

# ShortCircuit412

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## **SPEAKERS**

Carl Wu, Kirby Thomas West, Anthony Sanders

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Anthony Sanders 00:11

Shady towing practices in the city of Detroit, and a punch-up at a bachelorette party in the city of Baltimore. All that, plus a preview of the circuits this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, January 14, 2026, and I have two of my Institute for Justice colleagues here to discuss these cases from the Sixth Circuit and the Fourth Circuit, about some practices that go on in cities that are known to have a most outstanding reputation when it comes to public integrity and crime. So we'll get to those in a little bit, and my colleagues first, a little preview. So we here on Short Circuit, for the last almost 11 years now, have at times not done a great job talking about what we talk about, which is the circuit courts of appeals, the federal appellate courts. And so we have a little series this year that we'll be doing, and that is 12 months, 12 circuits. So each month we're going to take not a huge episode dive, or a whole episode or anything like that, but just a little peek into each of our federal circuits so we can let our listeners know, especially our non-lawyer listeners who are probably like, Fifth Circuit, what does that even mean? Like, who's there? Where is it? What does it do? So we're going to take, one by one, all of the circuits over the next 12 months, starting with this month, the First Circuit, number one, right, January. So we're going to do—there are 11 numbered circuits—so we're going to go one through 11, First Circuit through Eleventh Circuit. Then we're going to squeeze in the D.C. Circuit in December. Now, I know some of you lawyers out there are thinking, wait a minute, there are 13 circuits. You said 12 months, 12 circuits? Well, there aren't 13 months in a year, right? So the 13th circuit, so to speak, is the Federal Circuit. And we are very upfront here at Short Circuit that we do not cover the Federal Circuit. In fact, at times we have advertised our newsletter as covering all the circuits except the Federal Circuit. And that's because the Federal Circuit says a lot of things that we don't understand. Most of its docket has to do with intellectual property. It also does a few other random stuff. Now, I will say, at times we have covered the Federal Circuit. We've done, on occasion, in the newsletter and on the podcast, a Federal Circuit case. We talked about the tariffs case when it was at the Federal Circuit a few months ago. It has this kind of specialized docket. But anyway, 12 months, 12 circuits. But I want our Federal Circuit fans to know we are going to be doing the Federal Circuit, okay, but it's kind of going to be a wild card. We've got to squeeze it in at some point in the next 12 months, because we can't have 13 months. That just looks weird, right? A baker's dozen of circuits. So we will get to the Federal Circuit, and we will do all the other circuits, and we will start with the First Circuit today, but we're going to do that at the end of the show. It's just going to be a little thing, about 5-10 minutes, discussing the First Circuit. But before that, we have the Sixth Circuit and the Fourth Circuit and some of their latest opinions. So Kirby Thomas West, who knows her way around Detroit corruption and crime more than almost anyone else these days, is going to discuss this case out of the Sixth Circuit involving shady towing practices and car theft. So it's kind of a Gone in 60 Seconds kind of theme, so we'll get to that in a little bit. But first I want to introduce a first-timer who's on Short Circuit, who is going to be discussing this Fourth Circuit case about a bachelorette party and a punch-up and racial discrimination a little later. But first I want to introduce Carl Wu. So Carl is an attorney now at the Institute for Justice. He's joining us here for a little while, but before that he worked at the big bad firm of Skadden Arps. He also clerked for a judge on the Western District of Texas, Judge Xavier Rodriguez. He went to Rutgers for undergrad, and then he went to Brooklyn Law, but along the way, he was a paparazzi photographer. So I'm interested in hearing what he has to say about the life of photographing famous people and also how that compares to being a lawyer.

C Carl Wu 04:54

Dan today, well, happy to be here, you know. So I started doing it when I was 12. I used to collect memorabilia. I was always into photography, and one day, I just picked up a camera, took photos. It was like Angelina Jolie leaving an art shop, sent them into magazines. Say, Hey, you want to buy these? They bought them.

A Anthony Sanders 05:15

Wow. And so you lived in New York, right?

C Carl Wu 05:18

Correct, yeah.

A Anthony Sanders 05:19

So kind of easy to find famous people. So you just kind of like, run around and- Did you ever have moments like occasionally when the celebrities can't take it anymore, and they take a shot at the photographer and knock it out of your hand?

C Carl Wu 05:25

That happened once. Wasn't my camera, but it did happen once the guy from Avatar got into little kerfuffle.

A Anthony Sanders 05:25

Okay, well, we will leave it at that.

