¹⁴²

Thus, in Edith Perry’s case, that defendant advertised for and solicited black customers should not have insulated the company from liability. A

138. Memorandum and Order, at Finding of Fact #14, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. filed March 27, 1991).

139. Trial Transcript, at 2-128.

140. 909 F.2d 747 (3d Cir. 1990).

141. 477 U.S. 57 (1986).

142. *Levendos* at 909 F.2d at 751 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 60-61). In *Levendos*, plaintiff, a female, brought a Title VII action, claiming she had been constructively discharged from her employment with defendant company, claiming she was continually harassed because of her sex. *Id.* at 749. The Third Circuit in *Levendos* discussed when the employer will be held liable under Title VII for the acts of its employees, holding that the act of a supervisory employee or agent is imputed to the employer. *Id.* at 751. In determining whether someone is an agent, subjecting the employer to liability, the Third Circuit followed a test several other courts had adopted; a person is an agent under Section 2000e(b) of Title VII “if he participated in the decision-making process that forms the basis of the discrimination.” *Id.* at 752. Although *Levendos* is a Title VII case and not a Section 1981 action, nevertheless, even if the *Levendos* court’s rationale were applied to a Section 1981 action, defendant hair salon in Edith’s case should have been held liable for the actions and inactions of its Assistant Manager and owners; those actions and inactions should have been imputed to defendant hair salon. In this regard, the *Levendos* court held that one question is whether a supervisory employee had notice of the discrimination, and whether he or she had “participated in” or “contributed to” or “created” the discrimination, or whether the agent or supervisor participated in the decision-making process. *Id.* at 751, 752. In Edith Perry’s case, the assistant manager and supervisor, Ms. Kugler, had immediate “notice of the discrimination,” that Ms. Abbott was refusing to do a wash and set for Edith, a most basic, routine procedure. Thereafter, the Assistant Manager “participated in the decision-making process” and “contributed to” the discrimination by failing to order Ms. Abbott to wash and set Edith Perry’s hair. The Assistant Manager failed to take “prompt action to remedy the violation,” and thus her actions and inactions should have been imputed to defendant hair salon. See *Huddleston v. Roger Dean Chevrolet, Inc.*, discussed *supra* notes 188-19.

company cannot solicit black customers and then treat them as second-class citizens, effectively seating them in the back of the bus.

Moreover, defendant owners and their assistant manager testified they had notice that Ms. Abbott did not wish to serve black customers, and yet they did nothing to insure that Ms. Abbott would comply with Pennsylvania law and serve all patrons, regardless of race or color. The Assistant Manager, Ms. Kugler, for example, testified that previous to Ms. Abbott's refusal to do a wash and set for Edith that she and Ms. Abbott had discussions about Ms. Abbott's reluctance to do the hair of black clients.¹⁴³ And yet the Assistant Manager never informed Ms. Abbott that Pennsylvania law required her to do all hair, regardless of whether the woman was white or black, and that she would have to comply with the law or be terminated.¹⁴⁴

The owners also had notice: Ms. Abbott, herself, testified that she believed she told the owners at defendant salon that she was reluctant to do the hair of black patrons.¹⁴⁵ In addition, the owners of defendant company testified they had knowledge that Ms. Abbott had a racially troubling incident with another black patron previous to her discrimination against Edith.¹⁴⁶ But at no time after the first incident did the owners or a supervisor discipline or order Ms. Abbott to service all patrons regardless of color, in compliance with Pennsylvania law. Mr. Glover, the owner, for example, said he never ordered her to do the hair of all patrons, and in fact did not even talk to Ms. Abbott after the first incident.¹⁴⁷

Although at trial defendant owners argued that Ms. Abbott's refusal to serve Edith was not because of race but because she needed training in doing such procedures as a simple wash and set, the district court rejected the argument, finding that Ms. Abbott had discriminated against Edith Perry because of her race.¹⁴⁸ The ludicrousness of the need-for-training argument can be seen in the owners' handling of that issue. Between the first racially-troubling incident and the incident with Edith Perry, they did not provide any training to Ms. Abbott. Even after the incident with Edith Perry the owners did not follow up to see if she received any training. Mrs. Glover stated that they may not have given Ms. Abbott any training after her refusal to provide Edith Perry with a wash and set "because we were very short-handed and

143. Trial Transcript, at 3-22 to 3-23.

144. *Id.* at 3-23.

