any franchisors desire a diverse franchise body. In recent years, corporations, encouraged by the Equal Employment Opportunity Commission (EEOC), have established company-wide diversity programs. Franchisors have followed this trend, and many have set diversity goals for their franchisee networks, creating programs and incentives to attract and retain women and minority franchisees.1 As noted by the Supreme Court, “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”2 Broadening the population of potential franchisees ensures that franchisors are recruiting the best franchisee candidates possible. Also, franchisors may believe that it is in their business interest to have diverse franchisees that reflect their customer base.

But a franchisor’s efforts to promote diversity within its franchise network can create a sort of legal Catch-22. On the one hand, a franchisor that fails to secure a diverse network is vulnerable to claims of discrimination by franchisees and franchisee applicants from historically underrepresented groups. These franchisees and franchisee applicants may believe that the franchisor is selectively enforcing policies to their detriment as evidenced by the lack of minority and female representation within the franchise network. On the other hand, a franchisor may offer a program or incentive designed to promote underrepresented groups as a component of its diversity plan, thereby finding itself defending against claims of reverse discrimination if the program is not available to all franchisees. This article describes the legal framework that governs that Catch-22.

This article initially provides an overview of diversity in franchising, including how women and minorities are represented within franchise networks and the types of diversity programs that franchisors may have in place to attract and retain franchisees from underrepresented backgrounds. It next describes the legal framework under which a plaintiff franchisee or franchisee applicant may sue for race discrimination under 42 U.S.C. § 1981 and the pitfalls in litigating such claims. The article also discusses legal and practical considerations for implementing and defending a diversity program. These claims have generally been asserted as reverse discrimination claims under § 1981. Finally, the article describes discrimination claims that may arise under state franchise practice act and common law theories of breach of contract, implied contractual duties, and the tort of interference with business opportunities.

I. Diversity in Franchising

In 2006, over 300,000 franchised businesses operated in the United States.3 In a report by PricewaterhouseCoopers for the International Franchise Association Educational Foundation in 2002, Asian-Pacific Americans comprised 8.9 percent of franchise owners; Hispanics, 5.8 percent; and African Americans, 4.4 percent.4 Women solely owned 25 percent of franchises and had equal ownership in an additional 17.1 percent.5 Although earlier statistics are not as readily available, it has been reported that in 1992, African Americans owned 0.7 percent to 8.2 percent of four fast-food franchises in the United States and 2.4 percent of automobile dealerships.6 A survey of 371 franchisors reported that Asian Pacific Americans owned 5.4 percent of franchises; African Americans, 2.6 percent; and Hispanics, 2.2 percent, with women solely owning 9.6 percent.7 By way of comparison, in 2002, women comprised 51 percent of the general population. African Americans made up 12 percent of the population, Asian-Pacific Americans comprised 8.9 percent, and Hispanics were at 8.2 percent.8 It seems that women, African Americans, and Hispanics remain underrepresented within franchise networks, and although Asian Pacific Americans have adequate representation within franchises generally, their numbers may be concentrated within certain industries.9

A franchisor seeking to promote diversity must recognize the causes of underrepresentation. In addition to historic discrimination, women and minorities are underrepresented in franchise distribution networks for two persistent reasons. First and most obvious, these groups continue to suffer historic economic disadvantage and therefore tend to have less access to start-up and working capital.10 Second, these groups generally lack the social and business connections and other resources that would lead to franchising opportunities. Franchising is not necessarily a business model that is on the radar of these underrepresented groups.11 And once women or minorities become franchisees, they face the lack of franchise-related education, experience,
and mentoring necessary to ensure their success. Without these resources, a would-be franchisee is disadvantaged in its ability to start up and maintain a successful franchise.

To reduce financial barriers, numerous franchisors offer reduced franchise fees for women and minority applicants and reduced royalty payments during the start-up period. Others simply waive the franchise fee. Similarly, some franchisors offer price discounts on products purchased by franchisees from underrepresented groups. Diversity initiatives often include franchisee loan assistance by giving direct loans to the franchisee or arranging for such assistance through a third-party lender, providing for loan forgiveness, or offering a guarantee on bank loans obtained by the franchisee. In some diversity programs, the franchisor actually owns the franchise but appoints a minority operator. In these franchisor-owned stores, the franchisor provides the up-front capital investment, and the operator gradually buys out the franchisor’s interest through a stock purchase plan.

Franchisors also employ a number of creative programs and incentives designed to provide underrepresented groups with access, education, and mentoring. Perhaps the most straightforward means of promoting diversity is through recruitment. Franchisors provide seminars in underrepresented communities and participate in minority job fairs and business events. Additionally, many franchisors offer scholarships and in-house education and training designed to prepare women and minorities to operate franchises. Others provide management companies or consultants, loan an experienced employee to manage the franchise for a period of time, or provide management software as an ongoing means of providing experienced support. Further, franchisors assign mentors, create affinity groups, or partner with minority franchise associations to promote networking and enhanced access to experience and information. These affinity groups also allow minority franchisees to share best practices in operating franchises, thereby improving retention and success rates.

II. Discrimination Claims Under §1981

Despite increased awareness of diversity issues, programs, and incentives to improve participation by women and minorities in franchise networks, discrimination claims persist. Franchise discrimination claims most commonly follow one of three franchisor actions: termination or nonrenewal of the franchise contract, rejection of an applicant for a franchise, or disapproval of a relocation request. In sum, whenever a franchisee or franchisee applicant feels that because of the franchisee’s minority status the franchisor is selectively enforcing or applying a policy that leads to a sanction or penalty such as termination or rejection of an application, a discrimination claim may follow.

The franchisor-franchisee relationship is not an employment relationship governed by Title VII and other employment discrimination statutes. Instead, in the franchise context, many claims of discrimination and reverse discrimination arise in the context of 42 U.S.C. § 1981 or similar state statutes. Section 1981 prohibits discrimination on the basis of race in the making, performing, and modifying of contracts, including franchise contracts. Section 1981 has been construed to prohibit only race discrimination, not claims of discrimination based on national origin, gender, age, religion, or disabilities. However, courts have recognized the claims of reverse discrimination by white franchisees. These claims of reverse discrimination generally arise in the context of franchisors attempting to increase minority representation within their franchise networks through affirmative action components of their diversity programs.

This section outlines the elements that need to be proven to support a §1981 claim and discusses recent or exemplary cases brought by franchisees or franchisee applicants. Second, this section addresses issues that may arise in the franchise context: (1) whether a franchisee corporation has standing to sue under §1981 and (2) at what point in the application process a §1981 claim could arise. Third, this section identifies legal challenges to affirmative action components of diversity plans and discusses how to avoid them.

A. Burden of Proof in §1981 Claims

Smoking gun evidence of discrimination is rare. Instead, the norm is that these types of race discrimination claims are based on a combination of direct and circumstantial evidence. Courts decide many claims on summary judgment and, in so doing, use the familiar McDonnell-Douglas burden-shifting framework or a slightly modified version. That is, the claimant must carry the initial burden of establishing a prima facie case of discrimination by showing that it was treated less favorably than others because of race, that it submitted an application that met the requirements for an available contract, that the application was ultimately rejected, and that the contract was eventually awarded to an individual who is of a different race than the claimant.

Once the claimant establishes a prima facie case, the burden of production shifts to the defendant, as the entity accused of discriminating, to articulate some legitimate nondiscriminatory reason for the complainant’s rejection. If the defendant does so, the claimant must show that race was a determinative factor in the defendant’s decision or that the defendant’s explanation was merely pretextual.

