ARTICLES & ESSAYS: A Survey of the Lawyers' Committee Work on Private and Public Employment Discrimination Cases: 1984-Present

Fall, 2018

Reporter
62 How. L.J. 2 *

Length: 26658 words

Author: David Cynamon and John Freedman*

* David Cynamon, a retired litigation partner with Pillsbury Winthrop Shaw Pittman LLP, is a past Co-Chair and member of the Executive Committee of the Board of Directors of the Washington Lawyers' Committee. John Freedman, a partner at Arnold & Porter, is the current Co-Chair of the Committee's Board of Directors. The authors would like to thank and acknowledge the following individuals for their assistance and input to this article: Jack McKay, Joseph Sellers, Matthew Handley, Dennis Corkery, Raul Beke, Alex Peyton, Ian S, Wahrenbrock, and Simone A. Wood.

Text

[*2]

INTRODUCTION

Title VII of the Civil Rights Act of 1964 [1] created a potentially powerful tool to dismantle entrenched employment discrimination by enabling private individuals to bring suit against their employers for violations of the law. But in order to make this tool effective, people needed lawyers. In 1968, in response to the Report of the National Advisory Commission on Civil Disorders (also known as the Kerner Commission) [2], the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Committee") [3] was founded to make that potential a reality by providing pro bono legal counsel to plaintiffs in the Washington, D.C. metropolitan area. [4] In 1971, the Committee established its first project, the Equal Employment Opportunity Project, to **[*3]** challenge discrimination by private employers. [5] When Title VII was expanded in 1972 to cover federal, state and local governments, [6] the Committee established the Federal Sector Employment Project to provide similar legal assistance for public sector employees.

---

1 ***42 U.S.C.§§2000e-20***00e-17 (2018).

2 History, Wash. Law. Comm., *https://www.washlaw.org/about-us/history*.

3 The original name was the Washington Lawyers' Committee for Civil Rights Under Law. The name was later changed to reflect the broadened scope of the Committee's activities, including public education in Washington, D.C.

4 Wash. Law. Comm., supra note 2.

5 Id.

6 The Equal Employment Opportunity Act of 1972, § 706(f)(1); *42 U.S.C. § 2000e-15*(f)(1) (1976).

During the Committee's first fifteen years, these two projects constituted the bulk of the Committee's work and achieved a number of landmark rulings. [7]

While the Committee has greatly expanded its scope since those early years, private and public sector employment discrimination cases remain an integral part of the Committee's work. Since 1984, the Committee has paired with numerous volunteer law firms to pursue more than 100 private sector employment discrimination cases and at least 25 public sector lawsuits. [8] This paper surveys some of the more significant cases and results achieved, and discusses opportunities and challenges for the future.

I. THE COMMITTEE'S EARLY YEARS: 1971-1983

Before reviewing the Committee's work in this area during the past 35 years, it is worth briefly summarizing the first fifteen years because some of those cases continued into the period covered by this survey. During the early years of its existence, the Committee faced a "target-rich environment," as racial discrimination in employment was common throughout the Washington D.C. region. [9] As a result, the Committee pursued multiple class actions against private employers, labor unions and federal agencies. [10] Because class action and anti-discrimination law had not been fleshed out, many of these cases took **[*4]** years to litigate due to hard fought discovery disputes, extensive motions practice and appeals. [11]

Among the Committee's first private employment discrimination class actions were cases brought against Bassett Furniture Industries and Allied Chemical Corporation. [12] In both companies, black employees were relegated to lower-level positions, were paid less than their white counterparts, and had no opportunity for advancement. [13] Both cases were vigorously defended, but after several years of hard-fought litigation, the Committee was able to achieve favorable settlements for the plaintiffs. [14]

A major focus of the Committee during this period was racial discrimination in the construction trade unions. Construction of the D.C. Metro system was about to begin, and in order to ensure that African American workers would have a fair opportunity to share in the work, a group of local civil rights and community organizations formed the Washington Area Construction Industry Task Force ("Task Force") to combat historical discrimination in the

---

[7] See, e.g., Elliot M. Mincberg, Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: The Federal Sector Employment Project: Efforts by the Washington Lawyers' Committee to Combat Employment Discrimination in the Federal Government, 1972-1983, *27 How. L.J. 1339 (1984).*

[8] See generally Wash. Law. Comm., Annual Reports, 1984-2001; Wash. Law. Comm., Updates, Vols. 8 No. 2-22 No. 1, Fall 2002-Spring 2016.

[9] See Wash. Law. Comm., Annual Report, 1974-1975, Appendix B.

[10] See Mincberg, supra note 7; John Payton, Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: Redressing the Exclusion of and Discrimination Against Black Workers in the Skilled Construction Trades: The Approach of the Washington Lawyers' Committee for Civil Rights Under Law, *27 How. L.J. 1397, 1398 (1984).*

[11] See, e.g., *Berger v. Iron Workers Reinforced Rodmen, Loc. 201, 170 F.3d 1111 (D.C. Cir. 1999); McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989).*

[12] *Belcher v. Bassett Furniture Indus., 588 F.2d 904, 594 (4th Cir. 1978).* See, e.g., *Clanton v. Allied Chem. Corp., 409 F. Supp. 282 (E.D. Va. 1976).*

[13] *Belcher, 588 F.2d at 594; Clanton, 409 F. Supp. at 282.*

[14] See generally *Belcher, 588 F.2d 904.* See Clanton, 409 F. Supp. at note 283.

skilled construction trades. [15] Working with the Task Force, the Committee sued most of the area construction trade unions, including unions representing bricklayers, sheet metal workers, carpenters, electrical workers, and ironworkers. All of these cases, with the exception of the ironworkers, were ultimately resolved by settlement. [16] The litigation against the ironworkers union lasted into the period covered by this article, and is discussed in more detail below. [17]

In addition to suits directly against the construction trade unions, in 1977, the Committee, on behalf of the Task Force, pursued actions against the Department of Labor and the District of Columbia for their failure to enforce federal and local laws and administrative affirmative action plans to eliminate discrimination in the construction industry. [18] The action against the Department of Labor was resolved by entry of a consent decree in 1978, but it took four more years of **[*5]** litigation to obtain the Department's compliance with the decree. The parallel action against the District of Columbia was settled in 1983. [19]

The Committee's Federal Employment Project pursued multiple class actions against federal agencies, including the Government Printing Office, the Government Accounting Office, the General Services Administration, the Drug Enforcement Administration, and the Energy Research and Development Agency. [20] These and other cases not only resulted in millions of dollars in front and back pay awards, but established important precedents for the rights of federal workers in combatting discrimination in the Federal Government. [21]

II. CASE SCREENING AND SELECTION

From the outset, the Committee's small but dedicated legal staff has co-counseled with volunteer law firms so that the Committee can leverage its resources to litigate many more, and much larger, cases than the Committee staff themselves would be able to handle on their own. Over the years, the Committee has co-counseled with more than 100 law firms; indeed, more than 60 firms, including most of the larger firms in Washington, D.C., are currently represented on the Committee's Board of Directors. [22]

In the early years, cases came to the Committee primarily on an ad hoc basis: individuals seeking representation in discrimination cases would contact the Committee directly. The staff would then interview the potential plaintiffs and, if the cases appeared to have merit, would attempt to recruit law firms to take the cases. [23] Some cases came as referrals from the Equal Employment Opportunity Commission (EEOC) which, in its early years, was limited in the types of cases it could directly handle. The class actions against Bassett Furniture Industries and Allied Chemical came to the Committee in this fashion, pursuant to an EEOC grant to the Committee. [24] The Committee worked with the Task Force to develop cases against the construction trade industry unions. [25] Similarly, the

---

[15] Payton, supra note 10; see Wash. Law. Comm., supra note 2.

[16] This is a personal recollection of the author and/or the Committee.

[17] A full description of the Committee's construction trade union litigation is contained in Payton, supra note 10.

[18] Payton, supra note 10, at 1432-34.

[19] Id.

[20] Id.

[21] See Mincberg, supra note 7, at 1364-68.

[22] Leadership, Wash. Law. Comm., *https://washlaw.org/about-us/leadership*.

[23] Interview with Roderic V.O. Boggs, Committee Executive Director, 1971-2016 [hereinafter Boggs Interview].

[24] Wash. Law. Comm., Annual Report, 1973-74 at 4-6.

[25] Payton, supra note 10, at 7-13.

Committee's Federal Employment Project worked with local organizations like the Urban **[*6]** League to meet with minority employees at federal agencies to discuss problems of discrimination and identify potential cases. [26]

As the number of cases and referrals multiplied, they exceeded the capacity of the Committee's staff to screen and coordinate with law firms. Accordingly, in 1973, the Committee worked with the D.C. Bar to set up the Federal Employees Legal Advice and Referral Service, operated under the Bar's auspices. [27] That Service was the progenitor of the Bar's Lawyer Referral and Information Service which matches volunteer lawyers with individuals seeking representation in a wide variety of areas. [28]

The Committee's ad hoc referral system for private and public employment discrimination cases, however, became increasingly unwieldy. Often, individuals seeking legal assistance would contact multiple legal service organizations and private law firms, resulting in much duplication of effort in screening potential cases. [29] Accordingly, in the early 1980's, the Committee organized a network of attorneys in local law firms to review and screen cases; a law firm receiving a request for assistance could refer the case for screening by this network, which reduced duplication of effort and ensured that a more uniform standard of review was applied. [30]

As the Committee's caseload continued to grow, in the mid-1980's, the Committee assigned a legal assistant to screen potential cases. [31] Law firms were invited to refer cases to the Committee for screening; if a case was deemed meritorious and appropriate for the Committee's mission, the Committee would then seek a volunteer firm with which to co-counsel. [32] By 1990, the Committee was screening approximately 1000 requests for assistance per year in private and public employment discrimination cases. [33] Accordingly, the Committee hired its first full time case screener, Avis Sanders, who remained with the Committee until 2002. [34]

Under its current system, begun with Ms. Sanders, the Committee's staff screener is the first stop for all referrals and direct requests **[*7]** for assistance. [35] If the matter does not involve discrimination or an issue falling within the scope of the Committee's other project areas, the individual may be referred to another legal aid organization. Otherwise, the screener will write up a summary of the case, which is then considered and discussed at a weekly meeting of the Committee's project directors, under the auspices of the Director of Litigation. If there is a consensus that the case has merit and is consistent with the Committee's mission, the Committee staff will circulate the case among the Committee's participating law firms for volunteers or, in some cases, the staff will handle the matter on its own. [36]

III. PRIVATE SECTOR EMPLOYMENT CASES: 1984-PRESENT

---

[26] Mincberg, supra note 7, at 1408-20.

[27] Wash. Law. Comm., Annual Report, 1974-75, at 6-7.

[28] Wash. Law. Comm., Annual Report, 1979-1980, at 4.

[29] *Boggs Interview, supra* note 23.

[30] Wash. Law. Comm., Annual Report, 1984-85, at 5.

[31] *Boggs Interview, supra* note 23.

[32] Wash. Law. Comm., Annual Report, 1985-86, at 5.

[33] Wash. Law. Comm., Annual Report, 1990-91, at 7.

[34] Id.

[35] Wash. Law. Comm., Annual Report, 1996, at 4; Wash. Law. Comm., Annual Report, 2001, at 5.

[36] This assertion is based on the *Boggs Interview, supra* note 23, as well as the Authors' personal knowledge.

Since 1984, the EEO Project has litigated more than twenty class-action lawsuits against private employers, three cases that were foundational to the development of "tester" standing in employment discrimination cases brought by individuals and employment organizations, and numerous cases that resulted in significant punitive damages and injunctive relief. [37] Together these cases have resulted in more than $ 82 million in monetary awards, ranging in amounts from $ 80,000 to $ 38.4 million, as well as injunctive relief to remedy illegal workplace harassment and discrimination by private employers towards prospective, current, and former employees. [38] These cases were consistent with the Committee's goals of taking cases that have the potential to provide structural remedies to discrimination through class action relief, to establish precedent in undeveloped areas of the anti-discrimination laws, and to discourage discrimination by imposing heavy compensatory and punitive damages on malefactors. [39]

A. Tester Cases

In the absence of overt statements or conduct, discrimination in employment, housing and public accommodations can be difficult to discern, much less prove. An unsuccessful job applicant, or a person **[*8]** told that the apartment she was seeking has already been rented, cannot know from that information alone whether discrimination was a factor in the decision. Discovery might produce such information, but before any discovery can take place, a plaintiff must have a reasonable basis for filing a claim of discrimination. [40]

To address this problem, in the early 1980's the Committee began working with the Fair Housing Council of Greater Washington to use paired testers to investigate potential housing discrimination. [41] Ten years later, the Committee started working with the Fair Employment Council of Greater Washington ("FEC") to do testing in the employment context. [42] The FEC would have pairs of black and white testers with identical qualifications submit job applications in order to determine whether the prospective employer demonstrated a pattern of selecting white applicants over equally qualified black applicants. [43] In 1999, the two Councils merged to become the Equal Rights Center ("ERC"), with which the Committee has maintained a close and highly productive relationship. [44]

One of the obstacles to the tester approach, however, was the question of standing. As neither the testers nor the testing organization were actual applicants for employment, defendants argued that they had suffered no injury and therefore had no standing to pursue discrimination claims for damages or injunctive relief. [45] The Committee was involved in several groundbreaking cases to resolve this question.

