International Franchise Association
53rd Annual Legal Symposium
May 4-6, 2021
Virtual

# Systemwide Diversity and Inclusion:

# Surveying the Current Landscape and Considering How to Move Forward

**Aaron-Michael Sapp**
Partner, Cheng Cohen LLC
Chicago, Illinois

**Max Deleon**
Associate, Cheng Cohen LLC
Chicago, Illinois

**Gar Lauerman**
Associate, Cheng Cohen LLC
Chicago, Illinois

## TABLE OF CONTENTS

I. Introduction ........ 1

II. Surveying the Current Political and Social Landscape with Respect to Diversity and Inclusion Issues in the United States. ........ 1

III. Discrimination Claims in Franchising ........ 5

- A. *Crawford et al. v. McDonald's*. ........ 5
- B. Section 1981 Discrimination Claims in Franchising. ........ 7
  - 1. Elements. ........ 8
  - 2. Analytical framework. ........ 12
- C. State Law Claims. ........ 20

IV. Reverse Discrimination ........ 21

V. Practical Considerations ........ 24

- A. Diversity in Franchise Systems Overall Is On the Rise. ........ 24
- B. Affirmative Action Plans vs. Diversity Initiatives. ........ 25
- C. Considerations for Franchisors Seeking to Investigate Diversity and Inclusion Practices Within Their System and to Educate ........ 26
  - 1. Diversity Within the Corporate Franchisor ........ 26
  - 2. Diversity Among Franchisees. ........ 27

VI. Conclusion ........ 30

## I. Introduction

This paper is a primer to a broader discussion about diversity and inclusion in franchising. The authors are grateful for the panelists who ultimately agreed to discuss their brands' outlook and initiatives on diversity and inclusion issues. This paper aims to facilitate the panel's discussion in three ways. First, it provides context by broadly summarizing certain events surrounding the 2020 protests in response to the murder of George Floyd. Second, against that backdrop, the paper examines recent high profile cases brought by franchisees against their franchisors alleging claims of systemic racial discrimination. This second part examines the key elements of the legal claims asserted in these nascent cases and surveys the case law precedent on such elements from prior, perhaps less publicized, cases in the franchising context. The third and final section offers some general practical considerations for franchisors seeking to increase diversity within their systems.

## II. Surveying the Current Political and Social Landscape with Respect to Diversity and Inclusion Issues in the United States.

In July 2013, after George Zimmerman was acquitted for the shooting death of Trayvon Martin, activist Alicia Garza used Facebook to express how she felt. Among other things, she wrote in a social media post that she continued to be surprised at "how little Black lives matter."[1] This inspired her friend Patrisse Cullors to create the hashtag #BlackLivesMatter. That hashtag quickly went viral and activated a movement with the stated purpose of stopping unjust police violence against persons of color.[2] Within a year, Ms. Garza and Ms. Cullors joined with fellow activist and organizer Opal Tometi to create Black Lives Matter Global Network Foundation. The foundation's stated mission includes: "eradicat[ing] white supremacy and build[ing] local power to intervene in violence inflicted on Black communities by the state and vigilantes" and "combating and countering acts of violence, creating a space for Black imagination and innovation, and centering Black joy."[3]

In 2014, the Black Lives Matter movement coalesced with large-scale protests after the fatal police shooting of eighteen-year-old Michael Brown in Ferguson, Missouri.[4]

---

[1] Leah Asmelash, *How Black Lives Matter went from a hashtag to a global rallying cry*, CNN (July 26, 2020), https://www.cnn.com/2020/07/26/us/black-lives-matter-explainer-trnd/index.html.

[2] Conor Friedersdorf, *How to Distinguish Between Antifa, White Supremacists, and Black Lives Matter: Navigating the most fraught conversation of the moment requires attention to both means and ends*, The Atlantic, https://www.theatlantic.com/politics/archive/2017/08/drawing-distinctions-antifa-the-alt-right-and-black-lives-matter/538320/ (last visited April 20, 2021).

[3] HOWARD UNIVERSITY SCHOOL OF LAW LIBRARY, *Black Lives Matter Movement*, Howard University School of Law, https://library.law.howard.edu/civilrightshistory/BLM (lasted visited April 20, 2021).

[4] Jose A. Del Real, Robert Samuels & Tim Craig, *How the Black Lives Matter movement went mainstream*, The Washington Post (June 9, 2020), https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html. The Black Lives Matter movement is also referred to by many as "BLM" and "#BlackLivesMatter."

These protests and the response to them were broadcasted nightly on the news and shared on social media, emboldening a generation of activists to join the movement.[5] From there, the #BlackLivesMatter movement continued to grow, in part, due to the organizing utility of social media.[6]

Indeed, since the Ferguson protests, the movement has become a decentralized political and social movement protesting against incidents of police brutality and racially motivated violence against Black people.[7] Participants in the movement have reactively demonstrated against the deaths of numerous other Black people by police actions or while in police custody, including those of Jonathan Ferrell, John Crawford, Ezell Ford, Laquan McDonald, Akai Gurley, Tamir Rice, Eric Harris, Walter Scott, Freddie Gray, Sandra Bland, Samuel DuBose, Jeremy McDole, Alton Sterling, and Philando Castile. The movement has sponsored proactive demonstrations to spur police reform.[8] Moreover, beginning in the summer of 2015, Black Lives Matter activists became involved in politics by organizing around the 2016 United States presidential election.[9]

Nearly seven years after Ms. Garza's Facebook post, in May of 2020, George Floyd died while in police custody for the alleged crime of passing a counterfeit $20 bill. In connection with Mr. Floyd's arrest, Minneapolis police officer Derek Chauvin had knelt on the back of Mr. Floyd's neck for more than 9 minutes while Mr. Floyd repeatedly claimed that he could not breathe. Much of the arrest was caught on video and that graphic video quickly went viral. In the aftermath of Mr. Floyd's death—and organized in large part by Black Lives Matter and its established national infrastructure—Americans turned out for what researchers called the most sweeping and sustained protests in the

---

[5] *Id.*

[6] Francesca Santoro, *More Than Just a Hashtag: The Influence of Social Media on the Societal Change of the Black Lives Matter Movement*, The Journal of High Technology Law, Black Lives Matter Series Blog (Sept. 25, 2020), https://sites.suffolk.edu/jhtl/2020/09/25/more-than-just-a-hashtag-the-influence-of-social-media-on-the-societal-change-of-the-black-lives-matter-movement/; Jane Hu, *The Second Act of Social Media Activism: has the Internet become better at mediating change?*, The New Yorker (Aug. 3, 2020), https://www.newyorker.com/culture/cultural-comment/the-second-act-of-social-media-activism; Andrew Perrin, *23% of users in U.S. say social media led them to change views on an issue; some cite Black Lives Matter*, Pew Research Center (Oct. 15, 2020), https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter/ ("Roughly a quarter (23%) of adult social media users in the United States—and 17% of adults overall—say they have changed their views about a political or social issue because of something they saw on social media in the past year" and "some 12% of these adults say they changed their views—either positively or negatively—about the Black Lives Matter movement or about police brutality and the need for police reform.").

[7] Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N. Y. Times (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[8] United States Library of Congress, https://www.loc.gov/item/lcwaN0016241/ (last visited April 20, 2021); Wesley Lowery, *'Black Lives Matter' protesters stage 'die-in' in Capitol Hill cafeteria*, Wash. Post (Jan. 21, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/01/21/black-lives-matter-protesters-stage-die-in-in-capitol-hill-cafeteria/.

[9] *See* United States Library of Congress, *supra* note 8.

country's history, with demonstrations in all 50 states and the District of Columbia. The protests continued for weeks.[10]

In addition to individuals, corporate citizens too responded to Mr. Floyd's death. Some turned inward and sought to assure their employees that they understood the gravity of the event and were committed to allowing employees to take part in the social and political dialogue around Mr. Floyd's death and police brutality. For example, in contrast to prior restrictions on allowing employees to show support for social movements, Starbucks allowed its employees, including coffee shop baristas, to wear BLM t-shirts and pins. Other brands moved quickly to respond outwardly to Mr. Floyd's death, committing money, time, and resources to social justice causes:

- Sweetgreen issued a statement that read "We have a duty to our black employees, farmers, partners, and community to speak up" and share a compilation of anti-racism resources;

- Whataburger posted on Instagram that "It has to stop and we want to help" and committed $1 million of its charitable funds to its Feeding Student Success program, which the company started earlier in 2020 to "promote the success of black and minority students";

- YUM! Brands, which owns KFC, Pizza Hut, Taco, and Habit Burger Grill, pledged to donate $3 million to social justice efforts led by the NAACP Legal Defense and Educational Fun, ACLU, and nonprofits in Louisville;

- McDonald's President Joe Erlinger issued a public letter to McDonald's employees acknowledging that they have "tended to stay silent on issues that don't directly involve our business" but that they would seek to provide "opportunities to discuss these issues and our commitment to diversity and inclusion" and encouraged employees to submit thoughts and ideas about how the company can reinforce its commitment to its communities. Erlinger committed the company to donating $1 million to The National Urban League and the NAACP;

- Jamba Juice issued a statement that read, "We stand with and with you today and will always be a champion for diversity and inclusion in our stores and in our communities, and shared a Change.org petition that called on the Minneapolis Mayor and district attorney to immediately fire and file charges against the officers involved in Mr. Floyd's death; and

---

[10] *See* Del Real, Samuels & Craig, *supra* note 4, https://www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html.