C

Carl Wu 05:25

Yeah, the first famous person—I was walking to my violin teacher’s house for a lesson. The David Letterman Show was right on her block, and so I would pass by it, and that was kind of the intro to that life. And yeah, I did it all throughout high school, after high school, throughout college, full time for a little bit in between. And basically I’d be on my bike all day, riding around the city, looking for people, getting tips, getting information. Obviously very different from the lawyer life, where I’m not on my bike and I sit in a room and read all day long and write. But I will say there’s a lot of research involved in both, right? So we used to look for people, and we would have keywords, we would be on Twitter—spotted here, spotted there—and so that kind of attention and constant monitoring. So let’s say here you have argument, making sure there are no new cases that pop up right before. So that research, I think, tracks both careers.

K

Kirby Thomas West 06:11

I have a new podcast idea, Anthony, I think you should do a new podcast called The Secret Lives of IJers. Because I always joke with new IJers that I am the least interesting IJer because so many of our colleagues have really interesting histories or interests. Anthony, very much included. I’m delighted by this. Carl, happy to know this new information about you.

A

Anthony Sanders 07:13

Yeah, well we can get a little that. I will say I heard a rumor that, Kirby, that you’re going to be appearing on one of our sister podcasts, unpublished opinions. And so we will get to hear a bit about how interesting you really are. And I think you are holding back.

K

Kirby Thomas West 07:24

Yes! Not very, I’m afraid to say, but I’ll do my best. I’ll have to develop something cool about me before that starts.

A

Anthony Sanders 07:35

Well, the cool thing, I mean, this is true of IJ, but it’s true elsewhere too, is law school is filled with people who had a different career that, for whatever reason, they couldn’t make it at or they didn’t want to do anymore, or they wanted to actually be able to pay the rent, and so they go to law school, but it’s filled with all these interesting backgrounds, and so we like exploring that from time to time here on Short Circuit. But we also like exploring the federal courts of appeals, including this case from the Sixth Circuit about a tow truck driver who just happened to be in the right place at the right time too many times, and nevertheless, even with those shady practices, wanted a judgment against the city of Detroit, and what did that get them?

K

Kirby Thomas West 08:27

Not very much. But I want to start by first clarifying, when Anthony says that I am very familiar with corruption and bad practices in the city of Detroit, it's because I'm opposing those things—I'm on the good side. But Wayne County, Michigan, as longtime listeners might know, and all IJers know, is my number one nemesis here at IJ. I have a number of cases against Wayne County, including our Detroit forfeiture case, which is about vehicles in Detroit, so everybody should separately look into that case. But here we have a towing company who had a contract with Detroit to recover stolen cars. And so what they would do is recover the stolen cars, and they would charge a towing fee to the owner of the cars for the car's return. And as Anthony previewed, some of the things that they were doing started to raise questions. Specifically, it seemed like they were finding these stolen cars pretty quickly—and when I say pretty quickly, there's one instance in which the Detroit Police Department had video of a Jeep being stolen at 7:05 a.m., and at 7:19 a.m., that vehicle was recovered by Nationwide Towing. This is 14 minutes later, and the tires of the Jeep were already stripped by that time.

A

Anthony Sanders 09:13

I was impressed they could do all that in 14 minutes. They could, steal it, get it somewhere else, get the tires off and be gone.

K

Kirby Thomas West 10:03

I had the same thought, Anthony—I've changed a tire before, it took me about that long to change one tire. So an officer with the Detroit Police Department thought this seemed a little strange, and he started looking into it more, and he found other evidence that this particular towing company, Nationwide Towing, had an outsized number of recoveries of stolen vehicles compared to the other companies that had contracts with the Detroit Police Department. He recommended that the contract be suspended or terminated, and he sent that to the Board of Police Commissioners. When he sent it to the board, the board, at the advice of the Department of Law, said actually it looks like we didn't have the authority to issue permits in the first place. They thought the whole process was a little mixed up, and since the permit was probably invalid because they didn't have the authority to issue it, they didn't really need to do anything process-wise—they could just terminate the permit and be on their way. The procedures that had been put in place, and were part of the contract, were that the companies were entitled to a pre-termination hearing if the contract was going to be terminated before the five-year term, unless there was some kind of fraud or criminal activity. At that point, the termination could be immediate, but they were still entitled to a post-termination hearing to confirm that whatever wrongdoing had actually happened. The company didn't get either because, again, the police commissioners said, like, whoops, actually we weren't supposed to be doing this anyway, we don't have the authority to issue these permits. The company sued Detroit for the termination—they said the wrongful termination of their contract—and they sued for compensatory damages in the amount of \$103 million.