---

[37] Wash. Law. Comm., Annual Reports, 1984-2001; Wash. Law. Comm., Updates, Vols. 8 No. 2-22, No. 1, Fall 2002-Spring 2016.

[38] Id.

[39] Id.

[40] See generally, *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).*

[41] Wash. Law. Comm., Annual Report, 1983, at 13-14; Wash. Law. Comm., Annual Report, 1988, at 10.

[42] The Fair Housing Council was established in 1983 by a group of interfaith clergy in response to the Supreme Court's decision in *Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982),* which upheld the standing of testers to sue defendants for housing discrimination. The FEC was established in 1990 by a group of attorneys experienced in employment matters, to extend the tester model to employment discrimination.

[43] Wash. Law. Comm., Annual Report, 1990-1991, at 8.

[44] A third testing organization, the Disability Rights Council, was established in 1992 and merged into the ERC in 2002.

[45] In order to establish standing to sue, a plaintiff must satisfy three requirements: (1) the plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).*

In the first national case in which civil rights testers filed claims under the equal employment laws, two African American testers and the FEC sued a local employment agency and its national franchiser, **[*9]** Snelling & Snelling, for discriminatorily denying referrals to the African American testers while offering them to their white counterparts. [46] The U.S. District Court denied a motion to dismiss, finding that both the African American testers and the FEC had standing to bring claims under Title VII and *42 U.S.C. 1981,* which prohibits racial discrimination in the making and enforcement of contracts. [47] On interlocutory appeal, the D.C. Circuit agreed that the FEC had organizational standing under Title VII but that, because the testers lacked the ability at the time to obtain damages, they lacked standing under Title VII. [48] The Court also ruled that neither the testers nor the FEC had standing under Section 1981. [49] Although the denial of standing for the individual testers was a setback, upholding the FEC's standing was a major impetus to the ability of the Council and Committee to pursue testing investigations and lawsuits resulting from those investigations. In the case at hand, the plaintiffs settled their claims in return for a six-figure damage payment along with injunctive relief, including the employment agency's agreement to participate in the FEC's program, "Getting a Job is a Job," in which D.C. high school students are trained in job-seeking skills. [50]

Several years later, the FEC and the Committee brought a similar testing case under the District of Columbia Human Rights Act ("DCHRA"), the District's counterpart to Title VII. [51] The FEC and two female testers, along with a genuine job seeker, filed suit against a local employment agency for sex discrimination, based on allegations that the agency's owner linked referrals to demands for sexual favors. [52] In the first tester case in the country actually to proceed to trial, the plaintiffs were awarded significant compensatory and punitive damages. [53] The judgment was affirmed on appeal; the D.C. Court of Appeals held that both testers and fair employment organizations have individual and organizational standing under the DCHRA to **[*10]** bring suit for discrimination. [54] Thus, testers have broader standing rights under local District of Columbia law than under federal law.

The Committee's representation of the ERC continues to the present, primarily in the areas of housing and public accommodations discrimination. This work is discussed in separate articles covering those areas.

B. Ironworkers' Union Litigation

As mentioned above in Part II, during the 1970's the Committee brought multiple cases to end historical race discrimination in the local construction trade unions. Although all of the cases were hard fought, all but one were ultimately settled. The settlements with the bricklayers', electrical workers' and sheet metal workers' unions provided class-wide relief through the entry of consent decrees, which typically included goals and timetables to

---

46 *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp., 829 F. Supp. 402, 403* (D.D.C. June 18, 1993).

47 *Id. at 403-407.*

48 *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1281 (D.C. Cir. 1994).*

49 Id.

50 Wash. Law. Comm., 3 Update 1 at 4 (Summer 1994).

51 See generally *Molovinsky v. Fair Emp't Council of Greater Wash., Inc., 683 A.2d 142 (D.C. 1996).*

52 *Id. at 144.*

53 *Id. at 145.*

54 *Id. at 146.*

increase black union membership and opportunities for higher skilled positions. [55] The case against the carpenters' union, in which the court denied class certification, was settled on an individual basis. [56]

The ironworkers' union, however, did not settle. The Committee filed a class action against the union in 1975, alleging violations of *42 U.S.C. § 1981* and Title VII. [57] The district court certified the class on July 26, 1976. [58] There ensued six years of discovery, motions practice, and pre-trial proceedings. In accordance with the procedure recognized by the Supreme Court in the Teamsters case, [59] the court bifurcated the issues of class-wide liability and individual damages for trial. [60] In the summer of 1981, the case went to trial on the issue of the union's liability for a pattern and practice of discrimination. [61] But it was not until 1985 - one decade after the complaint was filed - that the district court issued its decision in favor of the plaintiffs and imposing class-wide injunctive relief. [62]

[*11] The union appealed, and in 1988, the D.C. Circuit affirmed in part, reversed in part, and remanded for further proceedings. [63] After imposing injunctive relief regarding class-wide liability on February 15, 1989, the district court referred the matter to a special master to conduct hearings to determine the amount of back pay and other damages to which individual class members would be entitled. [64] These hearings required a massive undertaking by the Committee, as 173 class members submitted claims. [65] The Committee and lead plaintiffs' law firms recruited and coordinated more than 100 volunteer attorneys to represent these class members. [66] The hearings were completed in 1991, but the special master did not issue his findings until 1994. After yet another appeal and remand, [67] final payments of more than $ 1 million in back pay, damages, and interest were made to successful individual class members in 1999. [68]

Berger took 25 years - a quarter of a century - to litigate from start to finish. Inexcusable delays by the district court and special master played a role. But, it is not unusual for major civil rights actions to take years to litigate (as will be seen in the next discussion of the Circuit City litigation). Few individual private law firms have the resources or motivation to undertake such marathons. The Committee's ability to recruit and coordinate large numbers of volunteers from multiple private law firms makes it possible to pursue and succeed in cases challenging discrimination against the most intransigent and deep-pocketed opponents.

---

55 Payton, supra note 10.

56 Id.

57 *Berger v. Iron Workers Reinforced Rodmen, Loc. 201, 843 F.2d 1395, 1406 (D.C. Cir. 1988)* [hereinafter Berger].

58 Id.

59 *Int'l Bhd. of Teamsters v. U.S., 431 U.S. 329, 360-61 (1977)* [hereinafter Teamsters].

60 *Berger v. Iron Workers Reinforced Rodmen, Loc. 201, 170 F.3d 1111, 1117 (D.C. Cir. 1999).*

61 *Berger, 843 F.2d at 1406-07.*

62 *Id. at 1407.*

63 *Id. at 1443-44.*

64 *Berger, 170 F.3d at 1117.*

65 *Id. at 1124.*

66 Wash. Law. Comm., Report of Activities 1989-90 at 6-7.

67 *Berger, 170 F.3d at 1119, 1144.*

68 Berger v. Iron Workers Reinforced Rodmen, Loc. 201, No. 75-1743 (J.G.P.), 1999 WL 34870222 (D.D.C. Dec. 8, 1999).

C. Circuit City

One of the most significant private employment discrimination cases pursued by the Committee in the mid-1990's was a class action lawsuit against Circuit City Stores, Inc. [69] The case illustrates both the scope of the Committee's work and the challenges presented by a federal judiciary that had become increasingly conservative in the 1980's and 1990's, particularly the U.S. Court of Appeals for the Fourth Circuit.

[*12] Circuit City was a nationwide retailer of consumer electronic products, with its headquarters in Richmond, Virginia. [70] The main office was a large operation with 3,500 employees, of whom about 800 were African American. [71] The company had no written objective requirements for promotion; promotions were based on subjective criteria, supposedly reflecting merit. [72] But, despite the fact that almost one-third of headquarters employees were black, Circuit City's upper-level management was entirely white, and only two black employees had ever been promoted to supervisor from the position of assistant supervisor. [73]

In October 1995, the Committee, in conjunction with one of its supporting law firms, filed a class action complaint against Circuit City on behalf of eleven individual African American headquarters employees. [74] The complaint alleged that Circuit City had engaged in a pattern or practice of racial discrimination that created a glass ceiling at company headquarters for black employees, including the eleven named plaintiffs. [75] Plaintiffs sought certification of the case as a class action, broad injunctive relief to remedy the alleged class-wide discriminatory promotion practices, injunctive, and monetary relief for the named plaintiffs. [76]

The case was hard fought from the outset. Circuit City successfully moved to transfer the case from the U.S. District Court for the District of Maryland to Circuit City's "home court," the Richmond Division of the U.S. District Court for the Eastern District of Virginia. [77] The company vigorously resisted plaintiffs' discovery requests, and the court ultimately sanctioned Circuit City for discovery abuses. [78] Along the way, the court dismissed the claims of two plaintiffs as time-barred and granted summary judgment in Circuit City's favor as to the claims of three other plaintiffs. [79]

In April 1996, the district court granted plaintiffs' motion to certify the case as a class action pursuant to *Fed. R. Civ. P. 23(b)(2)*, and certified a mandatory non opt-out class for all African Americans employed **[*13]** at Circuit City headquarters within the statute of limitations period. [80] Plaintiffs then proposed a bifurcated Teamsters trial plan, in which a jury would first determine liability and punitive damages as to the class-wide pattern-or-practice claim as

---

[69] See generally *Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998).*

[70] *Id. at 749.*

[71] Id.

[72] *Id. at 749-50.*

[73] Id.

[74] *Id. at 749, 753.*

[75] *Id. at 749-50.*

[76] *Id. at 753.*

[77] Id.

[78] Id.

[79] *Id. at 753-55.*

[80] *Id. at 753.*

well as liability and damages for the named plaintiffs. [81] Then, in phase two, the jury would determine liability and damages for potentially 200 additional class members with claims. In response, however, the district court sua sponte decertified the class. [82] The court concluded that trying the case as a bifurcated class action would be inefficient and unfair to Circuit City. [83] Instead, the court ruled that the case would go to trial on the individual claims of the six remaining plaintiffs, during which those plaintiffs would be permitted to present their evidence of Circuit City's alleged pattern or practice of discrimination, and Circuit City could defend that claim. [84] If the jury found in favor of plaintiffs on that claim, the court ruled that appropriate injunctive relief could be entered, and Circuit City would be collaterally estopped from denying its pattern or practice in any subsequent claims filed by class members. [85] Because one effect of the decertification order would be to end the tolling of the statute of limitations for the claims of unnamed class members, the court agreed to stay the entry of the decertification order until the conclusion of the trial. [86]

The trial commenced on October 28, 1996, and lasted for a month. [87] In support of their pattern-or-practice claims, the plaintiffs presented a statistical expert who demonstrated that the differences in promotion rates between similarly situated black and white employees at Circuit City were statistically significant, i.e., that such differences could not be explained by non-discriminatory reasons, like differences in levels of experience, but rather that racial discrimination was the **[*14]** likely differentiating factor. [88] Circuit City presented its own expert statistician to rebut the plaintiffs' witness. The plaintiffs, however, did not rely solely on statistical evidence. They also presented evidence of statements by Circuit City upper management personnel, including its head of human resources, that reflected disparaging attitudes toward African Americans. [89] Plaintiffs also introduced evidence that Circuit City had "buried" two internal reports that raised concerns about racial discrimination in promotions at company headquarters. [90]

At the conclusion of the trial, the jury unanimously found that Circuit City had in fact engaged in a pattern or practice of racial discrimination in promotions. [91] The jury also found in favor of two plaintiffs on their individual claims, for which the jury awarded both compensatory and punitive damages. [92] After denying Circuit City's post-trial motions, the district court entered an injunction aimed at eliminating the company's racially discriminatory promotion

---

[81] Plaintiff's Motion for Severance and to Adopt a Bifurcated Trial Plan, McKnight v. Circuit City Stores, Inc. (Lowery v. Circuit City Stores, Inc.), No. 3:95- CV-964, 1997 WL 33794407 (D. Md. 1997).

[82] *Lowery, 158 F. 3d at 754.*

[83] Id.

[84] Id.

[85] Id.

[86] The filing of a Rule 23 class action complaint automatically tolls the running of any applicable statutes of limitations with respect to all members of the putative class, until certification of the class is denied or the class is decertified. At that point, unnamed members of the putative class have thirty days in which to file individual cases. Id.

[87] See *id. at 755.*

[88] See *id. at 755;* see also *Teamsters, 431 U.S. at 340-43* (The U.S. Supreme Court held that such statistical evidence is admissible to establish the existence of a pattern or practice of discrimination, given that overt evidence of racial discrimination is often lacking. Thus, class action discrimination cases typically feature a "battle of experts" between statisticians retained by plaintiffs and defendants).

[89] *Lowery, 158 F.3d at 751.*

[90] Id.

[91] Id.