The claimant establishes a prima facie case of discrimination by showing that he is a member of a protected class, he was qualified for the contract, he suffered an adverse decision in connection with a franchise contract, and he was replaced by a person outside the protected class or treated differently than similarly situated nonprotected franchisees. A franchisee claiming reverse discrimination must demonstrate that he was “‘intentionally discriminated against despite his majority status.’”

B. The Prima Facie Case

Franchisees asserting §1981 claims sometimes fail to even establish a prima facie case for discrimination because of the difficulty of producing evidence regarding how franchisors have treated other franchisees and that these other franchisees are similarly situated. For example, in *International House of Pancakes v. Albarghouthi*, after issuing a notice of default and termination, IHOP sued its franchisee, alleging that he had sold his interest in the franchise without IHOP’s consent, that he had breached various franchise agreements, and that he violated
certain trademark and competition laws by his unauthorized use of IHOP trademarks.\(^{35}\) The franchisee counterclaimed, alleging, among other things, racial discrimination based on the franchisee’s Arab American origin.

On the parties' motions for summary judgment, the court found that the franchisee “failed to come forward with sufficient evidence to establish a prima facie case of discrimination under 42 U.S.C. § 1981.”\(^{36}\) First, the court rejected the franchisee’s evidence that he was treated differently than another white franchisee, finding that the circumstances relating to the white franchisee’s sale of his franchise were dissimilar.\(^{37}\) In addition, the court noted that even if the situations had been similar, it would still be unable to draw any inference that IHOP discriminates against Arab Americans simply because of one incident in which a white franchisee was treated differently from an Arab American one, particularly in the absence of any evidence suggesting that ethnicity, as opposed to any one of a variety of neutral factors, was the deciding factor.\(^{38}\)

Second, the franchisee tried to support his claim with a log listing franchisees subject to default notices, which purportedly contained a disproportionate number of Arab American names. The court again rejected the evidence, questioning whether the ethnicities of franchisees could be determined from their names and calling the comparison “inapt and statistically-invalid.”\(^{39}\)

Likewise, in *Pointer v. Building Stars Advantage*, the court found that plaintiff, an African American man, failed to establish a prima facie case of discrimination when he was denied a franchise because there was no evidence that his application was denied because of his race.\(^{40}\) Plaintiff submitted two applications for a franchise with the franchisor, but those applications showed a number of gaps in his employment history. Based on those gaps and “what was perceived as disinterest and a ‘somewhat combative attitude in his communications,’” the franchisor denied the franchise applications.\(^{41}\) 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.\(^{42}\) The court noted that “[n]owhere in any of the pleadings before the Court has it been established that race played any part in the denial of the franchise to plaintiff.”\(^{43}\) The court therefore concluded that plaintiff had not made out a prima facie case for racial discrimination and granted the franchisor’s motion for summary judgment.

### C. Legitimate Nondiscriminatory Reason or Pretext?

When the plaintiff franchisee is able to establish a prima facie case for discrimination, courts have grappled with whether the defendant franchisor has come forward with a legitimate, nondiscriminatory reason for the rejection and whether the reason was merely pretextual. Evidence of pretext once again focuses on how the franchisor treated similarly situated franchisees, and a significant issue is whether the other franchisees are sufficiently similar.

Recently, in *Elkhatib v. Dunkin’ Donuts, Inc.*, the Seventh Circuit reversed a grant of summary judgment for Dunkin’ Donuts and held that an Arab American franchisee could go forward with his claim for race discrimination.\(^{44}\) The franchisee sued Dunkin’ Donuts for discrimination based on its refusal to permit him to relocate to a more desirable location or renew his agreements.\(^{45}\) For eighteen years, the franchisee had not sold breakfast sandwiches containing pork at either of his Dunkin’ Donuts stores; he contended that members of the Arab race could not handle pork products by tradition and custom.\(^{46}\) But when the franchisee sought to relocate to a more advantageous location, Dunkin’ Donuts withheld its approval based on the franchisee’s refusal to carry the “full breakfast sandwich product line” and stated that Dunkin’ Donuts would not renew either of the franchisee’s franchise agreements.\(^{47}\) The district court granted the franchisor’s motion for summary judgment, construing the claim to be one of religious, rather than racial, discrimination and not covered by § 1981.\(^{48}\)

The Seventh Circuit reversed, finding that the provision in the franchise agreement requiring franchisees to carry the full product line was applied in a discriminatory manner and that an issue of fact remained as to whether Dunkin’ Donuts’ reasons for not renewing the franchise agreements and denying the relocation were pretextual.\(^{49}\) Evidence was presented that three other franchisees in the Chicago area, none of which was owned by an Arab, did not sell the sandwiches for various other reasons. Rejecting Dunkin’ Donuts’ argument that the reasons why these other franchisees would not sell breakfast sandwiches were not substantially similar to plaintiff’s circumstances, the court explained that “[t]he 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.”\(^{50}\) In addition, the court found it persuasive that carrying the full line of breakfast sandwiches seemed not to be important to Dunkin’ Donuts. For at least two of the similarly situated franchisees, Dunkin’ Donuts could have resolved the issue and required the franchisees to carry pork products.\(^{51}\) Furthermore, breakfast sandwiches only accounted for 4 percent of sales in Dunkin’ Donuts stores.\(^{52}\)

Similarly, in *Fair v. Prime Security Distributors, Inc.*,\(^{53}\) the Sixth Circuit reversed the district court’s grant of summary judgment to defendants, finding evidence of pretext. There, the dealer corporation and co-owner of the dealership sued when the franchisor refused to renew its dealer contract on the grounds that the dealer had poor sales and an inadequate business plan. The Sixth Circuit, in holding that there was sufficient evidence of pretext, considered evidence that the dealer’s sales performance was within the top ten in the region and had been recognized for its customer service.\(^{54}\)

In other cases, courts have considered close-to-direct evidence of discrimination, including racially offensive statements and redlining, as sufficient to create a dispute of material fact. Redlining is the practice of directing or limiting minority franchisees to certain customers or geographic areas, generally those that are poor or urban, solely because of their race.\(^{55}\) For example, in *Home Repair, Inc. v. Paul W. Davis Systems, Inc.*,\(^{56}\) plaintiff was a franchisee corporation owned solely by an
African American and was already a Paul Davis franchisee. The franchisor rejected a proposed sale of the largest franchise in its system to plaintiff on the grounds that the sale documents would have permitted the seller to compete in the territory despite a noncompete clause with Paul Davis. Plaintiff tendered direct and circumstantial evidence of discrimination. The direct evidence consisted of racially offensive statements by Paul Davis managers and employees, which Paul Davis denied. Because the incidents presented occurred well before the decision to reject the sale was made, the court found that plaintiff failed to establish a nexus between the offensive conduct and the rejection of the sale. However, the court found that the racially offensive statements, along with evidence that Paul Davis encouraged plaintiff to accept territories with large African American populations, created a “cumulative picture of discrimination” that was sufficient to overcome summary judgment.