A

Anthony Sanders 12:02

That's a lot of tows.

K

Kirby Thomas West 12:03

Yes, that's a lot of tows. They recovered, however, only nominal damages, because the court below said there might have been a due process violation here, but you cannot show that you're entitled to any kind of compensatory damages because, frankly, your contract would have been terminated anyway, even if they had followed the correct procedures. Now, the reason the district court said this is because there was a lot of evidence that they were engaged in criminal conduct. Specifically, again, there's this initial thing that tipped off the officers of the 14 minutes between the stolen car and the recovery of the car, there was just the outsized number of cars that they were taking—one tower in particular at the company, over a one-year period, was recovering 13 stolen cars per week. That was only one person, one tower at the company. They also found another instance in which it was like five minutes between the theft and the recovery of the car, so even quicker. And then really the icing on the cake is they recovered the phone of a car thief in Detroit who had been texting with this high-frequency tower, Kenneth "Turbo" Christian—I think if you're hiring somebody that goes by the name of Turbo, that should raise some red flags already, personally

A

Anthony Sanders 13:25

He might be really good.

K

Kirby Thomas West 13:27

Yeah. That's true—poor Turbo, though, I don't think he had a great relationship with this car thief. He was a little mean to him in these text messages—he said things like, “come back and get your money, dill hole,” and “do some work, twinkle toes.” But these text messages —“twinkle toes” these days, kind of refreshingly wholesome from a car thief, I think—obviously implicated him, that he had in fact not only been getting tips from car thieves, as he later acknowledged when he was asked questions about this, though he said that once his supervisor told him to stop taking tips from car thieves, he did stop doing that. So the supervisors knew, at least, that he had been taking tips, although those tips were also, I think, monetary, not just verbal tips. And there was all this evidence that the company had done this. Now, there was also an internal investigation by the Office of Internal Affairs at the Detroit Police Department that found that they had done nothing wrong. However, in a footnote of the Sixth Circuit decision, they said that that investigation was hardly rigorous, and in fact some of the deposition testimony showed that the officer who conducted the investigation had not read the memos from the initial investigators showing, again, this five-minute gap in theft, or those text messages—he was not even familiar with these pieces of evidence. So even though that internal affairs investigation concluded there was no wrongdoing, simultaneously there was a criminal investigation into this that showed, again, all this evidence that, in fact, Nationwide had not only been getting tips on how to get these cars and working with car thieves to collect more cars to get towing money, they had also been overcharging the towing fees by hundreds of dollars. And sometimes they would charge the owners of the cars for the return, but where they were charging fees that went to the city, they would charge like \$100 extra that would go in their pocket and then give the city the rest of it.

A

Anthony Sanders 15:39

And then they had this side gig with the guy's brother's auto shop- that was really shady.

K

Kirby Thomas West 15:47

Yes, so in one instance, they told an owner, okay, you could pay this \$700 fee to get your car back, however we'll waive the fee if you take your car to this auto shop. The auto shop happened to be owned by someone who had a 75% stake in Nationwide Towing, so it was a family member, a person who owned and operated Nationwide Towing. So this was a pretty extensive fraud scheme, and just the brazenness to then sue the city of Detroit for damages after you've done this—I'm just like, wow, that's pretty bold. I will say, they sued, they got just nominal damages because they couldn't prove compensatory damages, in part because the district court found their contract would have been terminated anyway, and in part because they had been overcharging fees by so much that the district court said you really aren't entitled to compensatory damages because you've been getting too much money this whole time. Anyhow, the Sixth Circuit affirmed on appeal. The issues on appeal were whether summary judgment was properly granted on the issue of no compensatory damages, and whether the district court properly denied a motion to strike. So the towing company had moved to strike a declaration from one of the officers who had investigated, saying basically that he had given impermissible legal opinions—for instance, he had described their conduct as fraudulent. The Sixth Circuit said no, that the motion to strike was properly denied and this was not a legal opinion, and then affirmed, applying this two-step analysis of whether compensatory damages were properly denied: one, would the same action have been taken anyway, and two, is there proof of actual injury sufficient to support compensatory damages. Under both of those factors, compensatory damages were properly denied, and so affirmed. But the whole case, I think, on the legal front may be less interesting, but on the factual front, I mean, this city—I'm telling you, if you go to Detroit, it's a lovely city. You can see there's so much promise there, this beautiful Art Deco architecture, it's got a lot of character and charm in parts, and just completely plagued by corruption and bad behavior, which the Institute for Justice is trying to rectify. But my goodness, this not a great look, not a great look—although actually not the government.