[92] *Id. at 756.*

practices. [93] Among other things, the injunction required Circuit City to establish a Department of Diversity Management and to establish within ninety days, a new, non-discriminatory promotions program based on objective, transparent criteria. [94]

Circuit City appealed to the Fourth Circuit from all of the rulings adverse to it, while plaintiffs cross-appealed from the order decertifying the class as well as the rulings adverse to the nine individual plaintiffs whose claims had been dismissed at the trial court level. The Court of Appeals upheld the district court's decertification of the class, holding that such an order lay within the exercise of the trial court's discretion. [95] The Court then held, however, that having decertified the class, the district court should not have permitted the individual plaintiffs to pursue a pattern-or-practice claim, which according to the appellate panel is available only in class actions. [96] Accordingly, the Fourth Circuit overturned the pattern-or-practice verdict and vacated **[*15]** the trial court's injunction designed to remedy the promotion practices that the jury had found to be discriminatory. [97] The Court of Appeals also vacated the punitive damages awarded to the individual plaintiffs, finding that there was not sufficient evidence to show that Circuit City's conduct was "so egregious that it was appropriate to submit the issue of punitive damages to the jury." [98]

The Fourth Circuit's rulings on the pattern-or-practice claim led to a result precisely contrary to that intended by the district court as well as contrary to the jury's verdict based on the evidence presented at trial. The district court had decertified the class, not because it found that plaintiffs had failed to satisfy any of the Rule 23 criteria, but because the court concluded that the pattern-or-practice claim could be tried more fairly and efficiently as part of the trial of plaintiffs' individual claims. The Court of Appeals agreed that it was within the district court's discretion to decertify the class, but then held that having done so the court had no discretion to try the pattern-or-practice claim. [99] Had the district court known that class decertification meant the death knell for such a claim, one wonders whether the court would have exercised its discretion in that manner. The Fourth Circuit, however, did not give the lower court the opportunity to consider class certification in light of the appellate court's ruling; rather than remand the case for further proceedings in accordance with its opinion, the Court of Appeals simply vacated the pattern-or-practice verdict and the corresponding injunctive relief as a matter of law. [100]

Plaintiffs sought Supreme Court review of the Fourth Circuit's decision. The Supreme Court granted the petition and remanded the case to the Court of Appeals to reconsider punitive damages in light of Kolstad v. Am. Dental Ass'n, which held that in discrimination cases, the plaintiff need not prove "egregious misconduct" in order to recover punitive damages. [101] On remand, the Fourth Circuit reinstated the punitive damages awarded by the jury, but did not reinstate the pattern-or-practice verdict and related injunction. [102]

[*16] The Circuit City case is illustrative of the Committee's work in several respects. First, it demonstrates how the Committee's practice of partnering with volunteer law firms enables the Committee to leverage its influence by

---

93 Id.

94 Id.

95 *Id. at 757-59.*

96 *Id. at 761.*

97 *Id. at 766.*

98 See id.

99 *Id. at 768.*

100 Id.

101 *Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 546 (1999).*

102 Id.

pursuing large class action cases that would be beyond the Committee's own staff resources. Circuit City spanned several years and involved thousands of attorney and support staff hours. Yet, this was only one of multiple big cases that the Committee litigated, not just in the area of employment discrimination, but in public accommodations and housing as well.

Second, Circuit City reflects the Committee's willingness and ability to take on deep pocket defendants in pursuit of fair employment practices. This case was fought bitterly and tried on Circuit City's home turf. Yet, a jury of local citizens listened to the evidence and sent a powerful message that employment discrimination, covert as well as overt, is not acceptable. The Fourth Circuit's adverse rulings notwithstanding, the jury's verdict was widely reported in Richmond, and the ultimate assessment of punitive damages against the company was a clear statement of disapproval of its pattern and practice of racial discrimination.

Third, Circuit City, like the ironworkers' union litigation, demonstrates that enforcement of the civil rights laws is a tough, long-term battle. Victory, in any given case, is far from certain. Despite having proved a pattern or practice of discrimination in promotions at Circuit City headquarters, the plaintiffs were deprived of a legal remedy against that practice. Steps forward are inevitably accompanied by steps backward. Progress comes in hard-fought increments.

D. Railroads and Utilities

At the turn of the century, the Committee pursued a trio of class actions against Amtrak on behalf of African American employees and applicants for employment. The Committee achieved significant class-wide monetary and injunctive relief through two settlements. A third case, however, remained stalled for years at the class certification stage, and ultimately the district court denied class certification, reflecting the difficulties of pursuing nationwide employment class actions.

Thornton, et al. v. Nat'l R.R. Passenger Corp., was filed on behalf of African Americans employed in positions covered either by a Collective Bargaining Agreement between Amtrak and the Brotherhood **[*17]** of Maintenance of Way Employees ("BMWE") for the Northeast Corridor or the Corporate Agreement between Amtrak and the BMWE, encompassing workers for the Metropolitan Boston Transit Authority (collectively, "BMWE positions"). [103] The lawsuit also included unsuccessful applicants for BMWE positions. After the district court certified the case as a class action, the parties reached a settlement that required changes to Amtrak's employment policies to remedy the effects of past discrimination, plus $ 16 million in damages. [104] The settlement of a companion case, McLaurin, et al. v. Nat'l R.R. Passenger Corp., resulted in an $ 8 million fund for class members as well as broad injunctive relief, including revisions to Amtrak's hiring, promotion, training, right-of-way, and EEO practices and a compensation study to provide the basis for eliminating any race-based disparities that operated to the detriment of African American employees; the establishment of a Vice President for Business Diversity; and the monitoring of the effects of the changed practices. [105]

The third case, filed in late 1999, was brought on behalf of a nationwide class of black Amtrak railroad workers. Campbell, et al. v. Nat'l R.R. Passenger Corp., et al. [106] The complaint alleged discrimination in hiring, pay,

---

[103] *Compl., 16 F. Supp. 2d 5 (D.D.C. 1998)* (No. Civ.A. 98-890(EGS)). The information in this paragraph was taken principally from Wash. Law. Comm., 4 Update 1-2 (1998) and Wash. Law. Comm., Annual Report 1999.

[104] Thornton v. Nat'l R.R Passenger Corp., No. 1:98-cv-00890- EGS, 2000 WL 33727177 (D.C. Mar. 1, 2000); see also Amtrak Settles Racial Suit, Vows Changes, L.A. Times (Mar. 04, 2000), *http://articles.latimes.com/2000/mar/04/business/fi-5285*.

[105] See generally Daniel Machalaba, Amtrak to Pay $ 8 Million and Change Practices to Settle Racial-Bias Lawsuit, Wall St. J. (July 2, 1999, 1:00 AM), *https://www.wsj.com/articles/SB93087610774777627*.

[106] *Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 285-86 (D.D.C 2018).*

promotions, discipline, and other employment practices. [107] After it became clear that an early mediated settlement was not possible, the parties engaged in litigation reminiscent of the Berger case. There was extensive discovery and motions practice, and the complaint was amended five times to reflect information obtained during discovery. The motion for class certification was filed and fully briefed in 2012. [108] The district court requested several rounds of supplemental briefs and hearings before plaintiffs could submit the class certification issue for decision. [109] Finally, on April 26, 2018 - six years **[*18]** after the motion for class certification was filed - the district court issued an opinion denying the motion, although the long delay between the filing of the motion and the decision had effectively denied the motion already. [110] The Committee is now assessing how to proceed with the case on an individual basis. As in Berger and several large public accommodations cases, the Committee will probably recruit multiple law firms to represent the individual plaintiffs on a coordinated basis.

In Martin v. Potomac Elec. Power Co., the Committee took on PEPCO, the electric utility serving the Washington, D.C. metropolitan area. [111] The named plaintiffs represented a class of 20,000 African-American employees and applicants and a separate class of women employees, claiming that PEPCO engaged in a pattern or practice of racial discrimination in promotions and assignments. [112] After the district court certified the class, the parties reached a historic settlement that provided for wide-ranging reforms to PEPCO's personnel system and the largest amount of monetary relief in such a case in the Washington D.C. area up to that time, consisting of $ 38.4 million in back pay, damages, and attorneys' fees. [113]

E. LGBTQ Discrimination

From the outset, the Committee has been involved in cutting edge employment discrimination lawsuits. Most recently, on July 14, 2015, the Committee, with co-counsel Gay & Lesbian Advocates & Defenders (GLAD), filed a class action lawsuit against Wal-Mart charging the retail giant with discriminating against employees who were married to same-sex spouses by denying their spouses health insurance benefits. [114] The lawsuit was the first class action filed on behalf of gay workers since the U.S. Supreme Court ruled in favor of marriage equality in Obergefell v. Hodges. [115] Class representative Jacqueline Cote works in Wal-Mart's Swansea, Massachusetts store and was denied spousal health insurance for her wife, Diana (Dee) Smithson, **[*19]** who has battled ovarian cancer since 2012. [116] The complaint alleged that, by denying spousal health benefits to Ms. Cote that were available to employees in opposite sex marriages, Wal-Mart discriminated against her based on her sex, in violation

---

[107] The complaint can be accessed through the Wiggins Child website. See The Campbell, Et Al. V. Amtrak Class Action Litigation, *https://www.wigginschilds.com/news/noteworthy-cases/campbellvamtrak/* (last visited Nov. 4, 2018).

[108] Campbell, F. Supp. 3d at 289.

[109] Id.

[110] *Id. at 286.*

[111] See generally Martin v. Potomac Elec. Power Co., Nos. 86-0603, 87-1177, 87-2094 and 88-0106, 1990 WL 158787 (D.D.C. May 25, 1990).

[112] Michael York, Pepco Bias Suit Heads for $ 38 Million Settlement, Wash. Post, (Feb. 21, 1993), *https://www.washingtonpost.com/archive/politics/1993/02/21/pepco-bias-suit-heads-for-38-million-settlement/271a7bfc-409c-478c-9940-600bc3283c09/?utm* term=.44a2c617dbcb.

[113] Id.

[114] Compl. at 1, Cote v. Wal-Mart Stores Inc., No. 1:15-12945-WGY (D. Mass. July 14, 2015).

[115] *Obergefell v. Hodges, 135 S.Ct. 2584, 2607-08 (2015).*

[116] *Compl., supra* note 114, at 32-34.

of Title VII. [117] As a result of the discrimination, Dee lacked health insurance to pay for her treatment and more than $ 150,000 in uninsured medical expenses. [118]

After the district court denied Wal-Mart's motion to dismiss and certified the class, the parties entered into a historic settlement pursuant to which Wal-Mart agreed to an injunction requiring it to continue to treat same-sex and opposite-sex married couples equally in the provision of health insurance benefits, as well as to create a class-wide fund of $ 7.5 million (including attorneys' fees), which will be used to make payments to 305 class members. [119] This settlement, and the procedural victories leading to it, represent an important precedent for providing the LGBTQ community protection under federal civil rights laws.

F.

"Wage Theft" Cases

In addition to pure discrimination cases, the Committee has pursued litigation involving so-called "wage theft": employers who violate the Fair Labor Standards Act ("FLSA") and related federal and state laws regarding payment of minimum wages, overtime, and the like. Because many victims of wage theft are immigrants, these cases have been pursued by both the Committee's EEO Project and Immigrant & Refugee Rights Project. Three of the most significant cases are the following:

In Cryer v. Intersolutions, Inc. et al, the Committee sued InterSolutions, a temporary staffing agency, which routinely denied overtime pay to its temporary and in-house non-exempt employees and threatened to terminate employees who complained about these practices. [120] The District Court certified an FLSA class of more than 500 temporary employees, after which InterSolutions agreed to a settlement. [121] **[*20]** Plaintiffs received full compensation for three years of unpaid overtime, which is doubled in accordance to the FLSA, and attorneys' fees of nearly $ 150,000. [122] The settlement also required InterSolutions to hire an external auditor to review the pay practices of the company and determine whether any other temporary employees were owed back pay. [123]

In 2009, the Committee filed a class action lawsuit, Claros v. Nastos Construction, Inc., et al., alleging that Nastos violated the FLSA by failing to pay its employees overtime for work over 40 hours per week, and for withholding other required compensation. [124] The Defendant vigorously litigated the case, which involved extensive motions, multiple amendments to the complaint, and numerous discovery disputes. [125] Ultimately, however, in 2013 the Committee was able to achieve a class wide settlement with Nastos, pursuant to which the employee class received $ 700,000 in unpaid wages and attorneys' fees. [126]

---

[117] *Compl., supra* note 114, at 1-3, 76.

[118] Class Action Compl. at 9; Cote v. Wal-Mart Stores Inc., No. 1:15-cv-12945-WGY (D. Mass. July 14, 2015).

[119] Settlement Agreement, Cote v. Wal-Mart Stores Inc., No. 1:15-cv-12945-WGY (D. Mass. Dec. 2, 2015).

[120] *Cryer v. Intersolutions, Inc., No. 06-2032, 2007 U.S. Dist. LEXIS 29339, at 2-3* (D.D.C. Apr. 7, 2007).

[121] Id.

[122] Cryer v. Intersolutions, Inc., No. 06-2032, Consent Decree filed June 13, 2007 (Dkt. No. 54).

[123] Id.

[124] Collective Action, Class Actions, and Individual Compl. at 2-3, Claros v. Nastos Constr., Inc., No. 1:09-cv-01888 (D.D.C. Oct. 2, 2009).

[125] See docket for Claros v. Nastos Constr., Inc., (Dkt. No. 1:09-CV-01888). The statement is confirmed by the docket entries in the case, which reflect numerous motions and discovery disputes.