D. Sufficient Evidence of Discrimination?

If the franchisee is able to withstand summary judgment and the case goes to trial, the McDonnell-Douglas framework falls by the wayside, and the issue simply becomes whether plaintiff has carried its burden of persuasion through a combination of a prima facie case of racial discrimination and “sufficient evidence to find that the employer’s asserted justification is false.” A number of franchisees have been successful. In Tyler v. RE/MAX Mountain States, Inc., an African American real estate agent and broker applied for a RE/MAX franchise but was rejected. At trial, the jury found for plaintiff, apparently finding that the franchisor’s reasons for not approving plaintiff—his lack of financial resources, staff, and real estate sales—were pretextual. The Tenth Circuit, reviewing the sufficiency of the evidence, affirmed the denial of the franchisor’s motion for judgment as a matter of law. Although the court agreed that “as a general rule, an employee must proffer evidence that shows each of the employer’s justifications are pretextual,” the court recognized that “when the plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.” The Sixth Circuit reviewed each of the five proffered reasons for denying the franchise application, finding evidence upon which the jury could have reasonably inferred that they were pretextual.

Similarly, in Harper v. BP Exploration & Oil Co., the franchisee was an African American lessor of BP gas stations. He sought two additional stations in high-volume areas, but these stations were offered to a white applicant who did not have previous experience in the petroleum industry. Later, as a result of restructuring by BP, BP declined to renew the franchisee’s lease. At a stipulated bench trial on liability, the district court found that BP’s proffered reason for not granting the additional franchises, i.e., that the franchisee was not a “quality dealer” as defined by BP’s own guidelines, was belied by evidence that the franchisee’s contract was renewed several times over the course of thirteen years, and BP’s practice was to terminate non–quality dealers in its system, which BP had not done. Although acknowledging that § 1981 only prohibits intentional discrimination and does not allow recovery based on a disparate impact theory, the trial court elected to consider disparate impact evidence to determine whether discrimination was a motivating factor. This evidence included the racial composition of BP’s franchise network. The court also considered BP’s failure to hire more minorities, BP’s policy of excluding African American dealers from stations located in white neighborhoods, and the lack of a minority recruitment policy.

On appeal, the Sixth Circuit found that the franchisee’s § 1981 claim as to one of the stations he did not receive was time-barred and reduced the compensatory damages award by $97,888, the lost profits associated with the time-barred claim. In so holding, the Sixth Circuit rejected BP’s argument that the franchisee mitigated damages by operating a station and convenience store during the time frame that the franchisee contended it would have operated the additional station. The Sixth Circuit also upheld the trial court’s award of punitive damages against BP, based in part on the three years that the franchisee had been subjected to discrimination and in part on a prior punitive damages award against BP for racial discrimination. The Sixth Circuit also rejected BP’s contention that the district court improperly considered evidence of disparate impact, holding that because the district court had already found that BP had discriminated against plaintiff, the consideration of the disparate impact evidence was harmless error.

In other cases, however, although factual issues sufficient to withstand summary judgment may exist concerning a franchisor’s reasons for its actions, some franchisors have been able to prevail at trial by showing that the rejection of the franchisee applicant was because of legitimate, nondiscriminatory reasons such as the franchisee’s lack of capital or failure to pay fees. In Smith v. Molly Maid, Inc., plaintiff, an African American woman, sought a Molly Maid franchise. After working with plaintiff over an eighteen-month period, including assisting her with the development of a business plan and reducing the territory she would have to cover (thereby reducing the fees), Molly Maid eventually decided not to offer her a franchise because of its concerns over her financial situation, lack of capital, and failure to pay required fees. The company made clear, however, that it would be willing to restart the franchise application process if plaintiff could obtain sufficient financing. After plaintiff’s application was rejected, the company awarded a franchise for the territory she had selected to a white male.

After a bench trial, the magistrate judge found that the
franchisor “did not intentionally discriminate against Plaintiff based on her race.” The court noted that plaintiff had not received certain information because she had not paid her fees; that Molly Maid employees had worked extensively with plaintiff to help her prepare a business plan; that Molly Maid required plaintiff to have a larger territory than plaintiff wanted for business, rather than discriminatory, reasons; and that the decision to terminate the relationship with plaintiff was made for financial reasons.79 Molly Maid’s record of assisting plaintiff in her application process and demonstrated willingness in writing to reconsider another application from her once the applicant was able to procure sufficient financing carried the day.

E. Other Issues Under § 1981
In litigating § 1981 claims, some legal issues in addition to meeting the burden of proof outlined above sometimes arise in franchisor-franchisee litigation. These issues are (1) whether a franchisee corporation has standing to assert § 1981 claims and (2) the point in time when a § 1981 claim arises for would-be franchisees.

I. Standing
Section 1981 provides that all “persons” within the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens.76 On its face, § 1981 would appear to only give standing to natural persons to sue, and the U.S. Supreme Court has noted in dicta that corporations cannot have a racial identity.77 However, this dictum has not proved to be binding. Courts have generally held that in certain circumstances, corporations, including franchisee corporations, can acquire a racial identity for purposes of suing under § 1981.

Many courts conclude that corporations that are predominately owned, if not solely-owned, by individuals of a particular race can assert claims of racial discrimination under § 1981.78 These courts reason that particularly for small, closely held corporations, the race of the majority owner or officer may be imputed to the corporation. For instance, in Calderon v. Southwestern Bell Mobile Systems LLC, the court permitted the franchisee corporation, whose president, owner, and majority stockholder was Hispanic, to sue under § 1981 when all of the alleged acts of discrimination related to the franchisee corporation’s business operations.79 These allegations included the failure to uphold contractual obligations to minority franchisees, refusal to enter into contracts with minority franchisees, and refusal to rent or sell certain cellular telephones to minority franchisees.80 The court further held that the individual owner of the franchisee corporation did not have standing to sue because the alleged discrimination was directed at the franchisee corporation rather than the individual.81

Other courts, however, have focused on the alleged injury and have permitted corporations to sue even if they are owned by nonminorities. For example, in John & Vincent Arduini Inc. v. NYNEX, a cleaning service employed numerous individuals of Hispanic descent but was owned and operated by two Caucasians. The alleged discriminatory conduct arose as a reaction to the corporation’s promotion of a Hispanic individual to a managerial position instead of defendant’s recommendation for a non-Hispanic candidate. The court reasoned that if plaintiff’s standing was denied based on its corporate status, it 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.”82 Thus, even if the corporation is owned by nonminorities, a corporation may be able to sue if it is discriminated against because of the race of someone associated with the corporation, whether it be a shareholder, officer, or employee.83

II. Diversity Initiatives and Reverse Discrimination
Potential franchisees sometimes face the issue of whether they have progressed far enough along in the application process to fall under the making of contracts definition of § 1981. Some courts have held that an actual application must be submitted in order to establish a prima facie case of discrimination and that being told by the franchisor that the would-be applicant would not be qualified because of his race is not sufficient. For instance, in Conners v. Ford Motor Co., plaintiff, a white male, claimed reverse discrimination because he contacted Ford about participating in Ford’s Dealer Development Program but allegedly was told by a Ford employee that he could not participate because he was not African American, a statement that the employee subsequently denied.84 The court held that plaintiff had not made out a prima facie case of discrimination under § 1981 as he could not show he applied for and was qualified to enter into an available contractual relationship.85 Not only had plaintiff failed to submit the written application for the program and to follow up with the Ford employee’s supervisor to request an application, the court found that he would not have qualified because he did not have the required amount of available capital.86

In contrast, in Bidiwala v. CiCi Enterprises, Inc.,87 the franchisor moved to dismiss two of three plaintiffs in the action on the grounds that only one of the plaintiffs had applied to become a CiCi franchisee and thus would have standing to sue under § 1981. The court rejected CiCi’s argument, relying on allegations that made it appear that plaintiffs engaged in the application process together and that CiCi treated them as joint applicants.88 Bidiwala confirms that to establish a prima facie case, plaintiff must have submitted an application to become a franchisee, but the decision avoids an overly technical reading of who is an applicant based on the course of conduct between the parties.