Jiachuan Wu, Nigel Chiwaya & Savannah Smith, *Map: Protests and rallies for George Floyd spread across the country: More than 450 protests across the country have erupted in response to the killing of George Floyd in Minnesota last week*, NBC News (June 1, 2020), https://www.nbcnews.com/news/us-news/map-protests-rallies-george-floyd-spread-across-country-n1220976.

- Home Depot committed to donating $1 million to the Lawyers Committee for Civil Rights Under Law.[11]

The immediate corporate responses have grown into more sustained gestures of corporate awareness and participation in broader social issues. One such act is an annual corporate recognition of "Juneteenth"—shorthand for June 19th, the day 155 year years ago that Black Americans in Texas learned they were free from slavery.[12] A growing number of U.S. companies, including Nike, Citigroup, Twitter, and Uber have made June 19th a paid day off..[13] Others, like Adobe, Lyft, the NFL, Postmates, Quicken Loans, Spotify, Target, and Tumblr announced that they would begin observing Juneteenth, with major banks, including JPMorgan Chase, Capital One, PNC, and Fifth Third closing early to observe the newly recognized holiday.[14]

According to Kevin L. James, dean of North Carolina A&T State University's business college, "observing Juneteenth is an acknowledgment of the stain of slavery and a celebration of Black American freedom" and "companies that do so will see perception gains among black workers and consumers."[15] However, James warns that while observance is a step in right direction, "it will be inadequate alone" without further action. Several companies have taken such affirmative steps. For example:

- Rapha Racing Ltd., a cycling apparel company, announced that starting in 2021 60% of its foundation's annual $1.5 million in funding will go towards supporting Black, Asian, and minority ethnic (or "BAME") and female focused programs and initiatives and is allocating a minimum of 50% of annual athlete sponsorship to BAME and LGBTQ+ cyclists as well as female teams and riders;

- Estée Lauder Companies has committed to making sure the percentage of Black employees at all levels in the company mirrors the percentage of Black people in the United States within the next five years and doubling recruits from historically Black colleges and universities in the next two years;

---

[11] David Hessekiel, *Companies Taking A Public Stand In the Wake of George Floyd's Death*, Forbes (June 4, 2020), https://www.forbes.com/sites/davidhessekiel/2020/06/04/companies-taking-a-public-stand-in-the-wake-of-george-floyds-death/?sh=6f6ed6ea7214; Mura Dominko, *8 Fast-Food Brands Supporting Black Lives Matter: You favorite chains are speaking out against racial injustice*, Eat This, Not That (June 3, 2020), https://www.eatthis.com/fast-food-brands-supporting-black-lives-matter/.

[12] Khristopher J. Brooks, *Juneteenth emerges as company holiday as Nike, Citigroup and others commemorate black history*, CBS News (June 19, 2020), https://www.cbsnews.com/news/juneteenth-holiday-company-trend-paid-time-off/.

[13] *Id.*

[14] *Id.*

[15] *Id.*

- PayPal created a $500 million fund to support Black and minority businesses by strengthening ties with community banks and credit unions serving underrepresented communities, invested directly in Black- and other minority-led start-ups, and set aside another $10 million for grants to assist Black-owned businesses affected by Covid-19; and

- &Pizza, a D.C.-based fast-casual chain, announced that going forward they will be giving their employees additional paid time off for activism "for those unseen by this country to be seen. For those unheard by this government to be heard."[16]

It is clear that the protests surrounding Mr. Floyd's death have penetrated corporate consciousness of, and spurred corporate participation in, social and political activism at a level not observed before. Companies were quick to make strong statements against racism, racism in policing, and police brutality, commit money and resources, take action to show employees and customers that they were supported, and put in place long term programs and commitments. To this day, "Black Lives Matter" remains untrademarked, apparently welcoming more and lasting corporate participation.[17]

## III. Discrimination Claims in Franchising

As if the current state of public affairs, including the renewed focus on racial equality for all persons, were not enough of a motivating factor for franchisors to examine diversity and inclusion issues within their own systems, there also remain important legal consequences for failing to address these issues.[18] Claims of racial discrimination asserted by franchisees are not new. But the focus on these claims in the current climate can lead to a host of issues, including bad publicity, drain on system resources, division among franchisees, and, of course, costs and expenses, including attorneys' fees. This section examines one such high profile case.

### A. *Crawford et al. v. McDonald's*.

---

[16] Rapha Racing Ltd., https://www.rapha.cc/us/en_US/stories/rapha-impact (last visited April 21, 2021); Gillian Friedman, *Here's What Companies are Promising to Do to Fight Racism*, N. Y. Times (August, 23, 2020), https://www.nytimes.com/article/companies-racism-george-floyd-protests.html.

Dominko, *supra* note 4.

[17] Lauren Leazenby & Milan Polk, *Whay you need to know about Black Lives Matter in 10 questions*, Chi. Trib. (Sept. 3, 2020), https://www.chicagotribune.com/lifestyles/ct-life-cb-black-lives-matter-chicago-20200903-xh75kbw5nfdk5joudlsgb2viwq-story.html.

[18] The authors are indebted to and have borrowed from the excellent work of Cala Wong McMillian and Kelly J. Baker in their Franchise Law Journal article regarding Section 1981 claims in the franchise context. *See generally* Cala Wong McMillian & Kelly J. Baker, *Discrimination Claims and Diversity Initiatives: What's a Franchisor to Do?*, Franchise L. J. 71 (2008). We encourage readers to seek out that article in full, which remains a valuable resource for franchisors and their counsel.

The most recent and high profile instance of discrimination allegations in the franchising world came with the August, 2020 filing of *Christine Crawford, et al. v. McDonald's USA, LLC et al.*[19] In that matter, seventy-six Black franchisees filed a complaint against McDonald's in the Northern District of Illinois for racial discrimination under 42 U.S.C. § 1981.[20] The franchisees allege that McDonald's steered Black franchisees toward lower-value areas (both lower revenue and higher costs due to disproportional crime rates), denied them the same growth of franchisees offered to White franchisees, required rebuild and renovation requirements that were not required of similarly situated White franchisees, targeted Black franchisees for more inspections than White franchisees, and gave harsher grading standards and repercussions to Black franchisees than White franchisees.[21]

McDonald's moved to dismiss,[22] prompting the plaintiffs-franchisees to amend their complaint.[23] The amended complaint cites to data from the National Black McDonald's Operators Association (NBMOA), which the franchisees allege shows that over the past twenty-two years, the number of Black franchisees has been cut in half while the total number of stores doubled. The franchisees further allege that the NBMOA data shows that, between 2010 and 2019, the cash flow gap between McDonald's Black and White franchisees more than tripled and the average annual sales for stores owned by Black franchisees was more than $700,000 less than those owned by White franchisees.[24] Among other allegations, the franchisees point to what they characterize as decades-old admissions by McDonald's to having placed Black franchisees in restaurants that did not afford them the same success as White franchisees. The franchisees assert that McDonald's has continued the same practice to the present.

McDonald's again moved to dismiss the amended complaint in late 2020.[25] McDonald's argues in relevant part that, even as amended, the franchisees' claims are largely untimely and do not plausibly allege intentional discrimination, instead relying on "nothing more than vague (and untrue) conjecture about discriminatory 'policies,' improper inferences from cherry-picked data, and mischaracterization of a 25-year-old

---

[19] Case No. 1:20-cv-05132 (N.D. Ill.).

[20] *Id.* at Dkt. # 1 (N.D. Ill.) (naming as defendants McDonald's USA, LLC and McDonald's Corporation). The Complaint also raises fraud and breach of contract claims.

[21] *Id.*

[22] *Id.* at Dkt. # 25.

[23] *Id.* at Dkt. # 30.

[24] *Id.*

[25] *Id.* at Dkts. # 38–39.

letter."[26] Further, McDonald's argues that the franchisees have failed to cohere to the causation standards articulated in the U.S. Supreme Court's recent decision in *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, which held that Section 1981 plaintiffs must plead that their unfavorable treatment would not have occurred "but for" their race.[27] In addition, McDonald's argues that the plaintiffs' conclusory allegations are implausible on their face, given that McDonald's had no incentive to undermine the success of its own franchisees.[28]

The franchisees argue that McDonald's alleged actions constitute a continuing violation for purpose of the statute of limitations.[29] As to McDonald's implausibility argument, the plaintiffs argue that McDonald's has a financial interest in using Black franchisees to access Black neighborhoods that otherwise would not be served by the brand, thereby profiting from the increased consumer base without sharing in the downside risk of operating in these markets due to their gross revenue royalty business model.[30] McDonald's replies that it has an "obvious economic interest in successful, profitable restaurants and franchisees, as well as protecting its well-known and valuable brand" and that the franchisees' allegations are "fundamentally implausible and extraordinary" because they offer "no factual support for the assertion that Black franchisees were limited to undesirable locations rejected by White franchisees."[31]

Briefing on the *Crawford* motion to dismiss concluded in February of 2021, and the court has taken the motion under advisement. Discovery has been stayed pending the court's decision, which is expected by the Summer of 2021. What can be said at this point is that the high-profile nature of the *Crawford* litigation, along with the larger societal context, has put discrimination claims in franchising back into the spotlight.[32]

### B. Section 1981 Discrimination Claims in Franchising.

---

[26] *Id.* at Dkt. # 48. As discussed further below, unlike Title VII, which allows allegations of "disparate impact" to survive, Section 1981 requires allegations of disparate treatment.