[126] See Settlement Agreement at 3, Claros v. Nastos Constr., Inc., No. 1:09-cv-01888 (D.D.C. May 31, 2013) (stating that a settlement of $ 550,000 was decided); see also Order and Final Judgment at 3, Claros v. Nastos Constr., Inc., No. 1:09-cv-01888 (D.D.C. Jan 14, 2014) (stating that plaintiffs were awarded $ 150,000).

In Ayala v. Tito Contractors, Inc., et al., a complaint was filed in October 2013 on behalf of employees of a construction contractor, in a case similar to Nastos Construction. [127] The complaint alleged that Tito had violated the FLSA, as well as related D.C. and Maryland wage laws, by insisting that its employees routinely work 60-80 hours per week but failing to pay overtime, pressuring employees to underreport, and failing to keep accurate time records. [128] Plaintiffs sought class certification under the FLSA's "collective action" provision, *29 U.S.C. § 216*(b). [129] The district court duly certified the class in 2014, **[*21]** after which Tito submitted to a settlement in March 2015 that restored more than $ 800,000 in unpaid wages to the plaintiff class. [130]

G. Individual Cases

Although class actions "make the headlines," the Committee has represented hundreds of individual plaintiffs in discrimination actions covering a wide variety of issues. In many of these cases, the Committee achieved significant damage awards and/or injunctive relief, either through trial or settlement. Examples include the following:

1. Garcia Hernandez v. Chipotle Mexican Grill, Inc.

In May 2011, Doris Garcia Hernandez began working at Chipotle Mexican Grill on M Street in Washington, D.C. [131] Ms. Garcia received positive employment reviews for her work, until she informed her supervisor of her pregnancy in late November 2011. [132] She claimed that upon learning of her pregnancy, her supervisor changed his attitude towards her and instituted a new policy that made it more difficult for employees to use the bathroom and drink water. [133] She was then terminated after taking leave to attend a prenatal appointment. [134]

The Committee filed suit on Ms. Garcia Hernandez's behalf, alleging pregnancy discrimination in violation of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and the District of Columbia Human Rights Act. [135] After trial, the jury returned a verdict of $ 50,000 in compensatory damages and $ 500,000 in punitive damages against Chipotle. [136] Moreover, the case inspired the District of Columbia Council to pass the Protecting Pregnant Workers Fairness Act to ensure that D.C. employees like Ms. Garcia Hernandez are guaranteed pregnancy accommodations at work. [137]

[*22]

2. Hardin v. Dadlani

---

127 *Ayala v. Tito Contrs., Inc., 82 F. Supp. 3d 279, 283* (D.D.C. Mar 4, 2015).

128 Id.

129 Id.

130 *Order Granting Plaintiff's Motion for Conditional Class Certification, Ayala v. Tito Contrs., Inc., 82 F. Supp. 3d 279* (D.D.C. Mar 4, 2015) (filed Feb. 26, 2014) (1:13CV01603). Details of the Settlement Agreement are personal recollections of the author.

131 *Compl. at 9, Hernandez v. Chipotle Mexican Grill, Inc., 257 F. Supp. 3d 100 (D.D.C. 2014)* (No. 1:14-cv-00297-BAH).

132 Id. at 3.

133 Id. at 4.

134 Id. at 6.

135 Id. at 1.

136 *Verdict Form at 1, Hernandez v. Chipotle Mexican Grill, Inc., No. 14-297, 257 F. Supp. 3d 100 (D.D.C. 2016).*

137 Abha Bhattarai, Chipotle Ordered to Pay $ 550,000 for Discriminating Against Pregnant Worker, Wash. Post (Aug. 9, 2016), *https://www.washingtonpost.com/business/capitalbusiness/chipotle-ordered-to-pay-550000-for-discriminating-against-pregnant-worker/2016/08/09/962ac7* 2e-5e49-11e6-8e45-477372e89d78 story.html?utm term=.0e2fda7a6477.

Ms. Hardin, who is African American, was hired to fill a bartender position at Redline, a D.C. bar, lounge and restaurant. [138] On Ms. Hardin's first day of work, the restaurant's owner appeared to be extremely disgusted after discovering that his staff had hired an African American bartender. [139] He proceeded to fire her on the spot. [140] Evidence gathered during the Committee's investigation showed that this blatant action was only part of an across-the-board scheme of discriminatory exclusion, including policies that excluded African Americans from working in visible positions and denied African American customers equal access to the establishment. [141] After a full trial, the jury awarded Ms. Hardin $ 175,000 in compensatory damages and $ 501,000 in punitive damages. [142]

3. Prince of Peace Lutheran Church v. Linklater [143]

Ms. Linklater, a music director at a local Lutheran church, was sexually harassed by the church's pastor. [144] She received outstanding performance evaluations until she complained about the harassment, after which she was subject to severe retaliation and a campaign to drive her out of the church. [145] Ms. Linklater was awarded damages totaling $ 1,350,000 for intentional infliction of emotional distress, including $ 1,000,000 in punitive damages against the pastor. [146] After a complex set of appeals and cross-appeals, the parties agreed to a settlement. [147]

[*23]

4. McCoy v. Peake Printers, Inc.

The Committee, co-counseling with the law firm of Miller and Chevalier, obtained a jury award of $ 2.4 million in compensatory and punitive damages for Mr. McCoy, an African-American press operator, on his claims of race discrimination, retaliation and a hostile work environment. [148] This outcome was one of the highest monetary awards for an individual discrimination case within the jurisdiction. [149] While Peake Printers' appeal was pending,

---

138 *Compl. at 2, Hardin v. Dadlani, 221 F. Supp. 3d 87 (D.D.C. 2011)* (No. 1:11-cv-02052).

139 Id.

140 Id.

141 *Hardin v. Dadlani, 221 F. Supp. 3d 87, 99 (D.D.C. 2016).*

142 Judgment in *a Civil Action at 1, Hardin v. Dadlani, 221 F. Supp. 3d 87 (D.D.C. 2016)* (No. 1:11-cv-02052-RBW).

143 Relman, Dane & Colfax PLLC, Jury Awards $ 687,000 in Race Discrimination Case, *http://www.relmanlaw.com/civil-rights-litigation/cases/Redline-Hardin-v-Dadlani.php* (last visited Oct. 11, 2018).

144 Prince of Peace Lutheran Church v. Linklater, No. 237453-V, 2005 WL 6369945 (Md. Cir. Ct. Jan. 19, 2005), aff'd, *28 A.3d 1171 (Md. 2011).*

145 Id.

146 *Prince of Peace Lutheran Church v. Linklater, 28 A.3d 1171, 1179 (Md. 2011).*

147 This was a private settlement, the details of which are the author's personal recollection.

148 Ruben Castaneda, Maryland Pressman Awarded $ 2.4 Million in Bias Case, Wash. Post (Apr. 28, 2001), *https://www.washingtonpost.com/archive/local/2001/04/28/md-pressman-award* ed-24-million-in-bias-case/8ffe136a-91ed-402f-8ba9-3ac1c9680913/?utm term=.cb1b6fb759f0.

the Committee successfully settled Mr. McCoy's claims for a payment of more than $ 2 million, as well as attorneys' fees and various forms of injunctive relief. [150]

5. Cooper v. Paychex, Inc.

Mr. Cooper, an African American district sales manager, was terminated from his position from a national payroll servicing company, even though he was performing as well as or better than his white peers. [151] Discovery revealed that the company had a history of not hiring or promoting African American employees. [152] After a four-day trial, the district court concluded that the reason Paychex gave for terminating Mr. Cooper was merely pretext for racial discrimination and entered a judgment in his favor for $ 200,000 in compensatory damages and $ 100,000 punitive damages, plus more than $ 300,000 in attorneys' fees. [153] The Fourth Circuit upheld the judgment on appeal. [154]

6. Martin v. Holiday Universal

Seven current and former employees brought an action against Holiday, a health club chain, alleging that they were denied promotions and transfers to Holiday's Washington, D.C. branches; the former employees alleged that they were discharged as a result of racial discrimination. [155] Holiday agreed to a settlement providing for nearly **[*24]** $ 1 million in compensatory damages and attorney's fees, as well as broad injunctive relief. [156]

7. Plater v. W.A. Chester, LLC

W.A. Chester LLC is a company that installs high-voltage electric transmission lines throughout the Washington, D.C. metropolitan area and nationally. [157] Plaintiff Leroy Plater and other African American employees were given the least desirable jobs at Chester, denied promotion to higher level positions, and generally experienced a racially hostile work environment. [158] Before trial, Chester agreed to a settlement that included broad injunctive relief requiring implementation of company-wide comprehensive structural and policy changes designed to make the company workplace more welcoming for minorities. [159] These changes included mandatory diversity training for all employees; new and expanded non-discrimination policies, including a zero tolerance policy for discrimination by

---

149 Id.

150 Id.

151 ***Cooper v. Paychex Inc., 163 F.3d 598 (4th Cir. 1998).***

152 Id.

153 *Cooper v. Paychex Inc., 960 F. Supp. 966 (E.D. Va. 1997),* aff'd, ***163 F.3d 598 (4th Cir. 1998).***

154 ***Cooper, 163 F.3d at 598.***

155 *Martin v. Holiday Universal, Inc., No. JH-90-1188, 1990 U.S. Dist. LEXIS 18102, at 1-5* (D. Md. Oct. 3, 1990).

156 Wash. Law. Comm., Annual Report, 1990-1991, at 8. The Committee also brought a related case against Holiday on behalf of African Americans whose applications for club memberships had been denied based on their race. This case is discussed in detail in Robert Duncan's article on Public Accommodations. Robert Duncan, The Washington Lawyers' Committee's Fifty-Year Battle for Racial Equality in Places of Public Accommodation, 62 How. L.J. [forthcoming Fall 2018].

157 Amended Compl. at 4, Plater v. W.A. Chester, LLC., No. 1:06-cv-01219 (D.D.C. Nov. 20, 2006). See generally Wash. Law. Comm., An Interview with Joseph G. Davis, Lead Counsel In Plater v. W.A. Chester, LLC, 13 Update 2, at 6 (Fall 2007) (discussing Davis and the Committee's work on this case).

158 Amended Compl. at 8, Plater v. W.A. Chester, LLC., No. 1:06-cv-01219 (D.D.C. Nov. 20, 2006).

159 Order granting parties' Joint Motion to Enter Settlement Order, Plater v. W.A. Chester, LLC., No. 1:06-cv-01219 (D.D.C. July 15, 2007).

supervisors; hiring an outside consultant to participate in investigations of discrimination complaints; and periodic reporting to plaintiff's counsel of compliance with these requirements. [160]

8. Equal Employment v. National Hospitality

Jesus Romero, who worked for 16 years as a dishwasher at Sheraton National Hotel in Arlington, Virginia, was fired after the hotel instituted an English-fluency requirement for all of its employees. [161] The Committee joined the EEOC in a lawsuit on Mr. Romero's behalf, **[*25]** alleging that Sheraton's blanket policy had a discriminatory impact on Spanish-speaking workers in positions for which English fluency was not a reasonable requirement. [162] Sheraton submitted to a settlement and consent decree that included payment of $ 50,000 in damages and back pay to Mr. Romero, along with $ 30,000 in attorneys' fees. [163] The consent decree required Sheraton to rescind its overbroad English-fluency requirement and to train its managers on Title VII's prohibition of discrimination on the basis of national origin, including the potentially discriminatory impact of an English fluency requirement. [164] Under the agreement, the defendant is also required to report back to the EEOC periodically on its compliance efforts. [165]

9. Fenwick v. So. MD Electric [166]

Paul Fenwick, an African American lineman at the defendant utility (SMECO), worked for years in a racially hostile atmosphere in which he and other black employees endured racial epithets and threatening conduct. [167] The company's management and human resources department ignored complaints, and he was eventually terminated after 22 years of service. [168] After Mr. Fenwick was ordered reinstatement through union arbitration, the company transferred him to a remote company location and denied him transfers into positions for which he had the greatest seniority. [169]

The Committee's lawsuit on Mr. Fenwick's behalf resulted in a consent decree, pursuant to which SMECO was required to institute mandatory diversity training for all employees, including not less than one full day of training for nonmanagement employees and two days for management employees. [170] In addition, the company was required to implement a streamlined program of investigating discrimination complaints by an outside Discrimination Compliance Officer, with all such investigation reports being personally reviewed by the **[*26]** company president. [171] The injunctive relief also included measures aimed at increasing the numbers of African Americans in

---

160 Id.

161 See Wash. Law. Comm., 11 Update 2 at 15 (Fall 2005). See also Amy Joyce, Hotel Settles Language Suit with EEOC, Wash. Post (Nov. 10, 2005), *http://www.washingtonpost.com/wp-dyn/content/article/2005/11/09/AR2005110902107.html*; Amy Joyce, EEOC Sues Virginia Hotel Over English Fluency Policy, Wash. Post (Oct. 6, 2004), *http://www.washingtonpost.com/wp-dyn/articles/A9663-2004Oct5.html*.

162 Joyce, EEOC Sues Virginia Hotel Over English Fluency Policy, supra note 161.

163 Joyce, Hotel Settles Language Suit with EEOC, supra note 161.

164 Id.

165 Id.

166 Consent Decree with Exhibit A and Approval, Fenwick v. So. MD Electric, No. 8:03-cv-00383 (D. Md. Feb. 10, 2003) (filed Jan. 7, 2004).