III. Diversity Initiatives and Reverse Discrimination
In the face of potential discrimination claims as well as for compelling business reasons, franchisors have sought to diversify their franchise networks. Although diversity goals are laudable, courts have held that simply desiring a diverse workforce or franchise network that reflects the racial composition in the population is insufficient to justify the affirmative action component of a diversity program. Instead, these affirmative action plans must meet more rigorous standards set out by the Supreme Court, and these plans have been challenged, sometimes successfully.
The Supreme Court has set out the burden of proof in challenging an affirmative action plan in two cases: Johnson v. Transportation Agency and United Steelworkers v. Weber. The person challenging the plan must carry the burden of showing that the justification is pretextual and the plan is invalid. In considering the validity of an affirmative action plan by a private employer, the court considers two issues. First, the court evaluates whether consideration of race was justified by a “manifest imbalance” in a “traditionally segregated job category.” Second, the plan must not “unnecessarily trammel the interests of the white employees.”

### A. Manifest Imbalance

To prove a manifest imbalance in a traditionally segregated job category, a franchisor need not make the case that it has discriminated historically, thereby potentially supporting additional discrimination claims. As the Supreme Court has explained, a “manifest imbalance need not be such that it would support a prima facie case against the employer.” Evidence that a manifest imbalance existed either before or after the objectives were adopted is sufficient to satisfy this first prong of the analysis.

In Frost v. Chrysler Motors Corp., the court granted summary judgment for plaintiff, a white female dealer applicant, who asserted reverse discrimination claims under § 1981 and Title VII claims because Chrysler rejected her dealer application. Although the particular dealership at issue did not meet the transfer of certain larger-volume dealerships and to require the Black Dealers Association the contractual right to disapprove the transfer of certain larger-volume dealerships and to require that the dealership be transferred to an African American dealer. Although the particular dealership at issue did not meet the volume requirement, Chrysler agreed at the request of the Black Dealers Association to hold the dealership for an African American candidate.

The Frost court not only rejected Chrysler’s motion for summary judgment but granted summary judgment for plaintiff on liability, invalidating Chrysler’s affirmative action plan. On the first prong of the Weber analysis, the court held that Chrysler failed to show a manifest imbalance in a traditionally segregated job category because Chrysler failed to present evidence of the percentage of the African Americans in the population who were qualified to become Chrysler dealers. In so holding, the court apparently rejected Chrysler’s evidence of the percentage of African American–owned Chrysler dealerships compared to African Americans in the general population, finding that those statistics would only support a training program such as Chrysler’s Minority Dealer Development Program, which is designed to remedy the lack of training and experience for minority candidates. Instead, the court held that because Chrysler’s MIP was at issue, Chrysler should have produced evidence that “among those persons who are otherwise qualified to own dealerships, a racial imbalance exists with respect to financial resources, or the ability to obtain the necessary capital to acquire dealerships.”

In contrast, in Rabbani v. General Motors Corp., the district court rejected plaintiff’s challenge to General Motors’ Minority Dealer Development Program (MDDP). Plaintiff, an Iranian of Persian ancestry and descent, was rejected for the training program because it was open only to African Americans, Hispanics, Asians, and Native Americans. In its defense, General Motors offered an expert statistical analysis using officers and managers at new and used car dealerships as the relevant pool of qualified candidates. General Motors’ expert calculated the disparity between the expected and actual number of minority-owned General Motors dealerships between 1975 and 1997 and concluded that the disparity was more than two standard deviations and statistically significant.

Applying these principles, franchisors, before implementing any affirmative action program, need to consider whether to conduct a statistical analysis to determine if there is a manifest imbalance in the traditionally segregated job category, which for franchisors would be the population qualified to become franchisees. Again, proof of actual intentional discriminatory behavior is not required. The Supreme Court has held that a disparity greater than the absolute value of two or three standard deviations supports a prima facie case of discrimination. In the affirmative action context, lower courts have held that underrepresentation at or near the two standard deviation level is sufficient to show a manifest imbalance in the segregated job category.

Franchisors should consider carefully what the comparative population is or ought to be. In Frost, the court took a narrow approach to defining the job category in question, holding that Chrysler could not justify the rejection of a white applicant for a privately capitalized dealership by redesignating that dealership point as one subject to Chrysler’s minority dealer program. Instead, the court held that Chrysler had to justify its rejection of the nonminority private capital dealer candidate by looking solely at the qualified pool of private capital dealer applicants in the population, not those dealer applicants who could become qualified through Chrysler’s minority dealer training program. The court did not account for the fact that selected minority applicants, to the extent that they were successful, were able to eventually purchase Chrysler’s equity in the dealership and become private capital dealers.

Franchisors must also consider their franchisee populations and carefully determine what groups are underrepresented, understanding that not all minority groups need to be treated the same under the law. For example, in Rabbani, General Motors, after reviewing its dealer network, determined to only offer its minority dealer training program to four minority groups: African Americans, Hispanics, Asians, and Native Americans. This may have been because other minority groups had adequate representation within the dealer network, and therefore there would not be a manifest imbalance to justify their inclusion in the affirmative action plan.
B. Interests of Non-Minorities

Even if franchisors are satisfied that their affirmative action plan would pass the first prong of Johnson and Weber, franchisors must consider the next step in the analysis, i.e., whether the plan unnecessarily trammels the interests of non-minorities. Denial of the contract or property right cannot unsettle a “legitimate, firmly rooted expectation on the part of” the complainant. In addition, the plan must be a temporary measure, which is used to attain a balanced workforce, not to maintain one.

Some factors that franchisors and franchisees need to consider are as follows:

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

In summary, affirmative action plans must be limited in time and scope to pass muster. Race must not be the only qualifier in determining whether to reject or accept a franchisee candidate, and certain franchise locations cannot be set aside specifically for minority ownerships without any ability of nonminority candidates to qualify. The benefits provided to aid minority franchisees—whether it is waiver of franchise fees, loans, or mentoring—must be for the purpose of attaining a representative and diverse franchisee population as compared to the population of qualified candidates. The affirmative action plan must provide that once that goal is attained, the benefits provided to minorities are to cease.

IV. Discrimination Claims Under State Law

In addition to the protections offered by § 1981, franchisees (and, sometimes, disappointed franchise applicants) may have a remedy under state franchise relationship laws or at common law. This section first discusses state franchise relationship laws. Some state statutes expressly bar disparate treatment of franchisees in major actions such as terminations and ownership transfer, while others bar disparate treatment in day-to-day business dealings. Other states do not expressly bar discrimination among franchisees but prohibit “unfair” acts by the franchisor. This section then discusses some practical costs of litigating a claim of disparate treatment under state statute.

This section also addresses the common law as a vehicle for franchisee claims of discrimination. Common law tends to concern itself solely with the relationship between the parties to the action, and courts typically will not compare the franchisor’s treatment of other franchisees in order to determine whether a contract has been breached or whether a franchisor has interfered with an opportunity. Thus, the common law typically does not provide a remedy for race-based discrimination and almost certainly would not provide a vehicle for a plaintiff wishing to challenge an affirmative action program.