[27] *Id.* (citing *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 589 U.S. ——, 140 S. Ct. 1009, 1019, 206 L.Ed.2d 356 (2020)).

[28] *Id.*

[29] *Id.* at Dkt. # 44.

[30] *Id.*

[31] *Id.* at Dkt. # 48.

[32] There is some evidence that the Crawford litigation has also spawned similar litigation elsewhere, at least against the McDonald's franchise system. In February of 2021, for example, a Black franchisee filed a Section 1981 discrimination lawsuit against McDonald's raising similar allegations as those raised by the plaintiffs-franchisees in *Crawford*. *See Herbert L. Washington v. McDonald's USA, LLC et al.*, No. 4:21-cv-00367, Dkt. # 1 (N.D. Ohio 2021).

The *Crawford* lawsuit primarily asserts claims for racial discrimination in violation of Section 1981 of the Civil Rights Act. Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves.[33] The section of that statute now codified in 42 U.S.C. § 1981 promised that "all persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence . . . as is enjoyed by white citizens."[34] Courts have construed Section 1981 to "forbid[] racial discrimination in the making and enforcing of contracts."[35]

It is important to note that Section 1981's broad application to contractual relationships makes Section 1981 the only meaningful federal antidiscrimination statute applicable to the franchisor-franchisee relationship. In contrast, to allege a claim for racial discrimination under the more prevalent Title VII, a plaintiff must prove the existence of an employer-employee relationship. Generally, courts have not applied Title VIII in the context of disputes between franchisors and their franchisees.[36] This section will first outline the elements of Section 1981 claims in the franchising context, with emphasis on Section 1981's limitations when compared to other antidiscrimination statutes such as Title VII. Next, this section will delve deeper into the analytical framework that courts apply when analyzing Section 1981 claims brought by franchisees against franchisors.

#### 1. Elements.

In order to state a claim for discrimination under Section 1981, plaintiffs must allege that: (1) "they are members of a racial minority"; (2) "that the defendant had the intent to discriminate on the basis of race"; (3) "the discrimination concerned the making or enforcing of a contract"; and (4) "race was the 'but-for' cause of [each plaintiff's] injury."[37] These elements carry important ramifications for discrimination claims in the franchise context.

##### *a. Members of a racial minority.*

**The statute only prohibits racial discrimination against persons.** Section 1981's substantive protections are more limited than Title VII, which covers multiple

---

[33] *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. ___, 140 S. Ct. 1009, 1015, 206 L. Ed. 2d 356 (2020).

[34] *Id.* (quoting 42 U.S.C. § 1981(a)).

[35] *KFC Corp. v. Gazaha*, No. 115CV1077AJTJFA, 2016 WL 1245010, at *5 (E.D. Va. Mar. 24, 2016).

[36] *See, e.g., Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1294 (9th Cir. 1999) (dealer not an employee for sex discrimination claim); *Mangram v. Gen. Motors Corp.*, 108 F.3d 61, 63 (4th Cir. 1997) (dealer not an employee for age discrimination claim).

[37] *See Wilbern v. Culver Franchising Sys., Inc.*, No. 13 C 3269, 2015 WL 5722825, at *25 (N.D. Ill. Sept. 29, 2015); *Jones v. Culver Franchising Sys., Inc.*, 12 F. Supp. 3d 1079, 1085 (N.D. Ill. 2013); *Servpro Indus., Inc v. Woloski*, No. 3:17-CV-01433, 2020 WL 5629452, at *19–20 (M.D. Tenn. Sept. 21, 2020).

protected classes. While 42 U.S.C. § 1981 does not specifically use the term "race," courts have construed its reference to "all persons" having the same contractual rights as "white citizens" to mean that the statute only prohibits race discrimination, as opposed to other forms of discrimination.[38]

**Nonetheless, corporate franchisees may sue under Section 1981.** While corporate entities technically cannot have ethnic or racial characteristics, for purposes of Section 1981 the corporate entity can sue under circumstances where they have "acquired an imputed racial identity."[39] This result was not preordained by the text of the statute, which does not on its face extend to corporations. In fact, in 1977 the United States Supreme Court noted in dicta that corporations cannot have a racial identity in the context of a discrimination claim.[40] Subsequently, however, most courts have held that corporate franchisees which are primarily minority owned have standing to sue under Section 1981.[41]

In some cases, even corporate franchisees owned by nonminorities may have standing where their officers or employees are minorities.[42] The D.C. Circuit summed up the principle courts have applied to standing issues by noting that "[r]ather than assume that racial identity is a predicate to discriminatory harm, we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm."[43]

---

[38] *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (Section 1981 does not apply to national origin); *Runyon v. McCrary*, 427 U.S. 160, 167 (1976) (same for gender and religion); *Kodish v. United Air Lines, Inc.*, 628 F.2d 1301, 1303 (10th Cir. 1980) (same for age discrimination).

[39] *Jones v. Culver Franchising Sys., Inc.*, 12 F. Supp. 3d 1079, 1085 (N.D. Ill. 2013).

[40] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("As a corporation, [plaintiff] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination.").

[41] *See Jones*, 12 F. Supp. 3d at 1085 (corporate franchisees had standing to sue where their sole members were Black and represented the franchisees with the franchisor throughout the franchise history); *Letap Hosp., L.L.C. v. Days Inn Worldwide, Inc.*, No. CIV.A.08-1355, 2008 WL 3538587, at *7 (E.D. La. Aug. 7, 2008) (same for corporate franchisee whose owner and guarantor was "of Indian descent").

McMillian & Baker, *supra* note 18, at 77.

[42] *See Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (corporation had standing "where such discrimination is based on the race of one of its employees"); *John & Vincent Arduini Inc.*, 129 F. Supp. 2d 162, 169 (N.D.N.Y. 2001) (cleaning service with Caucasian owners had standing to sue for discrimination when it promoted a Hispanic employee and the defendant allegedly retaliated, because to deny standing would "create a paradox insulating individuals who apply invidious techniques designed to compel corporations into discriminating against their own employees while at the same time leaving the corporation no recourse with which to protect itself from this pressure").

[43] *Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992).

*b. The intent to discriminate.*

**Disparate impact is not sufficient.** In contrast with Title VII, which allows for "disparate impact" discrimination claims based on neutral policies, Section 1981 plaintiffs must prove intentional disparate *treatment*. For this reason, statistical evidence alone is often not sufficient to make out a claim under Section 1981.[44] As explained more fully below when discussing courts' analytical framework for analyzing Section 1981 claims, plaintiff franchisees typically state a claim for discrimination either by alleging "direct" evidence of racial animus or "indirect" evidence of a franchisor's different treatment of minority and nonminority franchisees.

*c. The making or enforcing of a contract.*

**Only the franchisee itself may sue.** While the franchisor-franchisee contractual relationship brings it under the purview of Section 1981, only the contracting franchisee itself is protected under the statute. "To state a claim under § 1981, a plaintiff must have rights under an existing contract that he wishes 'to make and enforce.' In other words, a plaintiff must be the person whose right to make and enforce a contract was impaired on account of race.[45] In part because corporate franchisees themselves have standing to sue under Section 1981, franchisee owners who are not parties to the franchise agreement, as well as guarantors who have obligations but no rights under the contract, typically have not been found to have standing to bring a Section 1981 claim under an existing franchise agreement.[46]

**But prospective franchisees can have standing.** Because Section 1981 protects the right to "make" in addition to "enforce" contracts, the statute "protects against racial discrimination that 'blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.'"[47] As such, prospective franchisees may have standing to sue, including current franchisees who are blocked from further expansion.[48] As a limiting factor, most courts require that a

[44] *See Gen. Bldg. Contractors Ass'n v. Penn.*, 458 U.S. 375, 389 (1982) (disparate impact is not a valid theory in a Section 1981 case because "§ 1981 reaches only purposeful discrimination").

[45] *Jones v. Culver Franchising Sys., Inc.*, 12 F. Supp. 3d 1079, 1086 (N.D. Ill. 2013) (quoting *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479–80 (2006).

[46] *See id.* (corporate franchisee's owners had no Section 1981 standing to sue based on the franchisor's alleged discrimination against the franchisee); *Beasley v. Arcapita Inc.*, 436 F. App'x 264, 266 (4th Cir. 2011) ("[A]ny obligations the [guarantors] have under the Guarantee of Franchise Agreement do not create any rights for them under the Agreement, which the Supreme Court has explicitly required for a claim of relief under § 1981.").

[47] *Jones*, 12 F. Supp. 3d at 1084 (quoting *Domino's Pizza*, 546 U.S. at 476).