167 See Wash. Law. Comm., 10 Update 3 (Spring 2004).

168 Id.

169 Id.

170 Id.

171 Id.

management positions by recruiting at predominantly African American colleges and advertising openings in The Afro-American newspaper of Baltimore. [172]

IV. PUBLIC SECTOR EMPLOYMENT CASES

Since 1984, the EEO Project has continued to litigate cases against public sector employers, including several class action lawsuits. [173] Three of the most significant cases are described below, as well as a recent individual action in which significant damages were awarded.

A. Neal v. Department of Corrections, Brokenborough v. Department of Corrections, Merrion v. Corizon Health, Inc. [174]

Filed twenty years apart, these cases - all Title VII lawsuits against the D.C. Department of Corrections based on a pervasive pattern of sexual harassment - are three of the most significant public sector employment discrimination lawsuits the Committee has brought in the last quarter century. [175] The differences between these cases highlight how the Committee has addressed an increasingly difficult legal environment to vindicate our clients' rights on a class wide basis. [176]

The Neal case was the largest public sector employment discrimination case pursued by the Committee in the mid-1990's; it challenged a pattern and practice of sexual harassment at the D.C. Department of Corrections against female employees and retaliation against employees who objected to harassment. [177] Working with co-counsel at three private firms, and assisted by volunteer counsel from many other firms **[*27]** who represented individual claimants, the Committee was able to achieve significant relief for the class. [178]

The Committee initially filed suit in November 1993 on behalf of a single plaintiff - Sharon Bonds - who worked as a correctional officer in the D.C. Jail, where she experienced harassment (unwanted touching, unwanted overtures, and unwelcomed sexual advances) by two supervisors and was threatened by her supervisor after she complained. [179] In January 1994, the Committee filed an amended complaint seeking class wide injunctive and monetary relief on behalf of eight employees, who alleged a pervasive pattern and practice of sexual harassment by supervisors, as well as a pattern of retaliation against individuals who complained. [180]

---

[172] Id.

[173] See generally Wash. Law. Comm., Annual Reports and Updates, 1984-Present.

[174] See Neal v. Dir., D.C. Dep't of Corr., No. 93-2420, 1995 WL 517249 (D.C. Cir. 1995); *Brokenborough v. D.C., 236 F. Supp. 3d 41* (D.C. Cir. Feb. 17, 2017); Merrion v. Corizon Health, Inc., No 1:13-cv-1757, 2013 WL 6835531 (M.D. Pa. 2013).

[175] See generally id.

[176] See generally id.

[177] 1995 WL 517249, at 9.

[178] Id. at 1. The Neal case was also the first major case developed by Warren Kaplan, a successful attorney in private practice who, after retiring from his law firm, joined the Committee as its first Senior Counsel, working in the EEO Project. Kaplan was instrumental in developing and litigating a number of major cases for the Committee, including the Circuit City case, described earlier. He also was the model for subsequent Senior Counsel who have provided invaluable assistance to the Committee. They bring years of experience and maturity to the staff, devoting the skills that they developed in private practice to public interest work.

[179] Id. at 9.

[180] Docket at 31-32, Bonds v. Dir., D.C. Dep't of Corr., No. 93-2420 (D.C. Cir. 1993).

After the Defendants attempted to transfer the lead plaintiff, Bessye Neal, to a different position, the Committee sought and obtained injunctive relief in early 1994. [181] The Court subsequently entered a second injunction barring retaliation against another named plaintiff and the husband of a third named plaintiff, as well as the other named plaintiffs. [182] Later, the Court found that the Defendants had engaged in further acts of retaliation and held the Defendants in contempt, on two occasions actually imprisoning D.C. Jail managers for violating the injunction against retaliation. [183] The Court also appointed a special master to oversee personnel actions regarding the named plaintiffs. [184]

Throughout the class discovery phase, the Committee had to go to the Court repeatedly to ensure that Defendants complied with their discovery obligations, with the Court repeatedly holding Defendants in contempt of discovery orders. [185] After the Defendants, in responding to a discovery request to identify persons with knowledge of the matter, failed to identify a single person, the Court's sanctions **[*28]** culminated in an order precluding the Defendants from introducing any fact witnesses at trial whom they could not have identified earlier. [186]

Ultimately, the Court certified a class on December 23, 1994. [187] In March 1995, the Committee commenced a trifurcated trial - with the first phase on class liability issues, the second phase on damages to the named plaintiffs, and the third phase on equitable remedies. [188] During the liability phase, after learning that a correctional officer who had testified against the Defendants was transferred following her testimony, the Court entered an order enjoining the Defendants from taking any retaliatory action or threatening retaliatory action against any witnesses in the case and holding two of the Defendants' employees in criminal contempt. [189] After twenty-two trial days, on April 4, 1995, the jury unanimously ruled for the Plaintiffs - finding that the Department of Corrections engaged in a pattern and practice of sexual harassment and retaliation by creating a sexually hostile working environment for female employees. [190] Following seven days of additional trial, the jury awarded damages to six of the individual plaintiffs, in amounts ranging from $ 75,000 to $ 500,000. [191]

At the conclusion of the jury trial, the Court held an additional two-day bench trial to consider injunctive relief. [192] In August 1995, finding that sexual harassment occurred at the Department of Corrections "openly and wantonly," District Judge Lamberth entered sweeping injunctive relief, both enjoining the Defendants from engaging in sexual harassment and retaliation, mandating that the Department of Corrections establish a new Office of Special Inspector tasked with drafting a new policy on and investigating all complaints of sexual harassment and retaliation, and appointing a special master to protect the named plaintiffs from further retaliation. [193]

Judge Lamberth also ordered that the absent class members would be entitled to Teamsters hearings to allow individual class members to establish that they had been unfavorably affected by the Department's **[*29]** pattern

---

[181] Id. at 32.

[182] Consent Decree, Neal v. Dir., D.C. Dep't of Corr., No. 93-2420 (RCL), at 9.

[183] Docket, supra note 180, at 65.

[184] Consent Decree, supra note 183, at 5-6.

[185] These contempt orders are in the docket.

[186] Docket, supra note 180, at 48.

[187] Id. at 43.

[188] Id. at 47.

[189] Id. at 48.

[190] Id. at 49-50.

[191] Id. at 50.

[192] Id. at 56.

[193] Neal, supra note 177, at 2, 13.

and practice of harassment or retaliation. [194] Following this order, the Committee recruited counsel to represent more than 250 claimants. [195] Active litigation on these claims continued through 2005. [196]

Following trial, the Defendants appealed. In August 1996, the D.C. Circuit reversed, finding that the District Court had abused its discretion in precluding the Defendants from presenting any fact witness at trial without having considered whether lesser sanctions were appropriate. [197] Instead of retrying the case, the parties reached a settlement and agreed to a consent decree in August 1997 that included $ 8.5 million in damages plus equitable relief for the class, including maintaining the Office of Special Investigator. [198] The consent decree expired in February 2004. [199]

Almost ten years later - in November 2013 - the Committee again sued the Department of Corrections based on a continuing pattern and practice of sexual harassment of female employees. [200] The suit was filed on behalf of six employees of the Department of Corrections alleging ongoing sexual harassment and retaliation, and noting that "the conduct that gives rise to the Neal class action continues at the DOC today." [201] The lead plaintiff - Lisa Brokenborough - experienced repeated unwanted sexual overtures from her supervisor (including exposing himself) and was denied promotions and overtime hours for rebuffing his advances. [202]

In contrast to the Neal action, the Brokenborough action was filed only on behalf of the individual plaintiffs and not as a class action. [203] This change in tactics reflects the intervening 2011 Supreme Court case in Wal-Mart Stores v. Dukes, which reversed the certification of a class of women who alleged that they had been denied equal pay and promotions on the basis of their sex. [204]

[*30] In spring 2015, five of the plaintiffs reached settlements with the Department of Corrections. [205] After the Defendants' motion for summary judgment, as to the last plaintiff, was denied in February 2017, the parties settled the case in May 2017. [206]

B. Hopson v. Baltimore City Police Department [207]

---

194 Procedure for Absent Class Members at 1, Neal v. Dir., D.C. Dep't of Corr., No. 93-2420 (D.C. Cir., 1995).

195 Wash. Law. Comm. 2 Update 1 (Spring 1996); Wash. Law. Comm. 3 Update 2 (Fall 1997).

196 Docket, supra note 180.

197 Docket, supra note 180, at 94.

198 Id. at 100.

199 *Compl. at 8, Brokenborough v. D.C., 236 F. Supp. 3d 41* (D.C. Cir. Feb. 17, 2017).

200 Id. at 2.

201 Id. at 8.

202 Id. at 9-11, 13.

203 Id. at 5.

204 *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).*

205 Wash. Law. Comm., Spring 2015 Update.

206 Id.

207 *Hopson v. Balt. City Police Dep't, 232 F.R.D. 228* (D. Md. Nov. 22, 2005).

In 2004, the Committee filed a class action race discrimination lawsuit against the City of Baltimore Police Department alleging a pattern and practice of discrimination against African American police officers. [208] The initial suit was filed on behalf of twenty-one black officers, asserting that African American officers received disparate treatment in the Department's disciplinary system compared to Caucasian officers, were subject to a hostile work environment, and had experienced retaliation for opposing discriminatory practices. [209] For example, the lead plaintiff - Louis Hopson - was subjected daily to racially derogatory epithets and racially motivated threatening actions by his supervisors and co-workers, and suffered retaliation after complaining to the Internal Affairs Division by being transferred to the 4 a.m. shift. [210]

After several years of discovery and litigation on class certification issues, in June 2009, the Committee and the Defendants reached a settlement providing for significant monetary relief to the individual named plaintiffs, as well as broad equitable relief. [211] As part of the settlement, the City of Baltimore agreed to pay $ 2.5 million to the plaintiffs and in attorneys' fees and costs, with the potential for additional compensation if certain aspects of the non-monetary relief were not implemented. [212]

With regard to non-monetary relief, the Police Department agreed to retain an outside consultant to advise and report on any racial disparities in the administration of the disciplinary system. [213] The Police Department also agreed to provide leadership training programs over a five year period to encourage minority and female candidates **[*31]** for promotion. [214] And the Police Department agreed to enhance training in the Police Department's EEO and disciplinary functions. [215]

The settlement was approved by the Court and the case was dismissed in July 2009. [216]

C. Little v. Washington Metropolitan Area Transit Authority ("WMATA") [217]

The Little case was one of the largest public sector employment discrimination cases pursued by the Committee in the mid-2010s, and was a class action lawsuit filed on behalf of applicants and employees of WMATA (the Metro) and its contractors who had been denied employment because of WMATA's use of a criminal background screening policy. [218] The Committee asserted that the use of this policy - which barred individuals with a broad range of criminal convictions from employment at WMATA - had a disparate impact against African American applicants and employees in violation of Title VII. [219] The Committee worked with private co-counsel and the NAACP Legal Defense Fund. [220]

---

208 *Docket at 20, Hopson v. Balt. City Police Dep't, 232 F.R.D. 228* (D. Md. Nov. 22, 2005).

209 Id.

210 *Compl. at 11, Hopson v. Balt. City Police Dep't, 232 F.R.D. 228* (D. Md. Nov. 22, 2005).

211 *Settlement Agreement at 1, Hopson v. Balt. City Police Dep't, 232 F.R.D. 228* (D. Md. Nov. 22, 2005).