A. Equal Treatment Required

In some states, franchise relationship laws provide additional substantive grounds to challenge a franchisor’s alleged discriminatory action or policy. These franchise relationship statutes are at once more broad and more narrow than the protections afforded by § 1981. For example, state franchise relationship laws often prohibit disparate treatment of any franchisee for any reason, whereas § 1981 only prohibits discrimination based upon race or another protected characteristic. But, in contrast to the federal civil rights law, state franchise relationship laws usually protect only existing franchisees and therefore do not give standing to one of the most likely groups of plaintiffs in franchise discrimination cases: disappointed applicants for franchises.

Also in contrast to § 1981, which broadly prohibits discrimination prior to, at the termination of, and at any point during a contractual relationship, state franchise relationship laws typically prohibit discriminatory practices only at specific times in the franchisor-franchisee relationship. As discussed below, state franchise relationship laws governing discriminatory practice can be categorized as follows: (1) those laws relating to the requirements to terminate, (2) those laws relating to a new franchise appointment or transfer in ownership, and (3) those laws requiring equal treatment in day-to-day transactions.

B. Terminations

Most state franchise relationship laws protect a franchisee’s investment by limiting the grounds on which a franchisor may terminate or not renew a franchise agreement. The typical state franchise statute requires that a franchisor have good cause to terminate. Although the definition varies from state to state, good cause often requires that the ground for termination arises from a material violation of the franchise agreement or other legitimate requirement of the franchisor.

In some states, good cause also requires that the termination be nondiscriminatory. In Tennessee, for example, good cause includes the failure of a franchisee to substantially comply with the franchisor’s requirements, but only if those requirements “are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement, and which requirements are not in violation of any law or regulation.” Similarly, Hawaii prohibits termination or failure to renew without good cause or in accordance with the current terms and standards established by the franchisor then equally applicable to all franchisees, unless and to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on proper and justifiable distinctions considering the purposes of this chapter, and is not arbitrary.

In Iowa, good cause for termination requires that the franchisor’s own conduct is not arbitrary or capricious “when compared...
to the actions of the franchisor in other similar circumstances.”

Good cause under the Wisconsin Fair Dealership Law means that the dealer failed to comply with requirements that “are not discriminatory as compared with requirements imposed on similarly situated dealers.”

In one state, Michigan, good cause is not required for non-renewal of a franchise relationship but equal treatment is. Michigan prohibits provisions in franchise agreements “that permit the franchisor to refuse to renew a franchise on terms generally available to other franchisees of the same class or type under similar circumstances.”

Even in those states that do not specifically require equal treatment, franchisee litigants have alleged that disparate treatment is relevant to show that the stated reason for termination was pretextual. Further, although some state franchise relationship statutes do not expressly forbid disparate treatment, they do require that the termination be “fair” or in “good faith.” In these states, franchisees may try to argue that evidence of disparate treatment is probative to show that the termination was unfair.

C. Franchisee Applicants

Although most franchise relationship statutes do not protect franchisee applicants, two states, California and Iowa, statutorily address discrimination based on race and other protected characteristics of a prospective franchisee, thus expanding on § 1981’s protections. In contrast to § 1981, which only prohibits racial discrimination, Iowa’s franchise relationship law 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.”

California similarly prohibits franchisors from discriminating in the granting of a franchise based on the “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation” of the franchisee. Specifically, the statute provides that:

No franchisor shall discriminate in the granting of franchises solely on account of any characteristic listed or defined in subdivision (b) or (e) of § 51 of the franchisee and the composition of a neighborhood or geographic area reflecting any characteristic listed or defined in subdivision (b) or (e) of § 51 in which the franchise is located.

California’s Unruh Civil Rights Act provides a cause of action for disappointed applicants and transferees as well as for existing franchisees. This is in contrast to many state franchise relationship laws, which often only give standing to sue to existing franchisees. California also contemplates and authorizes the sort of franchise diversity initiatives discussed above:

Nothing in this section shall be interpreted to prohibit a franchisor from granting a franchise to prospective franchisees as part of a program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor.

Thus, California’s Unruh Civil Rights Act does not provide a cause of action for reverse discrimination as long as the alleged discriminatory conduct was pursuant to an affirmative action program.

Notwithstanding that most states do not expressly bar discrimination by a franchisor considering an applicant or transferee, claims alleging discriminatory conduct may arise under some state statutes requiring a franchisor to approve a transferee if it meets the franchisor’s criteria in approving a new franchise. This standard invites litigation about what the franchisor’s criteria are. Evidence that the franchisor has applied its criteria in an inconsistent or discriminatory manner among franchisees may undermine the franchisor’s argument that the standards applied in the transfer at issue are the franchisor’s actual criteria.

D. Disparate Treatment in Day-to-Day Transactions

As discussed above, state statutory prohibitions of disparate treatment often arise in the context of a major market action, such as the appointment, transfer, termination, or nonrenewal of a franchise. But some states go further to prohibit disparate treatment in day-to-day business dealings with franchisees. For example, Hawaii, Illinois, Indiana, Minnesota, and Washington specifically prohibit discrimination in charges to the franchisee, either by statute or by rule. Under the Illinois Franchise Disclosure Act,

[i]t shall be an unfair franchise practice and a violation of this Act for any franchisor to unreasonably and materially discriminate between franchisees operating a franchised business located in this State in the charges offered or made for franchise fees, royalties, goods, services, equipment, rentals or advertising services.

These provisions allow for such discrimination only when based on reasonable distinctions given the purpose of the statute, such as the time at which the franchise was granted or geographic or size differences.

Indiana’s statute, which may be the broadest, could be used as the basis for a claim of discrimination in all aspects of the franchise relationship. The Indiana Deceptive Franchise Practices Act makes it unlawful for a franchisor to “[d]iscriminat[e] unfairly among its franchisees or unreasonably fail[] or refus[e] to comply with any terms of a franchise agreement.”

E. Practical Concerns

Although there is surprisingly little case law arising out of state antidiscrimination franchise statutes, a franchisor can show that its challenged action was nondiscriminatory through evidence that it was consistent with internal policy, that the franchisor took adverse action against other franchisees for similar infractions, or both. In contrast, of course, a franchisee will seek to show that the complained-of action was discriminatory, unreasonable, or unfair as evidenced by the fact that other franchisees with a similar or worse history suffered no adverse action.

Litigation over a franchisee’s claim of discrimination also
raises discovery, evidentiary, and practical concerns for both parties. These include increased cost of discovery and confidentiality and competitive concerns. Although these are particularly nettlesome issues for a franchisor litigant, they tend to increase the cost of litigation for franchisee litigants as well.

First, in discrimination actions, discovery costs may be higher as compared to other franchise litigation. This is because in a discrimination claim, the claimant may make the franchisor’s relationship with all other franchisees, potentially nationwide, an issue. Although the franchisor litigant in particular would be burdened with its discovery obligations to search its records to find documents and witnesses with information relevant to its dealings with similarly situated nonparty franchisees, both parties to the action face the cost of increased document production and nonparty discovery.

Parties, or the court, can control costs somewhat by limiting the scope of discovery to a particular time period, geographic region, and type of market action. Furthermore, if the relevant statutes or contractual provisions that form the basis of the suits do not expressly prohibit disparate treatment, a franchisor may seek a protective order barring discovery of its relationship with other franchisees as burdensome, invasive, costly, and irrelevant. Absent an express requirement of equal treatment, evidence of a franchisor’s other transactions with other franchisees at different times and places, governed by the laws of other states, and involving dissimilar economic or marketing conditions, potentially different franchise agreement terms, and even outdated internal policies and guidelines could be of limited probative value. However, if the franchisor opposes such discovery, it may be barred at a later date from introducing evidence that the party franchisee was treated consistently with other franchisees.