[48] *See id.* (individual owners of franchisee could proceed on Section 1981 claim alleging that franchisor discriminated against them by not allowing them to expand and sign new franchise agreements).

prospective franchisee allege a failed application (rather than mere discouragement to apply) to successfully prosecute a Section 1981 claim.[49]

#### *d. "But-for" causation.*

**Race must be more than a "motivating factor" in the discrimination.** While a Title VII plaintiff may prove a discrimination case under the more lenient "motivating factor" causation test, claims under Section 1981 face a higher burden at the pleading stage. In 2020, the U.S. Supreme Court decided in *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, that Section 1981 plaintiffs must plead and prove that their unfavorable treatment would not have occurred "but for" their race.[50]

Indeed, in the short time since the decision issued, courts have used the heightened standard as a basis for dismissing claims at the pleading stage. For example, the Seventh Circuit cited *Comcast* to support dismissal of a plaintiff's Section 1981 complaint that failed to plead facts that "could permit the inference of but-for causation." The court explained, "when bringing a § 1981 race-discrimination claim, a plaintiff must initially plead and ultimately prove that, but for race, he would not have suffered the loss of a legally protected right."[51]

Likewise, the Fourth Circuit recently dismissed a complaint when the plaintiff failed to plead allegations sufficient "to show that racial considerations caused the adverse decision." In particular, the court noted, the plaintiff "fail[ed] to adequately connect his theory to racial discrimination."[52] The opinion continued that "[a]s the Supreme Court explained just a few months ago, it is not enough to show that race played 'some role' in the defendant's decision making process," but rather *Comcast* "require[es] courts to ask 'what would have happened if the plaintiff had been white?'"[53]

Another Fourth Circuit decision dismissed a plaintiff's complaint for similar reasons. That opinion succinctly explained:

---

[49] *See Bidiwala v. CiCi Enterprises, Inc.,* No. Civ.A.3:03-CV-2360-G, 2004 WL 245872 (N.D. Tex. Jan. 8, 2004); *Conners v. Ford Motor Co.*, No. 1:01-cv-09381, slip op. (N.D. Ill. Feb. 25, 2004) (motion to dismiss granted where White plaintiff did not submit an application because he was allegedly told that because he was not Black he could not participate in Ford's Dealer Development Program).

[50] 589 U.S. ——, 140 S. Ct. 1009, 1019, 206 L.Ed.2d 356 (2020). Notably, in contrast to "status" discrimination claims based on a plaintiff's membership in a protected class (including race), Title VII plaintiffs claiming retaliation must also prove "but for" causation. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013).

[51] *Mir v. State Farm Mut. Auto. Ins. Co.*, No. 20-1800, 2021 WL 717091, at *3 (7th Cir. Feb. 24, 2021), *reh'g denied* (Mar. 11, 2021).

[52] *Jones v. Lowe's Companies, Inc.*, No. 19-1975, 2021 WL 457927, at *7 (4th Cir. Feb. 9, 2021).

[53] *Id.*

> Even if [the plaintiff's] qualification for leave was assumed, however, she would still have failed to appropriately allege, as required by the Supreme Court's recent holding in [*Comcast*] that her race was the but-for cause of the Board's denial of her leave application. [Plaintiff's] allegation that she was subject to a different short-term leave application process than the firm's white partners is by itself insufficient. Because in the absence of plausible allegations that, for example, these white partners were similarly situated, such an allegation indicates only that she was treated differently, not that she was treated differently *because of* her race.[54]

The Third Circuit recently cited *Comcast* in support of its finding that the district court below had "properly dismissed [the plaintiff's] § 1981 claim because, among its deficiencies, the Complaint lacked allegations plausibly demonstrating that race was a but-for cause of the [contractual] relationship's end" and noting that "[i]ndeed, [the plaintiff] made clear in his Complaint that his race was, at most, one of several factors that led [the defendant] to close his case file."[55]

Finally, the Ninth Circuit recently cited *Comcast* in finding that "the § 1981 claims in this case are 'implausible' because the complaint identifies independent nondiscriminatory reasons for" the unfavorable actions, and thus the plaintiff's "allegations do not give rise to a plausible inference that [the defendant's] alleged racially discriminatory actions caused the alleged impairment to [the plaintiff's] contractual relationship."[56]

More decisions are sure to follow. But if litigators take away nothing else from this paper, it should be that the standard set forth in *Comcast* establishes definitively that the causation standard for Section 1981 claims is more onerous than for Title VII discrimination claims. Franchisee counsel who rely on outdated precedent to draft complaints for Section 1981 claims going forward risk learning a valuable lesson at the pleading stage.

#### 2. Analytical framework.

Assuming that the plaintiffs' claims survive the pleadings stage, the question becomes how courts analyze the merits of Section 1981 claims. Although Section 1981 and Title VII have many significant differences, the two antidiscrimination statutes are analogous with respect to this analytical framework. Indeed, because Title VII discrimination cases are more common and thus have more interpretive case law, courts

---

[54] *Lemon v. Myers Bigel, P.A.*, No. 19-1380, 2021 WL 161978 (4th Cir. Jan. 19, 2021) (emphasis in original).

[55] *Valentin v. Esperanza Hous. Counseling*, 834 F. App'x 745, 747 (3d Cir. 2021).

[56] *Astre v. McQuaid*, 804 F. App'x 665, 667 (9th Cir. 2020).

construing Section 1981 claims have recognized that "Section 1981 claims are properly analyzed under the Title VII framework."[57]

Under the Title VII framework, plaintiffs must prove their case either with "direct" or "indirect" evidence. Direct evidence "is defined as conduct or statements that both (1) reflect directly the alleged discriminatory attitude, and (2) bear directly on the contested decision. Such a showing of direct evidence essentially requires an admission by the decision-maker that his actions were based on the prohibited animus."[58] This "smoking gun" evidence is rarely encountered.

In the absence of direct evidence of discrimination, plaintiffs typically rely on indirect evidence to prosecute their claims. To survive the summary judgment phase using indirect evidence of discrimination, plaintiffs asserting claims under Section 1981 or Title VII must satisfy the well-known *McDonnell Douglas* burden-shifting scheme.[59] Under this scheme, plaintiffs must first establish a prima facie case of discrimination. The burden then shifts to defendants to identify a legitimate, nondiscriminatory explanation for the complained of conduct. The burden then shifts back to the plaintiff to establish that the defendant's explanation is a pretext. The following section examines each of these steps in further detail.

#### *a. Prima facie case.*

First, the complaining party must establish a prima facie case of racial discrimination. For example, in the context of Section 1981 claims in franchising, the complaining party under *McDonnell Douglas* must show:

> (1) that they are members of a protected [racial] class; (2) that the allegedly discriminatory conduct concerned one or more of the activities enumerated in the statute [making or enforcing of a franchise contract]. . . and (3) that the franchisor treated the franchisee less favorably with regard to the allegedly discriminatory act than the franchisor treated other similarly situated persons who were outside the franchisor's protected class.[60]

"Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination."[61] At the pleading stage,

---

[57] *KFC Corp.*, 2016 WL 1245010, at *5.

[58] *Id.* (quotations and alterations omitted).

[59] *Id.*

[60] *Id.*

[61] *Elbanna v. Captain D's, LLC*, No. 3:07-CV-926-J-32MCR, 2009 WL 435051, at *7 (M.D. Fla. Feb. 17, 2009).

the plaintiff need only plead a prima facie case sufficient to provide a defendant with notice of the claim.[62] In most franchise disputes, the issue for establishing a prima facie claim hinges on demonstrating the harm suffered by the franchisee. The harms alleged by franchisees has varied widely, from failure to enter into new franchise agreements, "steering" to non-optimal locations, failure to provide financial or other support, overly harsh enforcement of system standards, failure to allow for transfers, or outright termination.[63] Below are some additional considerations.

**The franchisee must find a similarly situated comparator.** The primary burden for franchisees involves proving that similarly situated nonminority franchisees were treated more favorably by the franchisor regarding the specific harms alleged. When the alleged harm is that the plaintiff franchisee was blocked from making a contract or from taking action under the contract, the franchisee must typically allege and ultimately proffer evidence that it was blocked or prevented from taking action despite being qualified and that equally or less qualified nonminorities were not so impaired.[64] On the other hand, when the alleged harm involves adverse treatment or termination of a contract, the franchisee must typically allege that similarly situated nonminority franchisees did not suffer the same treatment.[65]

---

[62] *See S. Motors Chevrolet, Inc. v. Gen. Motors, LLC*, No. CV414-152, 2014 WL 5644089, at *3 (S.D. Ga. Nov. 4, 2014).

[63] *See generally* McMillian & Baker, supra note 18 (collecting cases).

[64] *Compare Jones v. Culver Franchising Sys., Inc.*, 12 F. Supp. 3d 1079, 1085 (N.D. Ill. 2013) (franchisees sufficiently pleaded prima facie case by "alleg[ing] that when they were in need of financial assistance for their franchises, Culver failed to assist them when Culver had in the past provided assistance to white franchisees"), *with Elbanna v. Captain D's, LLC*, No. 3:07-CV-926-J-32MCR, 2009 WL 435051, at *7 (M.D. Fla. Feb. 17, 2009 (franchisee did not make out a prima facie case of discrimination for failure to be awarded a transfer franchise location when the franchisee failed to show that less qualified nonminority franchisees were awarded the transfers).

[65] *Compare Jones*, 12 F. Supp. 3d 1079, 1085 (N.D. Ill. 2013), (franchisee pleaded prima facie case when it alleged that the franchisor "overreacted to its problems with the State of Indiana regarding its underpaid sales taxes when it had previously ignored or downplayed comparable incidents by white franchisees, and schemed with a white franchisee to allow him to acquire [the plaintiff's] franchises") *with Servpro Indus., Inc v. Woloski*, No. 3:17-CV-01433, 2020 WL 5629452, at *20 (M.D. Tenn. Sept. 21, 2020) (franchisee could not make out a prima facie case because it could not identify "any similarly-situated franchisees about which [the franchisor] received complaints similar to those received about [the franchisee] that were not also terminated from the [franchisor's] system with notice and without opportunity to cure") *and International House of Pancakes v. Albarghouthi*, No. 04-cv-02264-MSK-MEH, 2007 WL 2669117 (D. Colo. Sept. 6, 2007) (granting summary judgment in favor of franchisor because the circumstances of the terminated Arab American plaintiff franchisee's termination were dissimilar to that of a White franchisee who the franchisee pointed to as being treated differently); *see also Pointer v. Bldg. Stars Advantage*, No. 4:03-cv-01237-HEA, Bus. Franchise Guide (CCH) ¶ 12, 960 (E.D. Mo. Apr. 26, 2004), aff'd, 115 F. App'x 321, at ¶ 12,960 (8th Cir. 2004) (Black prospective franchisee failed to establish a prima facie case of discrimination when he was denied a franchise where "Plaintiff himself apparently acknowledged that he was denied a franchise because of his failure to show a history of steady employment and that the franchisor refused to grant franchises to both African American and white franchisees based on gaps in employment").