212 Id. at 4.

213 Id. at 6.

214 Id. at 8.

215 Id. at 6.

216 See Settlement Agreement, Hopson v. Baltimore, No. 1:04 CV03842, 2009 WL 2416595 (D. Md. 2009).

217 *Little v. Wash. Metro. Area Transit Authority, 100 F. Supp. 3d 1 (D.C. Cir. 2015).*

218 *Compl. at 3, Little v. Wash. Metro. Area Transit Authority, 100 F. Supp. 3d 1 (D.C. Cir. 2015).*

219 *Id. at 11-12.*

The Committee initially filed suit against WMATA in July 2014 on behalf of nine plaintiffs, each of whom had a job offer revoked, been terminated or otherwise adversely impacted because of a prior criminal conviction. [221] For example, the lead plaintiff - Erick Little - had a job offer revoked to be a MetroBus driver based on a 27-year old conviction for drug possession; at the time his offer was revoked, Mr. Little worked as a bus driver for a regional bus service. [222] Several of the other plaintiffs were terminated from WMATA contractors after years of employment because of drug possession convictions that were similarly dated. [223]

[*32] Notwithstanding the Wal-Mart v. Dukes decision, the Committee decided to pursue the Little case as a class action under Rule 23(b)(2), primarily seeking relief that is injunctive in nature. [224] One factor that facilitated this decision was that WMATA had implemented its criminal background check screening policy in late 2011 by adopting a single uniform policy (Policy 7.2.3) that was memorialized in a single written document. [225]

In April 2015, the Court granted WMATA's request to bifurcate proceedings to resolve class certification issues before merits discovery could proceed. [226] Throughout the remainder of 2015 and early 2016, the Parties engaged in fact and expert discovery on class certification issues, with the plaintiffs moving for class certification in May 2016. [227]

In March 2017, District Judge Collyer granted the class certification motion in part, certifying three subclasses that covered WMATA applicants and applicants and employees of WMATA's contractors. [228] The court subsequently ordered that merits discovery be completed expeditiously. [229]

Shortly after the class certification decision, WMATA announced that it was rescinding policy 7.2.3, and replacing it with a policy that emphasized individual determinations based on the facts and circumstances of the employee's background, rather than automatic disqualifications. [230]

After merits discovery was largely completed, in November 2017, the plaintiffs and WMATA reached a settlement providing for significant equitable and monetary relief. [231] With regard to equitable relief, WMATA agreed that it would not go back to Policy 7.2.3 and would maintain its revised policy in place for at least a year. With regard to monetary relief, WMATA agreed to pay $ 6.5 million to the class and in attorneys' fees and costs. [232] On April 27,

---

220 *Id. at 42.*

221 *Docket at 22, Little v. Wash. Metro. Area Transit Authority., 100 F. Supp. 3d 1 (D.C. Cir. 2015).*

222 *Compl. at 17, Little v. Wash. Metro. Area Transit Authority., 100 F. Supp. 3d 1 (D.C. Cir. 2015).*

223 *Id. at 18-19.*

224 *Id. at 13.*

225 Id. at 403; id. at 417.

226 See *Little v. Wash. Metro. Area Transit Authority, 100 F. Supp. 3d 1, 4-7 (D.D.C. 2015).*

227 *Little v. Wash. Metro. Area Transit Authority, 249 F. Supp. 3d 394, 416 (D.D.C. 2017).*

228 *Id. at 426.*

229 See Docket, Little v. Wash. Metro. Area Transit Authority (Dkt. No. 1:14CV01289).

230 See *Little v. Wash. Metro. Area Transit Authority, No. 14-1289, 2018 U.S. Dist. LEXIS 70849, at 7 (D.D.C. 2018).*

231 See id. at 6-7.

232 Id. at 7.

2018, the district court granted final approval of the settlement, though an appeal challenging **[*33]** the settlement would have to be resolved before settlement funds are distributed. [233]

D. Van Rossum v. Baltimore County, Maryland [234]

Dianne Van Rossum worked as a health inspector for Baltimore County's Department of Environmental Protection and Resource Management. [235] Her office was located in the county courthouse. In May 2009, she began to experience a variety of symptoms, including reduced vision, pain and numbness, which she attributed to mold and fungus in the courthouse. [236] Shortly afterward, the Department relocated to a new building, but Van Rossum's symptoms worsened, due to poor ventilation and the fumes from new paint and construction materials. [237] She requested and was granted an accommodation, in which her office was moved to a lower floor, occupied by the Department of Recreation and Parks ("DPR"), and her symptoms eased. [238]

In January 2010, Van Rossum was informed that the DPR needed her office and that she would need to move back to her original office in the new building. [239] She submitted a medical leave request to cover expected absences, as a result of which she was demoted to the previous job that she had held when she joined the Department. [240] After being told that if she did not return to her original office, she would face disciplinary action, Van Rossum took early retirement in April 2010, as a result of which she lost some pension and related benefits. [241]

Van Rossum filed a claim with the EEOC, alleging discrimination under the Americans With Disabilities Act ("ADA"). [242] In March 2013, the EEOC issued its decision, agreeing with Van Rossum that the County had violated the ADA by failing to adequately address her disability, denying her a reasonable accommodation, and demoting her and forcing her to retire prematurely. [243]

[*34] After the EEOC's efforts to conciliate the claim failed, the Committee filed an ADA discrimination suit on Van Rossum's behalf in Maryland Federal District Court in January 2014. [244] The County argued that because she had filed for social security disability benefits (which required proof that the claimant's disability prevented her from working), she could not also pursue an ADA claim. [245] The court, however, agreed with Van Rossum that because

---

233 Id. at 25.

234 *Van Rossum v. Balt. City., 178 F. Supp. 3d 292 (D. Md. 2016).*

235 *Id. at 293.*

236 Id.

237 *Id. at 293-94.*

238 *Id. at 294.*

239 Id.

240 See id.

241 *Id. at 295.*

242 *Id. at 293.*

243 *Id. at 295.*

244 See *id. at 296.*

245 See *id. at 297.*

her disability did not prevent her from working with reasonable accommodations, the County's failure to make such accommodations entitled her to file a disability claim while continuing to pursue her discrimination claim. [246]

After a one-week trial in January 2017, the jury returned a verdict in Van Rossum's favor on all counts, and awarded her $ 780,000 in damages. [247] The trial court denied the County's post-trial motions, and also awarded plaintiff $ 500,000 in attorneys' fees and costs. The judgment and verdict were upheld on appeal. [248]

The jury's award is one of the largest ever granted in a failure-to-accommodate case under the ADA, and sends a powerful message to employers to take ADA issues and reasonable requests for accommodations seriously. [249] The case is also important as a precedent that the filing of a social security disability claim does not automatically preclude an employee from pursuing a disability discrimination claim against their employer. [250]

V. MERGER WITH THE EMPLOYMENT JUSTICE CENTER

In April 2017, with the support of a grant from the D.C. Bar Foundation, the Committee merged with the Employment Justice **[*35]** Center (the "EJC"). [251] The EJC was founded on Labor Day, 2000, to provide legal protection and assistance to low-wage workers in the District and surrounding suburbs. [252] The EJC provides advice to workers through free clinics, pursues impact litigation, and engages in advocacy for passage and enforcement of laws to protect workers' rights. [253]

The centerpiece of the EJC's mission is its Workers' Rights Clinic, which is held seven times a month at locations in Shaw, Anacostia, and Northeast Washington. [254] At these free clinics, workers speak with an intake volunteer who assists the worker with legal advice or drafting pro se demand letters or administrative complaints. [255] The clinics are staffed by intake volunteers, including both lawyers and non-lawyers, along with a team of experienced volunteer attorney advisors. [256] The clinics not only provide advice and assistance for workers facing discrimination and wage theft, but also help with FMLA rights, unemployment compensation, and workers' compensation, among

---

[246] See *id. at 299.*

[247] Jury Awards Baltimore County Former Employee with a Disability more than $ 780,000 in Lawsuit Brought by Washington Lawyers' Committee for Civil Rights and Kirkland & Ellis, Wash. Law. Comm. (Feb. 2, 2017), *https://www.washlaw.org/news-a-media/548-jury-awards-balti* more-county-former-employee-with-a-disability-more-than-780-000-in-lawsuit-brought-by-washington-lawyers-committee-for-civil-rights-and-kirkland-ellis [hereinafter Jury Awards].

[248] See *Van Rossum v. Balt. City., No. GJH-14-0115, 2017 U.S. Dist. LEXIS 147893, at 1* (D. Md. Sept. 11, 2017).

[249] See Jury Awards, supra note 247.

[250] Scott Johnson Jr., Receipt of SSDI Benefits Does Not Provide a Basis for Dismissal of ADA Claim, Soc'y for Human Res. Mgmt., *https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ssdi-benefits-ada-claim.aspx* (last visited Sept. 8, 2018).

[251] DC Employment Justice Center's Workers' Rights Efforts Continue Under Washington Lawyers' Committee for Civil Rights & Urban Affairs, DC Bar Found. (May 24, 2017), *https://dcbarfoundation.org/dc-employment-justice-centers-workers-rights-efforts-continue-under-wash* ington-lawyers-committee-for-civil-rights-urban-affairs/ [hereinafter DC Employment].

[252] Merger of the Washington Lawyers' Committee for Civil Rights & Urban Affairs and the D.C. Employment Justice Center, Wash. Law. Comm. (Apr. 19, 2017), *https://www.washlaw.org/news/581-merger-of-the-washington-lawyers-committee-for-civil-rights-urban-affairs-and-the-d-c-employment-justice-center*.

[253] See id.

[254] Emp't Justice Ctr., 2010 Annual Impact Report (2011).

[255] See Get Involved, Wash. Law. Comm., *https://www.washlaw.org/get-involved*.

other issues. [257] In appropriate cases, where the dispute cannot be resolved through advice or brief assistance, the clinic refers workers to volunteer counsel for pro bono representation. [258] Since its inception, the Workers' Rights Clinic has served about 1300 workers per year and has recovered more than $ 10 million in back wages and damages for its clients. [259]

In addition to the Clinic, the EJC advocates for the passage and enforcement of worker protection laws in the District. In 2008, for example, the EJC was instrumental in obtaining the D.C. Council's adoption of the Accrued Sick and Safe Leave Act, which mandates paid sick leave as well as paid leave for workers who are victims of **[*36]** domestic violence and sexual assault. [260] In 2014, the EJC played a key role in the passage of the D.C. Wage Theft Prevention Act, which significantly increased the penalties for wage theft, broadened the remedies available to victims, and required that employers maintain accurate time records and pay their workers at least twice a month. [261] Other workers' protection laws in which the EJC has been involved are the Fair Criminal Records Screening Act of 2014, which prohibits public employers from considering an applicant's criminal history for certain jobs until after the initial application; the Minimum Wage Act of 2013; the Workplace Fraud Act of 2012, which prohibits misclassification of construction workers as independent contractors; and the Unemployment Insurance Reform Act of 2010, which expanded eligibility and benefits for the many workers suffering from the impact of the Great Recession. [262]

Finally, the EJC has developed programs to enable workers to better protect their own rights. In 2010, the EJC created Workers Advocating for Greater Equality (WAGE), which educates workers on their legal rights and trains them to educate and advocate on behalf of fellow workers. [263] A similar EJC organization called the Injured Workers Advocates (IWA) advocates on behalf of those who have suffered workplace injuries or disabilities. [264] And the EJC is a leader in the Just Pay Coalition, a coalition of labor, non-profit organizations, including the Committee, faith leaders and worker leaders to press for adoption of legal protections for workers and for enforcement of existing labor and workers' rights laws. [265]

The overlap between EJC's work and the Committee's Employment Project, which, as has been seen, includes wage theft and related cases, made the merger a natural fit. [266] The EJC's four staff members - two lawyers, the

---

[256] Id.

[257] Workers' Rights Clinic, Wash. Law. Comm., *https://www.washlaw.org/projects/workers-rights-clinic*.

[258] See id.

[259] Emp't Justice Ctr., 2008 Annual Impact Report (2009).

[260] 10 Steps to Implement D.C.'s Accrued Sick and Safe Leave Act, Clasp (Apr. 2012), *https://www.clasp.org/sites/default/files/public/resources-and-publications/files/Steps-to-imple* ment-DC-paid-sick-days-law-v5-on-CLASP-template-FINAL-2.pdf.

[261] D.C. Wage Theft Prevention Amendment Act of 2014 Goes Into Effect, D.C. Bar, *http://www.dcbar.org/pro-bono/newsletters/summer-2015/wage-theft-in-effect.cfm*.

[262] Emp't Justice Ctr., 2010 Annual Impact Report (2011); Emp't Justice Ctr., 2012 Annual Impact Report (2013), Emp't Justice Ctr., Final Rep. 2014-15 (Aug. 6, 2015).

[263] Emp't Justice Ctr., 2012 Annual Impact Report (2013).

[264] See id.

[265] See Making Our Laws Real: Protecting Workers Through Strategic Enforcement of DC's Labor Laws, DC Jobs with Justice (Apr. 9, 2018), *http://www.dcjwj.org/laws-real/*.

[266] See DC Employment, supra note 251.

clinic coordinator, and community organizer - **[*37]** joined the Committee's project staff. [267] The EJC benefits from the Committee's greater resources and extensive relationships with law firms, while the EJC, through the Workers' Rights Clinic, gives the Committee a greater physical presence in communities of color and communities living in poverty. [268] The clinics also provide the Committee an opportunity to increase its reach into client communities, to collect data on the experience of clients, and to build its docket of high impact cases. [269] And workers benefit from a "one-stop shopping experience" for legal advice and assistance from a combined organization with greater resources and expertise than the individual components. [270]

VI. CURRENT ISSUES AND CHALLENGES FACING THE COMMITTEE

Much has changed in the half century since the Committee was established to help make the promise of Title VII and other civil rights laws a reality. Blatant racial segregation of private and public workforces in the Washington, D.C. metropolitan area is largely a thing of the past, due in part to the Committee's efforts such as the Federal Employment Project and its work with the Washington Area Construction Industry Task Force. [271] Sexual harassment is recognized as a form of discrimination subject to Title VII, and more protection is available to gay and lesbian employees. [272] Federal and local agencies, and most large private employers in the region, have policies in place to prohibit discrimination based on race, gender and sexual orientation. A substantial body of case law has been built on which plaintiffs in discrimination actions can seek redress under federal, state and local anti-discrimination laws. When the Committee was created, few other civil rights organizations or private law firms were available to represent victims of employment discrimination. [273] Now, a number of law firms - some of which were founded or headed by alumni of the **[*38]** Committee's staff attorneys - provide effective representation to plaintiffs in employment discrimination lawsuits. [274]

Yet, while great progress has been made, there also remains a great deal to be done, and the Committee's mission is as critical now as it was fifty years ago. While overt employment discrimination is less common - albeit by no means extinct - subtler but still pernicious discrimination remains. The WMATA case, discussed above, is a good example: the policy barring employment to those with criminal convictions appeared neutral on its face, but in fact had a significant disparate impact on African American employees and applicants. Legal protections for transgender employees are not yet as robust as they are for other protected classes. An increasingly conservative federal judiciary has made it more difficult for plaintiffs to pursue discrimination claims successfully, particularly class actions. And the U.S. Government itself can be an ally during some Administrations, but an adversary in others. For example, in the recent Supreme Court case concerning the availability of class actions in arbitration proceedings, [275] the Obama Administration submitted an amicus brief supporting the position that employees cannot be forced to

---

[267] Proposal of the Washington Lawyers' Committee for Civil Rights and Urban Affairs Underserved Communities Rights of Low-Wage District of Columbia Workers.