A second practical concern is that discovery of nonparty franchisees raises confidentiality and competitive concerns. A franchisor may be barred by statute or contract from releasing certain financial or background information about its franchisees. If discriminatory treatment is alleged, such confidential information may be relevant to show whether other franchisees have been terminated for failure to pay royalties or are in a suit involving an applicant’s rejection due to insufficient capitalization or poor character. Discovery on nonparty franchisees may also raise competitive concerns when sensitive information about nonparty franchisees’ marketing, sales record, and customer satisfaction history are at issue. The court can address competitive and confidentiality concerns, at least in part, through a protective order that decrees who may view the documents, how the documents may be submitted to the court, and what becomes of the documents upon termination of the litigation.

F. Common Law

Common law is typically an unfruitful vehicle for franchise allegations of discrimination. But from time to time, franchisees and applicants allege that disparate treatment constitutes a breach of contract or tortious interference with a business opportunity. Those claims are discussed in this section.

1. Breach of Contract

Common law claims for breach of contract usually do not provide a remedy to a franchisee alleging discrimination. This is because few franchise agreements contain an express provision guaranteeing equal treatment of all franchisees. Moreover, in a contract dispute, the court concerns itself with the language of the contract before the court and the relationship between the parties to the action. Thus, courts typically deem evidence about a franchisor’s relationship with nonparty franchisees, governed by franchise agreements that are not before the court, irrelevant to a franchisee’s claim for breach of contract. Nor do allegations of discrimination constitute an affirmative defense when a franchisor sues a franchisee for violation of its contractual obligations.

In addition to express contractual obligations, many states impose an implied duty of good faith and fair dealing on contractual relationships, including franchise agreements. Franchisee litigants have challenged a franchisor’s action on grounds that it was discriminatory and therefore in bad faith. Courts, however, generally have not looked favorably on franchisee claims arising under the implied covenant of good faith and fair dealing, including those alleging disparate treatment. The implied covenant does not provide a separate cause of action in tort, create an independent contractual provision, or alter contract terms that are actually negotiated by the parties and appear in the contract. Instead, the duty of good faith merely prohibits a party from “taking advantage of gaps in a contract in order to exploit the vulnerabilities that arise when contractual performance is sequential rather than simultaneous.” Thus, absent an express contract provision prohibiting the franchisor’s complained-of conduct, courts have been quick to reject a franchisee’s claim for breach of implied duties, including claims alleging disparate treatment.

In International Harvester Co. v. Calvin, for example, the court found that the mere fact that defendant did not terminate other dealers that had worse sales penetration was not determinative of bad faith. In Albarghouthi, the court rejected the franchisee estate’s argument that IHOP, motivated by racial animus, declared fictitious defaults. In dismissing the franchisee’s counterclaim for breach of the implied covenant, the court simply noted that “at least some of the defaults declared by IHOP were valid and justified, and thus, IHOP’s termination of the Franchise Agreement pursuant to these defaults was in no way improper.”

2. Tortious Interference

When a franchisor rejects a proposal to transfer ownership of
a franchise, the disappointed buyer and seller may, in some jurisdictions, have a claim for tortious interference if the reason for the rejection was “improper” or “unjustified.” Undoubtedly, interference motivated by racial or other group-based animus satisfies the improper or unjustified prong needed to state a claim for intentional interference.149 Moreover, in some jurisdictions, the allegation that the franchisor rejected a transfer of ownership for discriminatory reasons likely would be sufficient to overcome whatever privilege the franchisor had to interfere in the transfer.150

But many jurisdictions do not permit parties to a failed franchise transfer to bring suit against the franchisor for tortious interference in the first instance, no matter the franchisor’s motives in rejecting the proposed transfer.151 These courts have held that because the franchisor is a party to the franchise agreement and the very source of the business opportunity, it cannot as a matter of law tortiously interfere with the transfer of that opportunity.152

In Home Repair, Inc. v. Paul W. Davis Systems, Inc.,153 for example, an African American franchisee sued after the franchisor disapproved its purchase of another franchise. Plaintiff franchisee alleged that the transfer was disallowed because of the race of its principal and further alleged several statements and actions by the franchisor’s employees that demonstrated racial animus. The court permitted plaintiff to proceed with its § 1981 claim but dismissed, on a Rule 12(b)(6) motion, plaintiff’s claim for tortious interference. The court rejected plaintiff’s assertion that “malicious” conduct on the part of defendant franchisor defeated its privilege to interfere. The court reasoned that because defendant franchisor “was the source of the business relationship allegedly interfered with, . . . [it] cannot be liable for tortious interference” and that this principle was not altered merely because plaintiff pled that defendant acted with malice.

Thus, although the case law is scant, it appears that in jurisdictions that permit tortious interference suits against a franchisor for a disapproved transfer, evidence of racial or other group-based discrimination may be relevant to show that interference was improper, unjustified, or without privilege. But in those jurisdictions that adopt the rule that a franchisor cannot interfere with a business opportunity to which it is a party, discriminatory conduct on the part of the franchisor is insufficient to create a cause of action where one otherwise does not exist.

V. Conclusion

Franchisees and franchisee applicants have a number of options under state and federal law to assert discrimination claims, but franchisors can take steps to minimize those claims while also supporting their diversity initiatives. The lesson learned from the reported cases is that uniform enforcement of policies concerning major market actions such as terminations or nonrenewals or the appointment of new franchisees will go a long way toward avoiding discrimination claims and defending against them. Corporate commitment to diversity will also help to discourage discrimination claims, but franchisors must take care in defining their diversity initiatives, particularly any affirmative action components, to conform with Supreme Court jurisprudence requiring that the affirmative action plan be narrowly tailored to correct imbalances in specific job categories without trammeling the rights of those not covered by the plan. Achieving diversity for diversity’s sake is simply not sufficient under the law.

Endnotes

3. Darrell Johnson, Franchising Continues to Grow Across the United States, Franchising World 64, 65 (Nov. 2007).
5. Id. at V.
10. According to a business counselor at the Small Business Development Center at the University of Wisconsin-Milwaukee, “[f]inancing is the No. 1 problem minority franchise owners face.” Rachel McCormick-Jennings, Fast Food Franchise Track: Minority Entrepreneurs Find Opportunity in Brand Names, MILWAUKEE BUS. J., Jan. 30, 2006. See generally Kotel, Meaney & Tyre, supra note 1, at 7 n.25.
11. Kotel, Meaney & Tyre, supra note 1, at 6.
12. Captain D’s, for example, permits minority franchisees to pay reduced royalties and defer the majority of their franchise fees during the first three years of business. Wendy Lee, Captain D’s Makes Top 50 Minority Franchises, TENNESSEAN, Oct. 24, 2007. Papa John’s also launched a similar program in 2007, allowing qualified franchisees to pay no franchise fees in return for developing restaurants in certain urban markets. Papa John’s Named One of the 50 Top Franchises for Minorities; Company Launches Enterprise Zone Program to Spur Development, BUS. WIRE, Oct. 15, 2007.
14. This type of assistance is common in the automobile industry.

15. See, e.g., ServiceMaster Announces $1.3 Million Commitment to Shane Battier Minority Scholarship Program; Company Also Sets Aside $1 Million in Special Financing to Help with Franchise Start-Up Costs, Bus. Wire, Apr. 2, 2008.