The degree of similarity that courts will accept between the minority plaintiff and nonminority comparator varies from case to case. Some courts have held that "the individuals must be similarly situated in all relevant respects besides race" because "different treatment of *dissimilarly* situated persons does not violate civil rights laws," and thus "the comparator must be nearly identical to the plaintiff[.]"[66] In contrast, other courts have shown more flexibility, holding that "the similarly-situated requirement should not be applied mechanically or inflexibly, but rather it is a common-sense flexible inquiry that seeks to determine whether there are enough common features between the individuals to allow a meaningful comparison."[67]

**Isolated racial comments alone are insufficient.** In some cases, franchisees have attempted to make out a prima facie case by pointing to race-related statements made by an individual affiliated with the franchisor. Courts have typically not accepted such allegations as sufficient to make out a prima facie case unless they can be "woven together" with a plaintiff's other allegations to "suggest a 'general pattern' from which racial discrimination might be reasonably inferred."[68]

Plaintiff's proffered evidence of racial comments often fails due to lack of causation. In *Lemon*, the plaintiff alleged that one of the defendant's shareholders complained about her "playing the black card too often."[69] The court found that because the comment came four months prior to the plaintiff being denied short-term leave and the plaintiff "failed to allege any facts linking these two events, any potential connection [was] a matter for speculation" and thus the single comment was "incapable of stating a plausible claim that [the plaintiff's] short-term leave request would not have been denied but for her race."[70]

In several cases, racial comments have been held insufficient where there was no evidence that the person making them was the ultimate decisionmaker. For example, in *Servpro Indus., Inc v. Woloski*, the franchisee alleged numerous forms of discrimination treatment, including and leading up to termination of the franchise, based on the franchisee's race and Asian ethnicity.[71] After the franchisor moved for summary judgment, the franchisee argued that there was triable issue of fact as to whether the franchisor's

---

[66] *Elbanna v. Captain D's, LLC*, No. 3:07-CV-926-J-32MCR, 2009 WL 435051, at *10 (M.D. Fla. Feb. 17, 2009) (alterations omitted).

[67] *Elkhatib v. Dunkin' Donuts, Inc.*, 493 F.3d 827 (7th Cir. 2007).

[68] *Lemon v. Myers Bigel, P.A.*, 985 F.3d 392, 395 (4th Cir. 2021); *Elbanna*, 2009 WL 435051, at *13 (holding that "isolated comments" cited by the franchisee could not be construed as evincing racial animus or discrimination).

[69] *Lemon*, 985 F.3d at 395.

[70] *Id.*

[71] No. 3:17-CV-01433, 2020 WL 5629452, at *20 (M.D. Tenn. Sept. 21, 2020).

actions against the franchisee were racially motivated, proffering as evidence the alleged fact that one of the franchisor's employees stated to the franchisee "for people like you, who do not speak English, you should go back to China."[72] The court nonetheless found that the franchisee did not make out a prima facie case of discriminatory termination against the franchisor because there was no evidence in the record that the employee making the alleged racially-charged statements "had input into the decision to terminate the franchise" or that his alleged racial animus was the *'but-for' cause* of their termination."[73]

In other cases, however, courts have found that racial statements and actions combined with other evidence are sufficient to indicate a racial bias and support a reasonable inference of discrimination. For example, in *Alvarez Motor Cars, Inc. v. Jaguar Land Rover N. Am., LLC*, a Hispanic plaintiff dealer alleged that the defendant interfered with the plaintiff's sale of his dealership due to ethnic animus.[74] The plaintiff alleged that the defendant treated him with more hostility than other nonminority dealers, that there were no other Hispanic dealers, and that the defendant "misreports its franchise numbers to boost its diversity ranking from the National Association of Minority Automotive Dealers."[75] Combined with an allegation that the defendant's executives contemptuously refused "to advertise in Spanish language media because, 'they don't buy our cars,'" the court found that "Defendants' words and actions indicate a bias against Spanish-speaking ethnicities" and thus "it is reasonable to infer that Defendant would not have interfered but-for Alvarez's Hispanic ethnicity."[76]

**Statistical evidence alone is insufficient.** Courts have found that "statistical data, even data showing racial disparities, cannot by itself support a Title VII/Section 1981

[72] *Id.*

[73] *Id.* (emphasis in original); *see also KFC Corp. v. Gazaha*, No. 115CV1077AJTJFA, 2016 WL 1245010, at *5 (E.D. Va. Mar. 24, 2016) (Black franchisee's allegations that the franchisor's employees made reference to "you people" and made statements such as the franchisee's neighborhood not being "safe" were simply "isolated, casual comments" with "zero to exceedingly marginal" probative value, and "none was made by anyone in a position of authority at [the franchisor] with the ability to terminate the Agreement."); *Dunkin' Donuts Franchised Restaurants LLC v. Sandip, Inc.*, 712 F. Supp. 2d 1325, 1328 (N.D. Ga. 2010) (franchisor employee's statement that "[y]ou cannot win this case from the court because there's no Indian judge" could not "without more . . . support a discrimination claim" both because "there is no evidence that [the employee] was involved in the decision to reject the proposed sale agreement" and because "the alleged statement was made significantly after [the franchisor] rejected the proposed agreement").

[74] No. EDCV201086PSGSPX, 2020 WL 8365258, at *5–6 (C.D. Cal. Nov. 25, 2020).

[75] *Id.*

[76] *Id.*; *see also Home Repair, Inc. v. Paul W. Davis Systems, Inc.*, No. 98 C 4074, 2000 WL 126905 (N.D. Ill. Feb. 1, 2000) (racially offensive statements were not themselves enough to establish a nexus with the allegedly discriminatory behavior because they were not made in close temporal proximity, but along with other evidence of disparate treatment created a "cumulative picture of discrimination" sufficient to overcome summary judgment).

claim for racial discrimination" because "statistical evidence alone is insufficient to raise an inference of discriminatory intent in a disparate treatment case."[77] Because "disparate impact is not a valid theory in a § 1981 case," the "proof of disparate impact alone is insufficient to establish a section 1981 or section 1983 violation."[78]

Even where statistical evidence exists to show disparate treatment, the lack of analytical rigor applied to those statics can be fatal to a plaintiff's claim. For example, in *Elbanna v. Captain D's, LLC*, the Black plaintiff franchise applicant claimed that the defendant franchisor discriminated against him by first inspecting another restaurant he owned and denying his application on the results of the inspection.[79] The franchisee contended that the screening inspection was discriminatory, as the only two applicants inspected were himself and another Black applicant, neither of which were granted franchises. The court found that an inference of discriminatory purpose would be entirely speculative on the plaintiff's cherry-picked data, however, noting the lack of any "evidence of the total number of applicants; a comparison of those applicants whose other operations were inspected with all applicants; and the results of those inspections."[80]

On the other hand, if extensive enough, even statistics showing disparate outcomes for minority franchisees may be used by a franchisee as one piece of evidence. In *Wilbern v. Culver Franchising Sys., Inc.*, the franchisor argued at the summary judgment stage that the franchisee's case should fail because the franchisee relied in part on "disparate impact" statistical evidence.[81] The court rejected the argument, noting that "[e]vidence of a disproportionate impact is relevant to the question of intent since an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," and thus "disparate impact is a form of evidence with which Plaintiff can demonstrate disparate treatment," so long as it does not stand alone.[82]

#### ***b. Legitimate basis.***

After a plaintiff franchisee establishes a prima facie case of discrimination under Section 1981, the burden shifts to the franchisor to "articulate a legitimate,

---

[77] *KFC Corp. v. Gazaha*, No. 115CV1077AJTJFA, 2016 WL 1245010, at *6 (E.D. Va. Mar. 24, 2016) (finding no prima facie case where the franchisee "presented nothing other than statistical data as to the termination rates of KFC franchises").

[78] *Wilbern v. Culver Franchising Sys., Inc.*, No. 13 C 3269, 2015 WL 5722825, at *26 (N.D. Ill. Sept. 29, 2015).

[79] No. 3:07-CV-926-J-32MCR, 2009 WL 435051, at *12 (M.D. Fla. Feb. 17, 2009).

[80] *Id.* ("Statistics . . . without an analytic foundation, are virtually meaningless.").

[81] *Wilbern*, 2015 WL 5722825, at *26.

[82] *Id.*

nondiscriminatory reason" for the unfavorable treatment."[83] This burden is merely one of production, not persuasion.[84] Courts have held that the defendant's burden "is exceedingly light" and "easily fulfilled," and that the defendant "does not have to persuade a court that it was actually motivated by the reason advanced."[85] Because it is rare to encounter a case at the summary judgment level where the franchisor cannot articulate any legitimate basis for its action, the vast majority of cases that proceed past the prima facie stage relate to whether the franchisee can overcome the franchisor's stated basis.