[268] Id.

[269] Id.

[270] Id.

[271] Payton, supra note 10.

[272] *Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)* (sexual harassment constitutes discrimination prohibited by Title VII); DC Human Rights Act of 1977, as amended, § 2-1401.11(a) (prohibiting discrimination based on, inter alia, sexual orientation).

[273] Report of the National Advisory Commission on Civil Disorders (Kerner Commission), 1968.

[274] E.g., Cohen Milstein (Joseph M. Sellers, former Committee EEO Project Director), *www.cohenmilsteinc.com/professional/joseph-m-sellers*; Relman, Dane & Colfax PLLC (John P. Relman, former Committee Fair Housing Project Director), *www.relmanlaw.com/attorneys/jrelman.php*.

[275] See *Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).*

waive their rights to pursue class actions in arbitration; the Trump Administration reversed course and advised the Court that the Government had changed its position. [276]

Clearly, the Committee's work is even more important during Administrations, like the present one, that are hostile to enforcement of the civil rights laws. But even with sympathetic Administrations in place, the Committee will have work to do. Neither Government agencies nor private law firms have the Committee's experience and capability to recruit and coordinate multiple volunteer law firms and lawyers. Additionally, the Committee can serve as a resource to private plaintiffs and law firms by sharing its accumulated expertise on how best to pursue and litigate discrimination claims.

Among the biggest challenges currently facing the Committee in employment discrimination cases are: (1) the availability of class **[*39]** actions to victims of discriminatory patterns or practices; (2) how to protect workers in the modern "gig" economy from employment discrimination; and (3) how to address so-called "cat's paw" discrimination, in which an adverse employment action is the indirect result of discrimination by subordinate supervisors or co-workers. Each of these issues is addressed below.

A. Class Actions After Wal-Mart Stores and Epic Systems

As the summary of the Committee's work in this article makes clear, class actions are a vital weapon against pattern-or-practice discrimination, which adversely affects large numbers of employees. Although, in theory, it should be possible for an individual plaintiff or plaintiffs to prove a pattern or practice of discrimination and obtain appropriate injunctive relief, the courts have not generally permitted such an approach. [277] Thus, class actions have been a key component of the Committee's EEO Project.

Recent decisions of the Supreme Court, however, have severely limited, and potentially eliminated, the availability of class actions in most employment discrimination cases. In Wal-Mart Stores, Inc. v. Dukes, the Court reversed the certification pursuant to Rule 23(b)(2) of a nationwide class of 1.5 million women employees of Wal-Mart. [278] The plaintiffs alleged that the company violated Title VII by giving local managers unlimited discretion over pay and promotion decisions, and the managers' subjective exercise of discretion had a disparate impact on women. The Court held that such a nationwide class, which essentially challenged millions of individual employment decisions, could not meet the "commonality" requirement of Rule 23(a)(2), and that the class wide back pay claims could not be certified under Rule 23(b)(2) because the requested monetary relief was not merely incidental to injunctive relief. [279]

In some respects, Wal-Mart Stores simply reflects the adage that hard cases make bad law. A 1.5 million member nationwide class challenging individual pay and promotion decisions, and seeking an enormous amount of back pay, was an ambitious enterprise in a federal judiciary already skeptical of broad class actions. [280] Indeed, the

---

[276] Lydia Wheeler, Supreme Court Upholds Agreements that Prevent Employee Class-Action Suits, The Hill (May 21, 2018, 10:16 AM), *http://thehill.com/regulation/court-battles/388601-supreme-court-upholds-agreements-that-prevent-employee-class-action*.

[277] See *Lowery, 158 F.3d at 759.*

[278] See *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).*

[279] See *id. at 359-60.*

[280] Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, *88 N.Y.U L. Rev. 286, 319 n.123 (2013).*

[*40] Court's ruling that the case could not satisfy Rule 23(b)(2) was unanimous; the ruling on the commonality issue, however, was 5-4. [281]

In any event, the Court's ruling has created obstacles to employment discrimination class actions in two respects. First, Wal-Mart Stores makes clear that challenges to employment discrimination resulting solely from subjective decision making by management or supervisory personnel cannot be sustained as class actions. Second, the Supreme Court's ruling that back pay claims cannot be pursued on a class basis under Rule 23(b)(2) eliminates the possibility of determining back pay based on application of class wide formulas and requires instead that all such claims must be determined in individual Teamsters hearings. [282]

But while Wal-Mart Stores made it more difficult for employees to take collective action against discriminatory policies and practices, it was not in itself a death knell. As subsequent appellate decisions have made clear, employment practices that have subjective features can still be challenged on a class wide basis, if those practices arise within the context of a uniform company policy. [283]

The true death knell may have come in the Court's very recent decision in Epic Systems Corp. v. Lewis. [284] In that case, the Court held in a 5-4 decision that class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA) and do not violate the National Labor Relations Act (NLRA). [285] In previous decisions, the Court held that employers could require employees, as a condition of employment, to arbitrate employment disputes, including statutory discrimination claims. [286] But the Court left open the question whether employers could also require employees to give up their right to pursue collective actions in arbitration proceedings. Epic Systems answered that question in the employers' favor. [287] As the decision emphatically supports enforcement **[*41]** of waivers of class action claims in arbitration agreements, it is likely to accelerate the use of such agreements by employers, especially larger employers, and, in doing so, reduce even further the availability of class actions as a means of enforcement of the civil rights laws in the employment context.

This is not to say that all discrimination class actions are a thing of the past. There are still many employers, including government employers who, for a variety of reasons, are unlikely to impose arbitration requirements on their employees. In circumstances where large numbers of employees are adversely affected by such employers' uniform employment policies or practices, collective action may remain viable.

Nonetheless, in the wake of the Court's decisions in Wal-Mart Stores and Epic Systems, the recourse for workplace-related disputes will likely shift away from collective employment litigation to individual lawsuits or arbitration claims. As Justice Ginsberg's dissent in Epic Systems cautions, the economics of pursuing individualized claims through arbitration will deter employees from bringing claims altogether and lead to a "gap" in the

---

281 Lyle Denniston, Opinion Analysis: Wal-Mart's Two Messages, Scotus Blog (June 20, 2011, 2:02 PM), http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages/.

282 See *Wal-Mart Stores, 564 U.S at 366.*

283 See, e.g., *McReynolds v. Merrill Lynch Pierce Fenner & Smith, Inc., 672 F.3d 482, 488 (7th Cir. 2012);* see also Michael Selmi & Sylvia Tsakos, Employment Discrimination Class Actions After Wal-Mart v. Dukes, *48 Akron L. Rev. 803, 823 (2015),* for a useful discussion of the impact of the case.

284 See generally *Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).*

285 Id.

286 *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001).*

287 *Epic Sys. Corp., 138 S. Ct. at 1632.*

enforcement of statutes designed to protect workers. [288] As a result, there will be an increase in resource-constrained workers bound by arbitration agreements, who may have previously turned to collective actions but who will now require legal aid to pursue costly arbitration proceedings. Developing support for suits on behalf of these individuals will be critical.

In these circumstances, the Committee may have an even more crucial role to play than it has in the past. The Ironworkers' Union case, discussed earlier, provides a useful template. There, after obtaining a class wide finding of liability, the Committee was able to recruit and coordinate numerous volunteer lawyers to represent more than 100 individual class members in their Teamsters hearings. [289] There are few other local organizations that can organize and supervise such an undertaking. That capability can be used to redress the imbalance between deep-pocketed employers and groups of workers who will need to challenge discriminatory policies or practices on an individual rather than collective basis.

[*42] Similarly, the Committee can act as a clearinghouse and hub to facilitate the sharing and coordination of resources among private attorneys representing individuals with similar claims against similar employers. The Committee could establish a section on its website that would enable a private attorney to post information about a lawsuit or arbitration brought against a particular employer. Other attorneys who have clients with similar claims against the same employer could post as well, and a confidential extranet could then be established that would enable all counsel in such cases, with the assistance of Committee staff lawyers, to coordinate strategy, share information, and allocate costs and resources so as to make practical the arbitration of multiple individual claims against the same employer. Using this local network as a model, the Committee could encourage Lawyers' Committees or similar civil rights organizations around the country to adopt such networks, with the goal of creating a nationwide network to effectively challenge class wide employment discrimination in a post-class action legal environment.

B. Application of Federal Anti-Discrimination Statutes to Protect Workers in the "Gig" Economy

In recent years, as part of an effort to reduce costs while increasing productivity and employing new technologies, businesses have increasingly signaled a preference for hiring workers for individual and short-term projects, often in an effort to label workers as independent contractors rather than employees in what is commonly referred to as the "gig" or "sharing" economy. While the U.S. Department of Labor has struggled to quantify the number of gig workers, some estimates suggest that the "gig" economy currently comprises an estimated third of the American workforce. [290] As the number of workers classified by companies as independent contractors continues to grow, more and more workers will be left unprotected by federal anti-discrimination statutes.

There is consensus among federal circuit courts, including the D.C. Circuit and Fourth Circuit, that Title VII protections do not extend to independent contractors. [291] Independent contractors also remain unprotected by other federal anti-discrimination statutes **[*43]** including the Americans with Disabilities Act (ADA) [292] and Age

---

[288] *Id. at 1647* ("finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $ 200,000 to recover only $ 1,867.02 in overtime pay ...") cited in *Sutherland v. Ernst & Young, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011).*

[289] See *Berger, 843 F.2d at 1438.*

[290] Patrick Gillespie, Intuit: Gig Economy is 34% of US Workforce, CNN Money (May 24, 2017, 2:51 PM), *http://money.cnn.com/2017/05/24/news/economy/gig-economy-intuit/index.html*.

[291] See, e.g., *Khaksari v. Chairman, Broadcasting Bd. of Governors, 689 F. Supp. 2d 87, 92 (D.D.C. 2010)* aff'd, 2011 WL 5514018 (D.C. Cir. 2011) (no triable issue of fact under Title VII where worker is an independent contractor); see also *Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 316 (4th Cir. 2001)* (independent contractor cannot bring a Title VII claim).

[292] See, e.g., *Ratledge v. Science Applications Intern. Corp., No. 10 Civ. 239, 2011 WL 652274, at 2* (E.D. Va. Feb. 10, 2011) ("The ADA does not protect independent contractors from discrimination based upon disability"); *Schalk v. Associated*

Discrimination in Employment Act (ADEA). [293] As a result, an increasing number of workers in the "gig" economy find themselves limited to state and local statutes when seeking remedies for discriminatory work practices.

While avenues for redress are narrow, several circuits recognize two federal anti-discrimination statutes as providing causes of action for independent contractors: Section 504 of the Rehabilitation Act and Section 1981 of the Civil Rights Act of 1866 *42 U.S.C. § 1981.* [294] The Fifth, Ninth, and Tenth Circuits have all found that Section 504 of the Rehabilitation Act, which prohibits discrimination against disabled persons in federally assisted programs or activities, [295] provides a private cause of action to independent contractors who would not have standing under the ADA. [296] Although the D.C. Circuit has never held that the Rehabilitation Act covers independent contractors, in Redd v. Summers, the court reversed the district court's decision to grant summary judgment to the FBI in a Rehabilitation Act claim involving an independent contractor, noting "the Bureau's tour guide contract may constitute a federal program or activity, in which case [plaintiff] is entitled to show that she was unlawfully denied participation in the contract or retaliated against for protesting such denial" in violation of the Act. [297] The court's language in Redd, along with the reasoning applied by the Fifth, Ninth, and Tenth Circuits, could be applied in future litigation in the D.C. Circuit to reach a holding that **[*44]** Section 504 of the Rehabilitation Act does cover independent contractors, providing further protection to disabled workers.

In addition to the Rehabilitation Act, Section 1981 may allow for independent contractors to sue for race discrimination. Section 1981 states, in relevant part, "all persons … shall have the same right … to make and enforce contracts … and to the full and equal benefit of all laws and proceedings for security of persons and property as is enjoyed by white citizens … ." [298] The First, Third, Eighth, and Eleventh Circuits have all held that independent contractors may bring a cause of action under Section 1981 for discrimination occurring within the scope of the independent contractor relationship. [299] While Section 1981 claims are preferable to Title VII claims in certain instances because they allow for a longer statute of limitations than the latter and do not have a cap on damages, such claims are limited exclusively to discrimination on the basis of race or ethnicity. Consequently,

---

Anesthesiology Practice, 316 F. Supp. 2d 244, 249 (D. Md. 2004) ("independent contractors are not 'employees' covered by the [ADA], nor are those seeking to become independent contractors 'job applicants' covered by the statute").

293 See, e.g., *Garrett v. Phillips Mills, Inc., 721 F.2d 979, 980 (4th Cir. 1983)* (affirming dismissal of ADEA claim where plaintiff was an independent contractor and not an employee); *Art & Drama Therapy Inst., Inc. v. District of Columbia, 110 F. Supp. 3d 162, 173 (D.D.C. 2015)* (ADEA applies to employees but not independent contractors).

