# 9.36 Discrimination in Making and Enforcing Contracts (42 U.S.C. § 1981)

The plaintiff claims that the defendant prevented [him] [her] from [making] [performing] [modifying] [terminating] [enjoying a benefit, privilege, term, or condition of] a contract because of the plaintiff’s race. To prevail on this claim, the plaintiff has the burden of proving the following elements by a preponderance of the evidence:

[1. The plaintiff was a party to a contract. [I instruct you that the plaintiff has established this element.] or [1. The plaintiff attempted but was unable to [make a contract] [perform a contract] [modify a contract] [terminate a contract] or [enjoy all benefits, privileges, terms and conditions of the contractual relationship]].

2. The plaintiff’s inability to [make a contract] [perform a contract] [modify a contract] [terminate a contract] or [enjoy all benefits, privileges, terms and conditions of the contractual relationship] was “because of” defendant’s purposeful discrimination against the plaintiff on the basis of the plaintiff’s race.

If the plaintiff has proven each of these elements by a preponderance of the evidence, the plaintiff is entitled to your verdict.

# Comment

The definition of “because of” in this instruction is the same as that in Instruction 10.3 (Civil Rights—Title VII—Disparate Treatment—“Because of” Defined).

Section 1981(a) states in relevant part as follows: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”42 U.S.C. § 1981(a).“[T]he 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.”*Id.* § 1981(b).

Section 1981 does not provide a cause of action against state actors.*See Yoshikawa v. Seguirant*, 74 F.4th 1042, 1047 (9th Cir. 2023) (en banc); *see also* 42 U.S.C. § 1981(c) (“The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”).“A plaintiff seeking to enforce rights secured by § 1981 against a state actor must bring a cause of action under § 1983.” *Yoshikawa*, 74 F.4th at 1047.

Section 1981 “can be violated only by purposeful discrimination.”*Gen. Bldg. Contractor’s Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). The statute “reaches only intentional discrimination” on the basis of race, *id.* at 396, and does not impose liability for “practices that merely result in a disproportionate impact on a particular class,” *id.* at 386.

A plaintiff bringing a race discrimination claim under § 1981 must first “identify an impaired ‘contractual relationship,’ § 1981(b), under which the plaintiff has rights.” *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). The “contractual relationship” can be one that the plaintiff seeks to create, or one that already exists, “so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.” *Id.*; *see also id.* at 479-80 (“[A] plaintiff cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes ‘to make and enforce.’”). Further, the plaintiff may bring an action against a person who interferes with the plaintiff’s right “to make and enforce contracts,” for purposes of 42 U.S.C. § 1981. *See Woods v. Graphic Commc’ns*, 925 F.2d 1195, 1202-03 (9th Cir. 1991).

Once the plaintiff has identified an “existing or proposed contractual relationship,” *Domino’s Pizza*, 546 U.S. at 476, the plaintiff must establish that he or she was unable to make, perform, modify, terminate or otherwise enjoy all benefits, privileges, terms, and conditions of the contractual relationship, 42 U.S.C. § 1981(a), (b). Section 1981’s “prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations.” *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 302 (1994).

Finally, the plaintiff must establish that “purposeful discrimination” was the reason why he or she was unable to make or enforce the contract. *Gen. Bldg. Contractor’s Ass’n*, 458 U.S. at 391. To establish this element, the plaintiff must “ultimately prove that, but for race, [he or she] would not have suffered the loss of a legally protected right.” *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020). Thus, “[i]f the defendant would have responded the same way to the plaintiff even if he had been” a member of a favored race, then “the plaintiff received the ‘same’ legally protected right as” that member of a favored race and the plaintiff cannot prevail. *Id.* “Conversely, if the defendant would have responded differently but for the plaintiff’s race, it follows that the plaintiff has not received the same right as a white person.” *Id. See* Instruction 10.3 (Civil Rights—Title VII—Disparate Treatment—“Because of” Defined).

In evaluating whether a plaintiff had presented sufficient evidence to survive summary judgment on his claim for race discrimination under § 1981, the Ninth Circuit applies a burden-shifting analysis based on the *McDonnell-Douglas* framework that applies in employment discrimination cases under Title VII. *Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1144-45 (9th Cir. 2005). The *McDonnell-Douglas* framework, however, “is an evidentiary standard, not a pleading requirement” that sets forth the elements of the plaintiff’s claim. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002). The framework is “a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination.” *Comcast Corp.*, 140 S. Ct. at 1019. Thus, the Ninth Circuit has explained that *McDonnell-Douglas* provides a “summary judgment evidentiary approach to employment discrimination claims under 42 U.S.C. § 1981.” *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004). For this reason, in cases of employment discrimination brought under Title VII, “it is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case.” *Sanghvi v. City of Claremont*, 328 F.3d 532, 540 (9th Cir. 2003). The foregoing authority indicates that, in cases alleging race discrimination under § 1981, it would be error to charge the jury with the elements of the *McDonnell Douglas* prima facie case. *See id.*; *Maduka*, 375 F.3d at 912; *Swierkiewicz*, 534 U.S. at 510-11; *Comcast Corp.*, 140 S. Ct. at 1019. However, the Ninth Circuit has not directly addressed that question.