#### *c. Pretext.*

After the franchisor articulates the requisite nondiscriminatory reason, "the burden once again shifts and the [franchisee] must prove that the [franchisor's] proffered reason was mere pretext and that race was the real reason for" the unfavorable treatment.[86] "The plaintiff may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the [franchisor] or indirectly by showing that the [franchisor's] proffered explanation is unworthy of credence."[87] In other words, so long as a franchisee has established a prima facie case, it "may defeat a motion for summary judgment by undermining the credibility of a defendant's explanations for its actions without directly showing that defendant harbored an illegal motive."[88]

On the other hand, "[a] reason is not pretext for discrimination 'unless it is shown *both* that the real reason was false, *and* that discrimination was the real reason."[89] "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the [franchisor] intentionally discriminated against the [franchisee] remains at all times with the plaintiff."[90] And again, Section 1981 plaintiffs must ultimately establish that race was the "but for" cause of any unfavorable treatment, not merely a "motivating factor."[91]

---

[83] *KFC Corp.*, 2016 WL 1245010, at *5.

[84] *Id.*

[85] *Elbanna v. Captain D's, LLC*, No. 3:07-CV-926-J-32MCR, 2009 WL 435051, at *7 (M.D. Fla. Feb. 17, 2009) (quoting *Batey v. Stone*, 24 F.3d 1330, 1334 (11th Cir.1994)).

[86] *Id.*

[87] *Elbanna*, 2009 WL 435051, at *8.

[88] *Id.* (noting, however, that while "identification of a defendant's inconsistent statements has evidentiary value; mere denial of credibility has none").

[89] *Id.* (emphasis in original).

[90] *Id.*

[91] *Id.*

In practice, franchisees tend to be successful in directly attacking the merits of a facially valid basis only when they can show that the proffered reason was obviously false. For example, in *Fair v. Prime Security Distributors, Inc.*, the court found that the plaintiff dealership was able to overcome the franchisor's proffered legitimate basis for nonrenewal—that the dealership had poor sales and a poor business plan—by presenting evidence that the dealer's sales performance was within the top ten in the region and had been recognized for its customer service.[92]

In contrast, in *KFC Corp. v. Gazaha*, the franchisor's stated business reason for terminating a franchisee was that the franchisee had failed four consecutive health inspections.[93] The court rejected the franchisee's argument that the failed inspections were insufficient to justify termination of his franchise, finding the challenges insufficient to raise an inference of pretext. Similarly, in *Elbanna v. Captain D's, LLC*, one of the franchisor's legitimate bases for denying a franchise application was the franchisee's inability to meet the capital liquidity requirement.[94] Although the franchisee proffered evidence suggesting that the franchisor's liquidity concerns may have been overblown, the court noted that "it is not the Court's responsibility to second guess the wisdom of [the franchisor's] reasoning but to determine if the reasons given were merely a cover for discriminatory intent," for which there was no evidence.[95]

Evidence of disparate treatment is more typically what convinces courts to overcome a legitimate proffered basis. In *Elkhatib v. Dunkin' Donuts, Inc.*, the Arab franchisee claimed that the franchisor discriminated against him by denying his application to transfer to another location and refusing to renew his franchise agreement.[96] In response the franchisor proffered the basis that the franchisee refused to sell pork products and thus did not carry the franchisor's "full breakfast sandwich product line." The court agreed with the franchisee that a reasonable finder of fact could find this basis pretextual, because the franchisor had allowed three non-Arab franchisees in the same area to avoid selling the same sandwiches for different reasons and thus "carrying the full line of breakfast sandwiches seemed not to be important to [the franchisor]."[97]

In contrast, again in *Elbanna v. Captain D's, LLC*, No. 3:07-CV-926-J-32MCR, the rejected franchisee applicant pointed to a nonminority applicant who was accepted with what the plaintiff characterized as an inferior application.[98] The court found, however, that

---

[92] 134 F.3d 371 tbl., No. 96-1989, 1997 WL 810005 (6th Cir. Dec. 29, 1997).

[93] No. 115CV1077AJTJFA, 2016 WL 1245010, at *6 (E.D. Va. Mar. 24, 2016).

[94] No. 3:07-CV-926-J-32MCR, 2009 WL 435051, at *12 (M.D. Fla. Feb. 17, 2009).

[95] *Id.*

[96] 493 F.3d 827 (7th Cir. 2007).

[97] *Id.*

[98] 2009 WL 435051, at *12 (M.D. Fla. Feb. 17, 2009).

the franchisor believed that the other applicant had superior liquidity and also had done business with the other franchisee in the past. The court held that there was no evidence to support a reasonable inference of pretext, nothing both that "[a] subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion," and that "[a] business's preference for selecting and contracting with someone with whom it is familiar and is thus a 'known quantity' is a legitimate nondiscriminatory basis for its franchise decision."[99] As such, the court granted summary judgment, finding that the plaintiff had "failed to show that [the franchisor] gave preferential financial consideration to a non-Arab under 'nearly identical' circumstances."[100]

Ultimately, the final stage of the McDonell Douglas test is a holistic analysis whereby courts determine whether the totality of a plaintiff's evidence, including differential treatment, statistical evidence, racial comments, and other evidence of pretext, are sufficient to overcome the defendant's stated basis for the allegedly harmful action. Whether any given Section 1981 plaintiff succeeds in surviving summary judgment and prevailing at trial is a highly fact intensive exercise, but the principles above outline the common terrain on which these battles are fought in the franchise context.

### C. State Law Claims.

Apart from Section 1981, which applies throughout the country to all aspects of the franchise relationship, certain state laws provide mechanisms for franchisees to raise discrimination claims in various contexts. While common law claims for breach of contract, good faith and fair dealing, and tortious interference have all met with limited success in the discrimination context,[101] state franchise relationship and antidiscrimination statutes can provide protections that are comparable or in some instances broader than those afforded by federal law. For example, most state relationship laws prohibit a franchisor from any form of discrimination against its franchisees, not limited to discrimination based on race. While most relationship statutes protect franchisees in specific and targeted contexts, such as the decision to terminate or not to renew a franchise,[102] others broadly prohibit discrimination in all aspects of the

---

[99] *Id.*

[100] *Id.*

[101] See *Int'l House of Pancakes v. Albarghouthi,* No. 04-cv-02264-MSK-MEH, 2007 WL 2669117 (D. Colo. Sept. 6, 2007) (denying breach of the covenant of fair dealing claim based on alleged racial animus where franchisor had contractual basis for its actions).

[102] *See, e.g.* 815 ILL. COMP. STAT. 705/18 (prohibiting discriminatory charges); MICH. COMP. LAWS ANN. § 445.1527(e) (requiring equal treatment of franchisees regarding renewal provisions); HAW. REV. STAT. § 482E-6(2)(H) (prohibiting franchisors from unfair discrimination against franchisees in deciding to terminate or not renew a franchise).

franchise relationship.[103] And while most relationship laws apply only to existing franchisees, some extend their protections to prospective applicants or transferees within various protected classes; Iowa's relationship law for example, prohibits a franchisor from "discriminat[ing] against a proposed transferee of a franchise on the basis of race, color, national origin, religion, sex, or disability."[104]

In addition to relationship laws, several states have antidiscrimination statutes that have been found applicable to the franchise context. California's Unruh Civil Rights Act, for example, specifically applies to both franchisees and applicants within various protected classes and prohibits "unreasonable, arbitrary, or invidious discrimination" through policies or actions that "emphasizes irrelevant differences" or "perpetuates [irrational] stereotypes," arguably affording comparable protections as Section 1981 for a broader range of plaintiffs.[105] New Jersey's Law Against Discrimination also protects against discrimination in business for a number of protected classes and, like Section 1981, allows for a finding of discrimination through circumstantial evidence.[106] While the protections afforded by these statutes are similar to those afforded by Section 1981, they potentially apply to a broader range of franchisees.

## IV. Reverse Discrimination

Before examining the many laudable steps franchisors have taken or begun taking to increase systemwide diversity, it is important to understand the other side of antidiscrimination statutes such as Section 1981. As in other affirmative action contexts, claims of "reverse discrimination" occasionally have been made against franchisors over the years by nonminority franchisees (or more typically failed applicants) who have alleged that they were treated unfairly.

In these matters, courts grapple with the extent to which pro-diversity initiatives that directly favor racial minorities over nonminorities are allowed in the franchise context. Under Title VII, the Supreme Court in two major cases, *Johnson v. Transp. Agency* and *United Steelworkers v. Weber*, held that affirmative action in the private business employment context is allowed when it is to correct a "manifest imbalance" in a

---

[103] *See e.g.* IND. CODE § 23-2-2.7-2(5) (franchisor may not discriminate "unfairly among its franchisees").

[104] IOWA CODE § 537A.10(5)(f).

[105] Cal. Civ. Code § 51.8; *Reyes v. Atl. Richfield Co.*, 12 F.3d 1464, 1471 (9th Cir. 1993); *see also Dallas & Lashmi, Inc. v. 7-Eleven, Inc.*, 112 F. Supp. 3d 1048, 1062 (C.D. Cal. 2015) (collecting cases and noting the similarity of the statute's substantive protections and limitations to those provided pursuant to Section 1981).