294 See ***29 U.S.C. § 794***(a); see also ***42 U.S.C. § 1981.***

295 See ***29 U.S.C. § 794***(a).

296 See *Flynn v. Distinctive Home Care, Inc., 812 F.3d 422, 429 (5th Cir. 2016)* ("because the Rehabilitation Act does not incorporate Title I [of the ADA]'s standards for determining which entities may be held liable for employment discrimination, it does not incorporate Title I's requirement that the defendant be the plaintiff's employer"); *Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 943 (9th Cir. 2009)* (Congress does not intend for the Rehabilitation Act to restrict coverage to the employer-employee relationship); *Shrader v. Ray, 296 F.3d 968, 969 (10th Cir. 2002)* (Rehabilitation Act "does not incorporate the ADA definition of an employer").

297 *Redd v. Summers, 232 F.3d 933, 941 (D.C. Cir. 2000).*

298 ***42 U.S.C. § 1981***(a).

299 See *Brown v. J. Kaz, Inc., 581 F.3d 175, 181 (3d Cir. 2009); Wortham v. Am. Family Ins. Grp., 385 F.3d 1139 (8th Cir. 2004)* (worker's status as an independent contractor does not preclude her from pursing a claim under Section 1981); *Webster v. Fulton Cty., 283 F.3d 1254, 1257 (11th Cir. 2002)* (independent contractor can state a claim for violation of Section 1981); *Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 14 (1st Cir. 1999)* (Section 1981 "does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which an … independent contractor" may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship).

independent contractors remain without federal protections against discrimination on the basis of other traits including gender, religion, or sexual orientation.

In determining whether a party who brings a discrimination suit is an independent contractor or employee for purposes of Title VII and other federal discrimination statutes, the D.C. Circuit has set forth a twelve-factor test. [300] Among the factors for the court to consider are "the skill required in the particular occupation;" "the length of time during which the individual has worked;" the manner in which the work relationship is terminated;" and "whether the work is an integral part of the business of the employer." [301] Among these, the court noted that the most important factor is "the extent of the employer's right to control the means and manner of the worker's performance" but "consideration of all of the circumstances surrounding the work relationship is essential." [302] As a result, the court created a "relatively **[*45]** open-ended, fact-intensive inquiry" [303] that has left both employers and workers with a sense of uncertainty of what ultimately defines whether a worker is an employee or an independent contractor.

Most of these precedents arose in the context of an economy where the employer-employee relationship was the norm. Given the increase of short-term work contracts and independent-contractor agreements, the Committee could pursue litigation to challenge the Spirides test and urge the court to re-design the analysis in an effort to create a more simplified version that would give employers and workers a better understanding of the kind of work arrangement into which they are entering. For example, the court could embrace a test similar to the "ABC" test implemented this year by the California Supreme Court. [304] The "ABC" test presumptively considers all workers employees and permits workers to be classified as independent contractors, under California state wage law, only if the hiring business demonstrates three conditions:"(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." [305] In creating this new test, the court noted the disadvantages of complex multifactor tests including the difficulty of determining how a particular category of workers is classified from both the hiring business and worker perspective as a primary reasoning for creating a simpler, three-pronged analysis. [306]

In addition to the complex questions surrounding the classification of independent contractors, the gig economy presents difficulties in determining who a worker can name as a defendant in a discrimination suit as workers may have more than one putative employer. For example, if a tech assistant for a radiology practice that contracts with a hospital elects to sue for discrimination, is she limited to suing the radiology practice, the hospital, or can she sue both?

In Redd v. Summers, the D.C. Circuit observed that "for a joint employment test, a fairly standard formulation is that of the Third **[*46]** Circuit [the Browning-Ferris test]," which considers "'whether one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control over the terms and

---

300 *Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979).*

301 *Id. at 832.*

302 *Id. at 831.*

303 *Konah v. D.C., 815 F. Supp. 2d 61, 70 (D.D.C. 2011).*

304 See *Dynamex Operations West, Inc. v. Super. Ct., 416 P.3d 1, 34 (Cal. 2018).*

305 *Id. at 8.*

306 *Id. at 40-41.*

conditions of employment of the employees who are employed by the other employer.'" [307] However, the court, in Redd, opted to apply the Spirides test based on the parties' decision to rely on Spirides in their motions. [308] The court re-emphasized that determining the existence of an employer-employee relationship should focus on the extent to which the alleged employer has the "right to control the means and manner of the worker's performance." [309] Notably, in deciding to use the Spirides test, the D.C. Circuit doubted whether the test was suited for the case [310] and subsequently, the district court has concluded that the Browning-Ferris test is better suited to resolve claims of joint employment. [311]

Under the Browning-Ferris analysis, the court has held that where one contractor pays the salaries and benefits to a worker but the other retains sufficient control of the terms and conditions of employment, including scheduling and performance standards, both are joint employers. [312] While the Spirides focuses on the degree of control retained by the alleged employer, the Spirides test places an additional focus on "whether the relationship shares attributes commonly found in arrangements with independent contractors or with employees" including "duration of engagement, the method of payment, leave, retirement benefits, and taxes." [313]

Thus, while district courts have reasoned that the two tests often lead to the same outcome, [314] an examination of the hypothetical offered at the beginning of this section demonstrates why the D.C. Circuit should embrace the use of the Browning-Ferris test in cases involving the issue of joint-employment in order to achieve uniform results that will provide better clarity to this issue. If a tech assistant **[*47]** sued both the hospital and the radiology center alleging discrimination, under the Browning-Ferris test, even if the radiology center were the entity responsible for paying her salary and benefits, the hospital would still be liable if the tech assistant could show that the hospital retained sufficient control over the conditions of her employment including standards and the hours she worked. However, under the Spirides test, a court could arguably determine that this level of control would not be enough for joint-employer status if the tech assistant were unable to meet the additional requirements of Spirides.

With this in mind, the Committee might seek to pursue discrimination suits involving joint-employer claims and use the opportunity to advocate for a complete adoption of the Browning-Ferris test. As opposed to Spirides, the Browning-Ferris test provides a simplified understanding of what it means to be a joint-employer.

C. Cat's Paw Theory of Liability

"Cat's paw" discrimination occurs when a subordinate who is motivated by a discriminatory animus influences, but does not directly make the decision to take an adverse employment action. [315] A subordinate's acts can

---

307 *Redd, 232 F.3d at 938* (alteration in original) (quoting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1123 (3d Cir. 1982)).*

308 Id.

309 Id.

310 Id. at 937.

311 See, e.g., *Clayton v. D.C., 117 F. Supp. 3d 68, 83 (D.D.C. 2015); Coles v. Harvey, 471 F. Supp. 2d 46, 50 (D.D.C. 2007).*

312 Int'l Union v. Clark, No. 02 Civ. 1484, 2016 WL 2598046, at 7-8 (D.D.C. Sept. 11, 2006).

313 *Gray v. LaHood, 917 F. Supp. 2d 120, 126 (D.D.C. 2013)* (citing *Redd, 232 F.3d at 940).*

314 See, e.g., *Dean v. Am. Fed'n of Gov't Emps., 549 F. Supp. 2d 115, 122 (D.D.C. 2008)* (reasoning that the Browning-Ferris test "is not terribly distinct from the primary consideration in the Spirides test").

315 *Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011).*

nonetheless be attributed to an employer if the subordinate intended to cause an adverse employment action, and the acts are a proximate cause of the ultimate employment action. [316]

The Supreme Court first applied the cat's paw theory in Staub v. Proctor Hospital to a claim of unlawful termination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). [317] In Staub, a United States Army reservist alleged that his two immediate supervisors were hostile to his service obligations and schemed to have him fired by fabricating a series of workplace infractions. [318] As a result of his immediate supervisors' actions, another supervisor ultimately decided to terminate Staub. [319] In his complaint, Staub did not allege that the final decision maker was motivated by any unlawful anti-military animus. [320] Rather, Staub complained that the biased actions taken by his immediate supervisors **[*48]** constituted a motivating factor in the ultimate decision to terminate him. [321]

In an opinion written by Justice Scalia, an eight member majority held in favor of Staub on the cognizability of the cat's paw theory of discrimination. [322] After noting that USERRA "is very similar to Title VII," the Court interpreted the relevant provisions according to "general principles of law, agency law, which form the background against which federal tort laws are enacted." [323] Informed by these principles, the Court held that an employer can be held liable for intentional acts taken by a biased subordinate supervisor even if the final decision is itself unbiased, so long as the earlier act is a motivating factor in the ultimate decision. [324] The biased earlier act and the unbiased later act are each a proximate cause of the plaintiff's injury. [325]

According to the Court, it is "axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent's actions (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." [326] The final decision maker's neutrality is insufficiently "remote" or "purely contingent" to break the causal chain. [327] Furthermore, the later, unbiased decision is insufficiently independent from the earlier action to constitute a superseding cause, because it is not a "cause of independent origin that was not foreseeable." [328]

Thus, under cat's paw liability, if a plaintiff successfully demonstrates a predicate discriminatory act taken by a non-decision maker, the burden shifts to the employer to demonstrate that it would have made the same decision

---

316 See *id. at 422.*

317 *Id. at 419-22.*

318 *Id. at 414-15.*

319 *Id. at 415.*

320 Id.

321 Id.

322 *Id. at 422.* Justice Alito, joined by Justice Thomas, separately concurred to express disagreement with the Court's reasoning.

323 *Id. at 417-18.*

324 *Id. at 419-21.*

325 Id.

326 *Id. at 419.*

327 Id.

328 *Id. at 420.*

regardless of the non-decision maker's bias. [329] A decision "entirely justified" on other, nondiscriminatory grounds satisfies the defendant's burden. [330]

Although Staub generally endorsed the cat's paw theory, the Court expressly stated in a footnote that its opinion did not address whether an employer can be held liable for biased acts taken by non- **[*49]** supervisory co-workers. [331] There is currently a circuit court split on the issue of whether the cat's paw theory extends to acts taken by co-workers, with some circuits extending the theory to co-workers and adopting a negligence-based approach to employer liability, while other circuits decline to extend the theory to co-workers. For example, because the Staub opinion refers only to supervisors and expressly declines to address the issue of co-workers, the Fourth Circuit has declined to extend the cat's paw theory to such cases. [332] Similarly, a Sixth Circuit opinion declined to answer the question, noting that Staub "did not resolve whether cat's paw liability can be predicated on actions taken by co-workers, rather than supervisors." [333] On the other hand, the Second Circuit has held that an employer can be liable if the employer acts negligently with regard to a co-worker's acts, the co-worker acted with an unlawful motive, and the acts cause an adverse employment action. [334]

The Supreme Court's decision in Vance v. Ball State University possibly further complicates the cat's paw theory. [335] In Vance, the Court held that for the purposes of Title VII harassment claims, supervisors are employees "empowered by the employer to take tangible employment actions against the victim." [336] Tangible employment actions include hiring, firing, failing to promote, disciplining, and other decisions that cause a "significant change in employment status." [337] As a district court observed after Vance, the Vance decision appears to create "tension" with Staub because, "if the discriminating employee has the power to fire a Title VII plaintiff, he is a supervisor under Vance. However, there would be no need for the employee to convince someone else to fire the plaintiff." [338] Whether Vance did in fact displace any of the holding in Staub is not clearly resolved.

[*50] Given these unresolved questions, cases involving discriminatory acts taken by co-workers offer an opportunity to address whether co-worker claims are clearly cognizable and if so, whether the negligence-based approach is the correct one. Additionally, cases that involve employees whose responsibilities do not clearly make them either a co-worker or a supervisor offer an opportunity to reconcile any tension between Staub and Vance. If co-worker claims do not fit within the scope of the cat's paw theory, then a case in which a co-worker is delegated

---

329 See *id. at 421.*

330 Id.

331 *Id. at 422 n.4* ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.").

332 *Smyth-Riding v. Scis. & Eng'g Servs., LLC, 699 F. App'x 146, 155-56 (4th Cir. 2017).*

333 *Seoane-Vazquez v. Ohio State Univ., 577 F. App'x 418, 428 n.4 (6th Cir. 2014).*

334 *Vasquez v. Express Ambulance Serv., 835 F.3d 267, 276 (2d Cir. 2016).*

335 See *Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).*

336 Id.

337 *Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998).*

338 *Burlington v. News Corp., 55 F. Supp. 3d 723, 734 (E.D. Pa. 2014).* "Indeed, the entire raison d'etre of cat's paw liability is that the biased subordinate lacks the power to fire another employee unilaterally and must therefore convince a superior to do so. A rule that only permits cat's paw liability to attach if the biased employee has the authority to fire others would in most cases defeat the purpose of cat's paw liability." *Id. at 738.*

significant power to influence decisions, such that they are in effect exercising supervisory authority, would also present an opportunity to address these issues.

CONCLUSION

For 50 years, the Washington Lawyers' Committee for Civil Rights and Urban Affairs has been at the forefront of the fight against employment discrimination by private and government employers in the Washington, D.C. region. Although there have been great changes and great improvements in this area, the battle is far from over. As the Committee begins its second half century, its small but highly effective legal staff, supported by its large network of volunteer law firms and attorneys, are ready to meet whatever challenges may arise.