145. *Id.* at 2-122 to 2-123.

146. *Id.* at 2-71, 2-72, 2-73 (testimony of M. Glover); 2-165, 2-167, 2-169, (testimony of R. Glover). Ms. Abbott denied that such an incident ever took place. *See* Trial Transcript, at 2-131.

147. *Id.* at 2-168, 3-3, 3-4, 3-8 to 3-11 (testimony of R. Glover). *See also* Trial Transcript, at 3-22 to 3-23 (testimony of H. Kugler); 2-122 (testimony of B. Abbott).

148. Memorandum and Order, at Finding of Fact #10, *Perry v. Command Performance*, No. 89-2284 (E.D. Pa. filed March 27, 1991).

our first objective, of course, is to be able to service clients.”¹⁴⁹ “Clients,” apparently to Mrs. Glover, do not include blacks. As the district court found, in holding that Ms. Abbott had racially discriminated against Edith Perry, the need-for-training argument was a sham.

What was shown, through the testimony, was not only that Ms. Abbott discriminated against Edith Perry, but that the owners and assistant manager at defendant salon had their imprint on that October 12, 1987 incident as well; they authorized, and condoned, and could have prevented, and could have remedied. They were just as responsible as if they personally had refused to give Edith Perry a wash and set on October 12, 1987 because of her race, and as managers and owners their actions and inactions should have been imputed to defendant hair salon, making defendant salon liable under Section 1981 for the racial discrimination against Edith Perry.

III. FASHIONING A REMEDY: TOWARDS CORPORATE RESPONSIBILITY AND ERADICATING THE BADGES OF SLAVERY

The lower courts in Edith Perry’s case stripped Section 1981 of its effectiveness in remedying racial discrimination. That Command Performance should have been held liable for the actions and inactions of its agents and employees—Ms. Abbott, Ms. Kugler, Mr. and Mrs. Glover—seems so clear to this writer as to be beyond argument. And yet Command Performance was allowed to slither through the net of the District Court, the Third Circuit, and the Supreme Court.

Nor can the Edith Perry case be dismissed as a maverick case where justice went awry. The case discussed in the Philadelphia Inquirer of the Black man whom employees of the Philadelphia Electric Company racially harassed is another example of a company being let off the hook for the actions of its employees.¹⁵⁰ And the first jury’s acquittal of the police officers in the Rodney King case is a sign of something that has gone wrong. These cases and others are a reflection of a society and a court system that has begun to turn its back on the protection of this country’s civil rights laws for minorities. If Blacks are to be full-fledged members of our society and truly to be treated as equals, then some form of the *respondeat superior* doctrine is necessary in a Section 1981 action, and the Supreme Court must clarify what shape that doctrine will take in such cases.

The very language of Section 1981 supports use of a *respondeat superior* rule. After all, Section 1981 states that “all persons . . . shall have the same right to make and enforce contracts . . . as enjoyed by white citizens,” and since there is no limiting language in Section 1981, Section 1981 can be read in such a way that an employer would be held strictly liable for the discriminatory actions of its employees if said employees are acting generally

149. Trial Transcript, at 2-67.

150. Caba, *supra* note 54.

within the scope of their work relationship.