[106] N.J.S.A. ¶ 2 10:5-3; *Letap Hosp., L.L.C. v. Days Inn Worldwide, Inc.,* No. CIV.A.08-1355, 2008 WL 3538587, at *5–6 (E.D. La. Aug. 7, 2008) (analyzing the protections afforded by the statute in the franchise context).

"traditionally segregated job category" to attain (not to merely maintain) a balanced workforce, so long as it does not "unnecessarily trammel the interests" of nonminorities.[107]

Nearly thirty years ago, in the context of a reverse discrimination claim brought against an automotive manufacturer under Section 1981, a district court applied this same Title VII standard. In *Frost v. Chrysler Motors Corp.*, the plaintiff, a White dealer applicant, alleged that his application was rejected in favor of a Black dealer applicant for one of Chrysler's "MIP" Marketing Investment Program dealerships.[108] Chrysler's MIP dealerships were capitalized in whole or in part by Chrysler itself and were designed "to enable it to place dealerships in those areas in which it has found no private investors with sufficient capital to open a dealership."[109] Chrysler used the MIP dealerships in connection with its Minority Dealer Development Program, under which Chrysler gave the Chrysler Black Dealers Association rights of first refusal for certain MIP dealerships to be held for Black dealers.[110] Due to this program, the majority of Chrysler's MIP dealerships were operated by Black dealers. With regard to the specific allegations in the *Frost* case, the relevant MIP dealership had been operated by a Black dealer for years prior to a vacancy, and Chrysler rejected the White plaintiff-applicant in favor of waiting six months for a Black applicant to be awarded the franchise after completing Chrysler's Minority Dealer Development Program.[111] The White plaintiff-applicant sued under Section 1981 and later moved for summary judgment on the grounds that Chrysler's policies and actions were impermissibly discriminatory on their face.

Not only did the district court grant the plaintiff's motion for summary judgment, it further invalidated the entire program for failure to conform to the *Johnson* and *Weber* requirements. The court first found that Chrysler had failed to show a manifest imbalance "among those persons who are otherwise qualified to own dealerships" for the relevant category.[112] Specifically, the court found that "Chrysler expects its dealers to be qualified by 'experience, aggressiveness and ability' or to be 'familiar with automotive retailing and ha[ve] a record of effective performance,' and to also have the necessary capital resources to purchase such a dealership" and that "Chrysler has produced no evidence from which the Court may compare the percentage of black persons possessing these qualifications with the percentage of dealerships owned by blacks."[113] While Chrysler

---

[107] *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

[108] 826 F. Supp. 1290 (W.D. Okla. 1993).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1296.

[113] *Id.*

proffered evidence "comparing the percentage of black-owned dealerships and the percentage of blacks in the general population," the court found that this did not justify the Black Dealers Association rights of first refusal in the MIP program because "blacks comprise approximately 55 percent of all MIP dealers in the Chrysler-owned dealerships," and thus Chrysler was impermissibly "attempting to remedy a conspicuous imbalance in one job category (privately capitalized dealership owners) by implementing an affirmative action plan in another (MIP dealers)."[114]

The court went on to find that Chrysler's program impermissibly acted to "maintain," rather than "attain," a balanced work force in the relevant franchise category.[115] While the court noted that Chrysler's affirmative action programs were undoubtedly "*intended* to correct an imbalance in black-owned dealerships," it held that the true question was confined to the balance of the MIP dealerships themselves, because "the right of first refusal applies only to the MIP dealerships" and because "the MIP dealerships are very different from and more attractive than the privately owned dealerships."[116] Thus, because "[f]ifty-five percent of Chrysler's MIP dealers are black, as opposed to approximately twelve percent of the general population . . . even the most carefully drafted affirmative action plan to increase the number of black MIP dealers would not further the permissible goal of achieving a balanced work force" because "the right of first refusal clearly operates to maintain rather than achieve a percentage of black MIP dealers which far exceeds the percentage of blacks in the general population."[117]

Finally, the court found that "the harsh impact of the right of first refusal" on nonminority applicants was not mitigated by Chrysler's argument that "white applicants have the option of pursuing a privately capitalized dealership," because "the privately capitalized dealerships are not reasonably comparable to, and are less attractive than the MIP dealerships" and because Chrysler's made "no attempt to show that private capitalization is a realistic option for most qualified white candidates."[118] As such, the court found "that the 'legitimate and firmly rooted expectations' of qualified dealer candidates," including the plaintiff in the case, "are unsettled by Chrysler's affirmative action plan."[119]

The continued validity of Section 1981 to "reverse discrimination" in the franchising context was recognized within the past decade in *S. Motors Chevrolet, Inc. v. Gen. Motors, LLC*,[120] where the court denied a franchisor's motion to dismiss a White dealer

---

[114] *Id.* at 1296-97.

[115] *Id.*

[116] *Id.* (emphasis in original).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] No. CV414-152, 2014 WL 5644089, at *1 (S.D. Ga. Nov. 4, 2014).

applicant's Section 1981 lawsuit alleging that General Motors prevented its purchase of a dealership in preference for a minority-owned business, noting that "Dealership minority preference plans can violate federal discrimination law" and that the plaintiff alleged facts showing such a preference in GM's affirmative action plan.[121] The court sympathized with the franchisor, pointing out that "manufacturers like GM can easily find themselves damned if they do, and damned if they don't dispense dealerships along legally gauzy color lines" but noted that "this is a burden for Congress, not the courts, to address."[122]

To be sure, cases involving reverse discrimination in the franchise context have been rare and largely confined to auto dealership disputes, and the court's reasoning in *Frost v. Chrysler Motors Corp* has not been widely cited. On the other hand, the *Johnson* and *Weber* analysis continues to be one that franchisors must consider in building and evaluating their own programs intended to achieve diversity.

## V. Practical Considerations

### A. Diversity in Franchise Systems Overall Is On the Rise

What is clear from the previous sections is that there is a renewed focus on diversity in franchise systems in light of the current social and political climate. However, diversity initiatives in franchising are not new.

In 2012, the IFA engaged PricewaterhouseCoopers to review Census Bureau data to determine the prevalence of minority ownership in franchised businesses. The results showed an increase in the rate of franchise ownership by minorities. Also, minorities were more likely to own franchised businesses as opposed to non-franchised business. Other results include:

- Since 2007, there has been a 50% increase in minority ownership in franchised businesses;
- Nearly one-third of franchises are owned by minorities, compared to 18.8% of non-franchised businesses;
- Asians own 11.8% of all franchises compared to 6.3% of non-franchised businesses;
- Hispanics own 10.4 percent of all franchised businesses compared to 7.2 percent of non-franchised businesses;
- Blacks own 8% of all franchised businesses compared to 4.7% of non-franchised businesses; and

[121] *Id.*

[122] *Id.*

- Between 2007 and 2012, female ownership among franchisees increased by nearly 50%.[123]

Assuming that the trends revealed by this study have continued through 2021, there are encouraging signs that diversity within the franchise community is on the rise.

### B. Affirmative Action Plans vs. Diversity Initiatives

The data in the prior section, while encouraging, does not mean that the franchise community's work with respect to diversity is done. Far from it. Although there are many ways to increase diversity, two of the more common options for franchisors are the implementation of affirmative action plans and diversity initiatives.

As discussed above, affirmative action plans are susceptible to court challenges unless they are thoughtfully planned and executed and supported by reliable data. At minimum, an affirmative action plan must stand up to scrutiny on these three issues: (i) is the plan justified by a manifest imbalance in a traditionally segregated job category; (ii) is the plan designed to attain, rather than maintain, diversity; and (iii) does the plan avoid unnecessarily trammeling the interests of white franchisees?

To answer the first question, franchisors should gather data—specifically, by conducting a statistical analysis—to establish that such a manifest imbalance exists. A general rule of thumb is that underrepresentation at or a near the level of two standard deviations is required. In reaching this result, however, franchisors should consider carefully how they define the "job category"; too narrow of a view may result in data that does not support the plan.

To answer the second and third questions, franchisors should ask the following:

- Do the objectives either create an absolute bar for the advancement of white people who desire to become franchisees or require the replacement of white franchisees with minorities?

- Do the objectives set aside any specific positions for minorities?

- Is race merely a "plus factor" in considering the transfer of the franchise?

- How long is the plan to be in effect? Are the objectives a temporary measure in order to attain (rather than maintain) a balanced number of minority-owned franchises?

---

[123] Earsa Jackson, *Diversity on the Rise*, IFA Foundation (June 12, 2008), https://www.franchise.org/franchise-information/diversity/diversity-on-the-rise; *Franchised Business Ownership by Minority and Gender Groups*, IFA FOUNDATION, https://www.franchisefoundation.org/franchise-business-ownership-minority-and-gender-groups-2018 (last visited April 27, 2021).

- Would the objectives, if applied, undermine legitimate, firmly rooted expectations by white applicants that they would be approved as franchisees?[124]

### C. Considerations for Franchisors Seeking to Investigate Diversity and Inclusion Practices Within Their System and to Educate

An alternative to formal affirmative action plans are diversity initiatives or programs. The authors of a 2006 paper for the ABA's Forum on Franchising suggested that franchisors ask themselves the following questions when assessing which program would best suit their system:

1. What is the franchisor's perception and/or public image in diverse communities?

2. Is the franchisor a franchisor of choice? For whom?

3. What are the demographics of the franchisor's current customers?

4. What are the demographics of the franchisor's current franchisees? Why?

5. Who is the franchisor recruiting and hiring? How does the franchisor decide whom to target?

6. To whom does the franchisor market and sell its goods and services? Who does the franchisor's marketing and selling?

7. Is diversity reflected in the franchisor's advertisements?

8. What communities benefit from the franchisor's philanthropy and charitable work? How does the franchisor decide whom to target?