17. See Accor North America Expands Diversity Outreach, supra note 16 (providing corporate manager at new franchisee’s location for up to five years).


22. See, e.g., Elkhatib, 493 F.3d at 827.


24. 42 U.S.C. § 2000e. See, e.g., Adcock v. Chrysler Corp., 166 F.3d 1290, 1294 (9th Cir. 1999) (holding that because Chrysler did not control day-to-day operations of dealership, dealer would not be considered employee for sex discrimination claim); Mangram v. Gen. Motors Corp., 108 F.3d 61, 63 (4th Cir. 1997) (holding that General Motors dealers are not employees of General Motors and that plaintiff, at best, demonstrated that as a participant in General Motors’ Minority Dealership Development Program he was a trainee for a nonemployment relationship with General Motors for purposes of age discrimination claim). Although it is beyond the scope of this article to discuss the circumstances under which a franchisor may be held vicariously liable for discrimination claims brought against franchisees, see Claudia K. Levitas & Mercedes Gonzales Hale, Vicarious Liability for Gender Discrimination & Sexual Harassment, 26 Franchise L.J. 71 (Fall 2006), for an analysis of these issues.


26. 42 U.S.C. § 1981(a) provides thus: “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 . . . . [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.” 42 U.S.C. § 1981(b).


32. See Adamson v. Multi Cmty. Diversified Servs., Inc., 514 F.3d 1136, 1145 (10th Cir. 2008).

33. See Arendale v. City of Memphis, 519 F.3d 587, 603 (6th Cir. 2008).

34. Id. (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir.1985)).


36. Id. at *13.

37. Id. at *12.

38. Id. at *12 n.17.

39. Id. at *13.


41. Pointer at 38,715.

42. Id.

43. Id.

44. 493 F.3d 827 (7th Cir. 2007).

45. Id.

46. Id. at 828.

47. Id. at 829.

48. Id. Neither party argued for affirming the district court’s decision on this basis. Id.

49. Id. at 831–32.

50. Id. at 831.

51. Id. at 832.

52. Id. at 832–33.


54. Id. at *3.

55. Emerson, supra note 6, at 560–61.


57. Id. at *6.
58. Id. at *7.

59. Tyler v. Re/Max Mountain States, Inc., 232 F.3d 808, 812 (10th Cir. 2000) ("After a full trial on the merits, 'the sequential analytical model adopted from McDonnell Douglas . . . drops out and we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against' the plaintiff. . .") (quoting Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1226 (10th Cir. 2000)); Smith v. Molly Maid, Inc., 415 F. Supp. 2d 905, 915–16 (N.D. Ill. 2006) ("Although the burden-shifting structure falls away.").

60. Tyler, 232 F.3d at 808.

61. Id. at 812 n.4.

62. Id. at 814.

63. Id. at 814–16.


65. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). 134 F.3d 371, 377 (10th Cir. 2000) ("After a full trial on the merits, 'the sequential analytical model adopted from McDonnell Douglas . . . drops out and we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against' the plaintiff. . .") (quoting Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1226 (10th Cir. 2000)); Smith v. Molly Maid, Inc., 415 F. Supp. 2d 905, 915–16 (N.D. Ill. 2006) ("Although the burden-shifting structure falls away.").

66. Id. at *7.

67. Id. at 751.


69. Id. at *4.

70. Id. at *6. The prior case against BP was Howard v. BP Oil Co., No. 91-03231-1-CV-MHS (N.D. Ga. 1995), aff'd, 102 F.3d 555 (11th Cir. 1996).


72. 415 F. Supp. 2d 905 (N.D. Ill. 2006).

73. Id. at 910–12.

74. Id. at 916.

75. Id. at 915–16.


83. See, e.g., Gersman v. Group Health Ass’n, 931 F.2d 1565, 1568 (D.C. Cir. 1991) ("Rather 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."); vacated on other grounds, 502 U.S. 1068 (1992); Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc., 295 F.3d 1065, 1072 (10th Cir. 2002) (holding that corporation would have standing to assert discrimination claims "where such discrimination is based on the race of one of its employees").


85. Id. at 2–3.

86. Id.


88. Id. at *2.


91. Johnson, 480 U.S. at 626.

92. Id. at 632; Weber, 443 U.S. at 197.


94. Johnson, 480 U.S. at 632.


97. Id. at 1292–93. Chrysler also had a Minority Dealer Development Program in place, which trained qualified minorities, primarily African Americans, to become dealers. Id. at 1293. Although whites were not eligible to participate, the program was not at issue because plaintiff had not tried to apply for training in the program.

98. Id. at 1296.


100. See id. at 3 (“In developing the MDDP, GM did not identify any past intentional discrimination in its dealership practices.”).


103. Frost, 826 F. Supp. at 1297.


106. See Johnson, 480 U.S. at 630, 637–38; Weber, 443 U.S. at 208.


108. Johnson, 480 U.S. at 638.


110. See Johnson, 480 U.S. at 638.

111. Indeed, few state franchise relationship laws specifically bar race or sex discrimination among existing or prospective franchisees. Emerson, supra note 6, at 529.

112. See, e.g., Empire Distrbs. of N.C., Inc. v. Schieffelin & Co., 859 F.2d 1200, 1203 (4th Cir. 1988) (affirming dismissal of claim of prospective purchaser of wine distributorship because “the Act does not grant standing to a prospective transferee . . . to challenge the refusal of a winery to consent to the transfer”); Knauz v. Toyota Motor Sales, USA, Inc., 720 F. Supp. 1327 (N.D. Ill. 1989) (dismissing prospective applicant’s suit under Illinois Motor Vehicle Franchise Act because act only protects existing franchisees); Statewide Rent-A-Car v. Subaru of
am., 704 f. supp. 183 (d. mont. 1988) (prospective buyer lacked standing under montana statute); tyan v. gen. motors corp., 591 a.2d 1024 (n.j. super. ct. app. div. 1991) (a prospective or actual transferee is not a “franchisee” entitled to protection under the act until the franchisor approves the transfer), rev’d in part on other grounds, 604 a.2d 99 (n.j. 1992) (per curiam). but some state franchise relationship statutes do provide standing to prospective franchisees or “any person” injured by a violation, including, for example, the recently enacted tennessee franchise disclosure act of 2007. tenn. code ann. § 47-25-1509 (2008) (“notwithstanding the terms of any franchise, agreement, waiver or other written instrument, any person who is injured by a violation of this part may bring an action for damages and equitable relief.”)

113. for a recent discussion of state termination statutes and the good cause requirement, see genevieve a. beck & ellen r. lokker, the materiality requirement for franchise terminations, aba 29th annual forum on franchising, at tab w7 (2006) (conference materials).

114. id. at 1.

115. tenn. code ann. § 47-25-1502(4)(a) (2008); see also ark. code ann. § 4-72-202(7)(a) (2008) (defining good cause where the “requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement”); wis. stat. ann. § 135.02(4)(a) (2007) (defining good cause where the dealer fails to comply with requirements that “are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement”).


117. iowa code § 523h.7.1 (2007).

118. wis. stat. § 135.02(4)(a) (2007).


120. see, e.g., clifford jacobs motors, inc. v. chrysler corp., 357 f. supp. 564 (s.d. ohio 1973). there, the court found that the failure of the manufacturer to terminate other dealers that had not met similar provisions was not evidence that the provision was merely a pretext.

121. see, e.g., del. code ann. tit. 6, § 2552 (2008).

122. iowa code § 537a.10(5)(f) (2008).