If a business is not held liable for the racially-discriminatory actions of its employees who are in the performance of their job duties, blacks will remain second-class citizens and the vestiges of slavery will remain a part of this country's history. In a dissenting opinion in the *General Building Contractors Association* case, Justice Marshall, with whom Justice Brennan joins, discusses the legislative history of Section 1981.¹⁵¹ Thus, he writes that the Thirty-ninth Congress in fashioning Section 1981 had a "broad remedial" purpose of "eradicating racial discrimination and its pernicious effects" and intended to "eradicate the 'badges of slavery' that remained after the Civil War and the enactment of the Thirteenth Amendment."¹⁵² Justice Marshall summarizes the pernicious effects of racial discrimination:

Racial discrimination can be the most virulent of strains that infect a society Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims. This disease must be recognized and vigorously eliminated wherever it occurs.¹⁵³

Racial discrimination has taken a tremendous psychological toll on Edith Perry over the course of her life, and she should not have to suffer the humiliation and degradation of sitting in the back of the bus in Little Rock, Arkansas, or being denied services at Command Performance because of her race. And a business should not be allowed so easily to waltz away from its responsibilities by simply arguing, as the owners did in Edith Perry's case, "We don't know nothin' about no racial discrimination." Similar to what several other federal courts have done, in Section 1981 actions the employer should be held vicariously liable for the actions of its employees who are generally within the scope of their work relationship performing job-related duties or duties incidental to their job functions. In this regard, Beth Abbott was within the scope of her employment relationship when she denied Edith Perry hair styling services; she chose to whom she would provide those services based on race.

There is only one qualification that should, perhaps, be made to vicarious liability under Section 1981 actions. Employers who take prompt action to remedy the discrimination by terminating the employee who discriminated should not be held vicariously liable. If the employer acts responsibly and terminates the employee who discriminated, much of the psychological sting of that discrimination will be dissipated. If Command Performance had simply acknowledged the discrimination and terminated Beth Abbott, Edith would have felt vindicated. It would have said to her that

151. 458 U.S. 375, at 408 (Marshall, J., dissenting) (quoting *Crocker v. Boeing Co.*, 662 F.2d at 1002 (Aldisert J., with whom Higginkotian, J., joined dissenting in part)).

152. *Id.*

153. *Id.* at 413.

the employer, Command Performance, would not tolerate her being treated as a second-class citizen. Edith would have been at peace, and she would not have spent time and money to attempt to find vindication through the legal system.

This qualification to the *respondeat superior* doctrine allows an employer, who really wishes to stop racial discrimination, to end it. The employer becomes a “witness” in the Amish sense for racial equality in this country. This suggested qualification to the *respondeat superior* doctrine is similar to a principle found in the law of libel and slander. At common law a retraction of the defamatory statement was a defense to a libel and slander action and exonerates the defamer if “it is made immediately after the defamation, and is so clearly connected with it that in effect it negatives the utterance itself.”¹⁵⁴ Similarly, in a Section 1981 action if the employer immediately terminates the employee for his/her discriminatory actions, this could serve as a means of exonerating the employer from being held vicariously liable, unless the employer in some other way promoted the discriminatory actions of his employee or was otherwise directly involved in those actions, as was the case with Command Performance’s agents—the Assistant Manager and owners.

In Edith Perry’s case, Command Performance should have been held vicariously liable for the racially-motivated actions of its employee, Beth Abbott, whether on the basis of a traditional *respondeat superior* analysis or on a qualified *respondeat superior* rule as suggested here. In addition, regardless of whether a *respondeat superior* rule were applied, Command Performance should have been held liable for the actions and inactions of its agents—the Assistant Manager and owners—who directly condoned, promoted, tolerated, and participated in the discrimination against Edith Perry.

The court system failed Edith Perry. This writer can only hope that at some point in the near future the Supreme Court will fashion a Section 1981 liability rule that will send a clear message to the lower courts that we can no longer condone or tolerate racial discrimination, or sit idly by while the seeds of discrimination prosper.

154. PROSSER & KEATON, THE LAW OF TORTS 845-46 (5th ed. 1984).