9. What training and opportunities does the franchisor provide and to whom?

10. Who is leaving the franchise system? Who is staying?[125]

Compiling and analyzing the answers to these questions can be an important first step in driving change within a franchise system. The below addresses a few in further detail.

#### 1. Diversity Within the Corporate Franchisor

[124] McMillian & Baker, supra note 18, at 7.

[125] Kathryn M. Kotel et al., Oct. 2006, 'Embracing Diversity in Franchise Systems – and Managing Associated Legal Risks', paper presented at ABA 29th Annual Forum on Franchising, at 11–12.

Often, change must start within the franchisor organization itself. A common refrain is that franchisors must "practice what they preach" by "be[ing] as diverse as the people they want to attract."[126]

Recently, many corporate CEOs, including those of franchisors, have publicly embraced a greater commitment to diversity and inclusion. One such example is through the initiative Action for Diversity & Inclusion.[127] This initiative's stated goal is to take measurable action to advance diversity and inclusion in the workplace through pledges and action. CEOs who sign the pledge on behalf of their companies agree to:

1. Continue to make workplaces trusting places to have complex, and sometimes difficult conversations about diversity and inclusion;

2. Implement and expand unconscious bias education;

3. Share both best and unsuccessful practices; and

4. Create and share strategic inclusion and diversity plans with their boards of directors.[128]

Participating companies then list the various actions each is taking with the hope of sharing those results with other organizations. Such collaboration, the initiative hopes, will help achieve diversity and inclusion actions faster than any company could achieve on its own.[129]

### 2. Diversity Among Franchisees

Increasing diversity within the franchise system requires a commitment to two related goals: increasing diversity among customers and increasing diversity among franchisees. With respect to the first goal, it is no secret that the franchising business model largely began in the suburbs—franchisors selling units to be located in strip malls, shopping centers, and retail plazas.[130] By re-examining how franchisors can modify their franchise offering to better work in different areas, such as inner-cities, franchisors can broaden their customer base and potential pool of minority applicants. Taco Bell, for

---

[126] Nick Powills, *Why Diversity in Franchising Matters*, 1851 Franchise, https://1851franchise.com/why-diversity-in-franchising-matters-3357#stories.

[127] CEO Act!on For Diversity & Inclusion, https://www.ceoaction.com/about/ (last visited April 22, 2021).

[128] CEO Act!on For Diversity & Inclusion, *CEO Pledge*, https://www.ceoaction.com/pledge/ceo-pledge/ (last visited April 22, 2021).

[129] CEO Act!on For Diversity & Inclusion, *Actions*, https://www.ceoaction.com/actions/ (last visited April 22, 2021).

[130] Zackary K. Iacovino & Michael R. Daigle, *Legal Considerations for Franchisors Expanding into Inner-City Markets*, 38 Franchise L.J. 513, 513 (2019).

example, recently created a new "Cantina" concept, which serves alcohol and tapas-style dishes.[131] Further, with respect to appearance, each Cantina location is specifically designed to reflect the local community.[132] In connection with broadening the brand's consumer base, franchisors also should consider making additional operational exceptions for those locations to increase the likelihood that they succeed in new markets. For example, franchisors could give these locations more freedom with respect to menu pricing. Franchisors also could revise local marketing and advertising to account for language and cultural differences in new markets.

The second goal is to increase diversity among the system's franchisees. To do that, franchisors must develop ways to overcome some of the common obstacles preventing minority franchisees from franchising in the first place. These obstacles have been characterized as "gaps" and three are discussed below.[133]

### *a. Overcoming the information gap.*

The first gap relates to information. Some minority communities simply are not informed about franchising and its opportunities.[134] Numerous organizations exist to assist franchisors with educating groups unfamiliar with the model. For example, DiversityFran (formerly MinorityFran) is a franchise education and research foundation program that, among other things, helps educate minority communities about franchising opportunities.[135] Its Diversity Institute houses various diversity and inclusion programs designed to educate, research, provide scholarship, and liaise with other national organizations. This last point can be particularly important. The IFA, for example, works with leading organizations like the National Urban League, Minority Business Development Agency, U.S. Hispanic Chamber of Commerce, National Bar Association, the NAACP, Associations of Small Business Development Centers, U.S. Conference of Mayors, and various ethnic Chambers of Commerce Across the country.[136]

Recently, Dunkin' Brands teamed up with the NAACP to increase the number of Black-owned franchisees in the U.S. by offering franchising education, training, contacts, and resources to increase diversity in its system.[137] In connection with this collaboration,

---

[131] *Id.* at 518

[132] *Id.*

[133] Powills, *supra*, note 126.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Earsa Jackson, *Why Diversity Can Bring You Success*, Global Franchise (June 13, 2018), https://www.globalfranchisemagazine.com/advice/why-diversity-can-bring-you-success.

the NAACP shared information about franchising at state conventions and hosted free Franchising 101 webinars. Dunkin' and the NAACP also engaged in an hour long discussion for a Twitter audience in an innovation known as a "Twitter Talk."[138]

There are myriad ways to become involved with these organizations to increase awareness about the benefits of the franchise business model within communities unfamiliar with franchising.

### *b. Overcoming the relationship gap.*

The second gap, related to the first, involves minority communities having fewer relationships within the franchising community. All successful businesses are built on good relationships.[139] It is incumbent upon franchisors seeking to expand their franchisee base to take steps to create those relationships. That starts with ensuring that the makeup of the franchisor's own organization reflects the communities with whom it seeks to franchise. If prospects are unable to relate to or connect with anyone within the franchisor organization, let alone the franchise sales team, they are not likely to pursue the opportunity further.

The flipside to this point, however, reveals tremendous upside. By investing the resources to create new relationships and partner with successful franchisees in minority communities, franchisors create even greater opportunities to connect with other members of that community in the future. Moreover, most franchise systems eventually pluck from their franchisee ranks candidates for corporate positions with the franchisor in sales, operations, development, and even the executive team. By increasing the diversity of their franchisees, franchisors increase the pool of qualified minority candidates for corporate positions.

### *c. Overcoming the capital gap.*

The third gap, potentially the most critical one, relates to capital. Some minority business owners are asset-poor and, for that reason, may not consider starting their own franchise in the first place.[140] As one commentator explains, "Unfortunately metrics confirm that the lack of access to capital is the greatest barrier to entry facing minority franchisees . . . . This ultimately means that *finding* the right local franchisee also requires *funding* the right local franchisee."[141]

---

[138] *Id.*

[139] Tina Hovsepian, *Business And People: Why Relationships Are Essential For A Successful Business*, Forbes (July 20, 2018), https://www.forbes.com/sites/forbeslacouncil/2018/07/20/business-and-people-why-relationships-are-essential-for-a-successful-business/?sh=1fbe7b2474f2.

[140] Powills, *supra* note 126.

[141] Niko Papoutsis, *Franchising The Inner-Cities: Leveraging Diversity & Legal Creativity To Incite Urban Development*, Geo. J. on Poverty L. & Pol'y (January 21, 2020), https://www.law.georgetown.edu/poverty-journal/blog/franchising-the-inner-cities-leveraging-diversity-legal-creativity-to-incite-urban-development/.

In recent years, franchise brands have tried to overcome the capital gap in several ways. Several brands have implemented diversity initiative programs that waive or reduce franchise fees, discount the total startup investment, and reduce royalties for minority applicants.[142] For example, Papa John's utilized its "Enterprise Zone Program" to waive both the initial franchise fees and all royalties during the first year of business for minority franchisees developing stores in highly urban markets.[143] In 2017, 7-Eleven held a contest to give away a free franchise to a female entrepreneur. After receiving hundreds of applications, it ultimately awarded three free franchises.[144] Others have dealt with high startup costs by implementing "Manage-to-Own" structures.[145] For example, Little Caesar's has offered one such program, providing upwards of $500,000 in startup investment to cover all expenses required to develop participants franchisees' stores. Participants received a salary, a percentage of profits, and the opportunity to gain full ownership of the restaurant over time.[146]

These are just a few of the creative ways that franchisors have sought to overcome the lack of initial capital that may prevent certain minority groups from becoming franchisees. This area, in particular, remains open for innovation.

## VI. Conclusion

For many reasons, 2020 was a year that the world will not soon forget. The scale and duration of the nationwide protests in the wake of George Floyd's death forced corporate America to examine the systemic racism and discrimination that has marginalized minority groups in this country for centuries. As if the social and political climate were not enough, high profile lawsuits involving claims of discrimination against iconic brands further emphasized the need to address diversity and inclusion issues within every organization, including franchise systems. The solutions to longstanding issues, like increasing diversity and inclusion, may be complex, but the first steps are simple. Franchisors must investigate their own organizations and systems and then devote the resources to increasing diversity within each. The good news is that data suggests that diversity within franchise systems is increasing. And with continued commitment from franchisors and their franchisee partners those trends hopefully will continue.

---

[142] McMillian & Baker, supra note 18, at 72 ("To reduce the financial barriers numerous franchisors offer reduced franchise fees for women and minority applicants and reduce royalty payments during the start-up period. Others simply waive the franchise fee.").

[143] Papoutsis, *supra* note 141.

[144] Jackson, *supra* note 137.

[145] Papoutsis, *supra* note 141.

[146] *Id.*