123. see cal. civ. code §§ 51(b), 51.8(a) (2008). these protections arise under california’s unruh civil rights act and not the state’s franchise relationship laws.

124. id. § 51.8(a). as noted, § 51.8 also prohibits discrimination against franchisees due to “the composition of a neighborhood or geographic area reflecting any characteristic [within the protected classes].” this additional protection, relating to the racial makeup of a franchisee’s potential customers, is unique to california.

125. reyes v. atl. richfield co., 12 f.3d 1464, 1471 (9th cir. 1993), briefly discusses the unruh act’s application to claims involving discrimination in granting of franchises. in reyes, the franchisee alleged that the franchisor’s termination was racially motivated, alleging that the franchisor instructed him to replace filipino employees. the court found this allegation insufficient to support the claim that the franchisor’s motive for termination was improper in light of undisputed evidence that the notices of default were appropriate. in any event, the court found that the franchisee did not have standing to assert a claim on behalf of its filipino employees.

126. not only does § 51.8 of the unruh act permit a nonfranchisee to sue, it may also permit actions against nonfranchisors. in woldeab v. 7-eleven, inc., no. 06 cv. 0615 jm (lsp), 2007 wl 173906, at *2 (d.d.c. jan. 16, 2007), immigrants from eritrea sued over the denial of a 7-eleven franchise. the court denied the motion to dismiss brought by an individual defendant, employed as a manager by 7-eleven, on grounds that “a reasonable inference can be made that the putative complaint alleges [the manager] is also a ‘franchisor.’”

127. cal. civ. code § 51.8(a).

128. see, e.g., minn. stat. § 80c.14 subdiv. 5 (2008) (“it is unfair and inequitable for a person to unreasonably withhold consent to an assignment, transfer, or sale of the franchise whenever the franchisee to be substituted meets the present qualifications and standards required of the franchisees of the particular franchisor.”).

129. cf. ford motor co. v. ark. motor vehicle comm’n, 161 s.w.3d 788, 797 (2004). there, the automobile dealer act permitted a manufacturer to reject a transfer if the applicant failed to meet the manufacturer’s criteria as “generally applied.” the decision does not discuss whether the manufacturer applied its criteria in a discriminatory manner.

130. fundamentals of franchising, at app. f (rupert m. barkoff & andrew c. seldon eds., 2d ed. 2004).


133. relatively few published opinions arise out of the state franchise relationship statutes. emerson, supra note 6, at 527.

134. l-o distribs., inc. v. speed queen co., 611 f. supp. 1569 (d. minn. 1985) (interpreting wisconsin fair dealerships law, termination of dealership was not discriminatory because manufacturer had policy of terminating for poor sales penetration, and evidence showed that six other dealers had been terminated for similarly poor sales).

135. wright-moore corp. v. ricoh corp., 908 f.2d 128, 139 (7th cir. 1990) (defined discrimination among franchisees “as between two or more similar franchisees, and under similar financial and marketing conditions, a franchisor engaged in less favorable treatment towards the discriminatee than towards other franchisees”) (quoting canada dry v. nehi beverage co., 723 f.2d 512, 521 (7th cir.1983)).

136. cf. mike smith pontiac gmc, inc. v. mercedes-benz of n. am., inc., doah case no. 86-0271 (fla. div. of admin. hearings june 11, 1986) (order). mike smith involved a dealer’s challenge to a performance-based notice of termination. in that case, the petitioner sought an order compelling documents showing “examples of a dealer-operator being eliminated from a franchise because the operator-dealer has jeopardized the proper performance of any mercedes franchise.” the tribunal denied the motion to compel evidence of nonparty dealers on grounds that “[i]t is not evidence that the provision was merely a pretext."

137. good cause requirement, see genevieve a. beck & ellen r. lokker, the materiality requirement for franchise terminations, aba 29th annual forum on franchising, at tab w7 (2006) (conference materials).
Kilday at 593–94.

This is a defense to a speeding ticket. More a defense to a breach of contract than laxity in enforcing the speed limit is a defense to a speeding ticket.”

137. For example, KY. REV. STAT. ANN. § 190.070(2)(g) (2007), which governs the relationship between automobile dealers and manufacturers, prohibits manufacturers from disclosing “any business, financial, or personal information which may be, from time to time, provided by the dealer to the manufacturer, without the express written consent of the dealer.” But the Kentucky statute creates an exception for judicial proceedings.

138. In Jaguar Cars v. Blackhorse Motorworks, Ltd., No. A 94-289, 1999 WL 1711085, at *2, *5 (E.D. Ky. Nov. 2, 1999), for example, the dealer’s allegation of disparate treatment among dealers was irrelevant in determining whether Jaguar could terminate a dealer for warranty fraud. The court noted that Jaguar had the right to terminate for fraudulent activity, and nothing in the dealer agreement stated that every dealer must be treated in the same way.

139. Emerson discusses the Kilday v. Econo-Travel Motor Hotel Corp., 516 F. Supp. 162 (E.D. Tenn. 1981) and similar decisions at length, noting “Kilday signals that a relatively uniform franchise agreement does not grant a protected, third-party beneficiary status to franchisees as a whole, authorizing them to insist that the agreement’s provisions be enforced consistently. Instead, each franchisor-franchisee agreement stands alone, and the other franchisees have no enforceable rights thereunder. Thus, the courts following Kilday simply will not use contract law to require that franchisors implement franchise agreement provisions uniformly throughout the franchised system.” Robert W. Emerson, Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates, 35 AM. BUS. L.J. 559, 592 (1998). Professor Emerson also notes that there are several cases similar to Kilday but no reported counterdecisions. Id. at 593–94.

140. For example, Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 279 (7th Cir. 1992), held that even if a franchisor treats other franchisees more leniently, it is “no more a defense to a breach of contract than laxity in enforcing the speed limit is a defense to a speeding ticket.”


142. THOMAS M. PTEGOFF & W. MICHAEL GARNER, FUNDAMENTALS OF FRANCHISING 209 (Rupert M. Barkoff & Andrew C. Seldon eds., 2d ed. 2004) noted that “[c]ourts in most states consistently have held that the implied covenant of good faith and fair dealing that exists in any commercial contract also exists in franchise agreements.”


144. Original Great Am. Chocolate Chip Cookie Co., 970 F.2d at 280.

145. See, e.g., Burger King Corp. v. Weaver, 169 F.3d 1310, 1318–19 (11th Cir. 1999) (no cause of action for breach of implied covenant in derogation of express terms of underlying contract or in absence of a breach of an express term); Taylor Equip., Inc. v. John Deere Co., 98 F.3d 1028, 1031–32 (8th Cir. 1996) (“[T]here is no independent tort for its breach. . . . The implied obligation must arise from the language used [in the contract].”).


148. Id. at *11. The court addressed defendant’s allegations of an anti-Arab discriminatory motive in relation to his § 1981 and state civil rights act claim. The court dismissed defendant’s claim that the franchisor breached the implied duty of good faith and fair dealing, although the court’s opinion did not expressly address whether a discriminatory motive could breach the implied contractual duty.

149. See Nizzo v. Amoco Oil Co., 333 So. 2d 491 (Fla. Dist. Ct. App. 1976) (citing racial prejudice as an example of improper interference).

150. Id.; see also Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1294 n.9 (11th Cir. 2001) (auto manufacturer enjoys privilege to reject a proposed transferee, which privilege is qualified where an unlawful motive is the sole purpose of the interference).


152. Genet Co., 498 So. 2d at 684.