A

Anthony Sanders 18:30

Although, the city did do the right thing here. Eventually.

K

Kirby Thomas West 18:34

That's true, yes, credit where it's due—they did the right thing eventually. After a couple years of rampant fraud, they managed to figure it out. I know we're going to be talking about Baltimore next, but I will say this also reminded me, for viewers of *The Wire*, the text messages from the car thieves in particular reminded me, in less colorful language, of a famous quote from the show: are you taking notes on a criminal conspiracy? Free legal advice—don't do that.

A

Anthony Sanders 19:06

Carl, your thoughts?

C

Carl Wu 19:08

I mean, I think one thing that this case does reaffirm is that process is important in itself. It relies on that *Carey v. Phipps* case, which shows that here, even though in the end there wouldn't have been any other finding—they would have gotten terminated anyway—it's a nice affirmation that the process is separate. It protects people who are not only in the wrong but also in the right, and so we often rely on that case. I think Nationwide is still operating, not in Detroit but in other states, so hopefully they have fixed whatever issues they had in those other states. But I guess one other thing I'll say is that oftentimes, when you think about liability, you kind of forget about damages. Here, obviously, it was \$1 in damages, but often you kind of miss out on that point.

A

Anthony Sanders 20:01

Yeah, and that's a good reminder, Carl, that this case, *Carey v. Phipps* from the '70s, where the Supreme Court said if your procedural due process rights are violated, then your ability to get nominal damages—so symbolic damages—is absolute, I think is the word they use. So if you're denied this hearing, even if you're guilty six ways to Sunday, that is a violation of your rights. You can get a judgment, but it's not even going to buy you a cup of coffee, because it literally is going to be \$1. And also, this does not get into at all, Kirby, attorneys' fees. I'm guessing they may or may not have moved for attorneys' fees at this point—it may have been stayed while the case is on appeal—but attorneys' fees are themselves not automatic, even when you win a judgment. I think they probably have absolutely no chance at attorneys' fees here, even though they did win a Section 1983 case.

K

Kirby Thomas West 21:05

Yeah, I would think it would be a pretty uphill battle. One minor, I think, interesting legal point that was noted in this opinion was under this test of are you entitled to compensatory damages or not for a due process violation. So the first part is, would this have happened anyway if process had been given to you? And I appreciated that the court noted that when we're looking at this, we can't allow post hoc rationalization—so things that they couldn't have known at the time, like the city coming up with other evidence that, oh, we would have done it because of XYZ that we found out in this litigation, or something like that—it has to be based on the information that was available at the time. And I think that was a good thing for the court to note, not to use a case like this with such bad facts to make it harder for someone to get compensatory damages where they really are entitled to them for a due process violation.

A

Anthony Sanders 22:00

Yeah, good point, because bad facts can make bad law, but the court was careful here not to make bad law unless you're as bad as the plaintiff apparently was here. So more of a mix of bad and good. And I tell you the truth, I can't even tell exactly what's going on in this case from the Fourth Circuit, which is about a racial discrimination claim, a retaliation claim, and then there are claims that I'm kind of confused weren't even brought, so we'll take a step back from all that. But Carl, please tell us the story of this bachelorette party in Baltimore—they got a little bit out of hand.

C

Carl Wu 22:44

Yeah, Anthony, so this case, it's Johnson v. Baltimore Police Department, or BPD, for short, out of the Fourth Circuit. And it's really an employment discrimination case. Kind of shines a light on intra Baltimore PD issues. Yeah, it really is like *The Wire*. I mean, it's like nothing's changed. That was 20 years ago. And throughout the case, it gets worse and worse. And so the plaintiff here is Wanda Johnson. She was a 14-year veteran on the job, and she basically alleges that she suffered racial discrimination and retaliation because she was forced to resign after some sustained disciplinary charges. And so we're on a motion to dismiss here, so we're going to take the facts as true as alleged. And the story starts back in 2018—Ms. Johnson was having a bachelorette party at a nightclub in Baltimore, and there was a bar fight altercation outside the nightclub where a member of her party, an off-duty Baltimore police officer, ended up getting punched by an on-duty police officer, Sergeant Koushall. Now, Sergeant Koushall was eventually arrested—he was charged with second-degree assault and misconduct—and that conviction was affirmed by the Maryland Supreme Court. And so you might think, after all of this, he would be the one who would be terminated—that is not correct. He is actually still on the force, at least as of oral argument. And so instead, Ms. Johnson was investigated. So backing up a little, during Sergeant Koushall's investigation, Internal Affairs investigated him, Ms. Johnson testified before the grand jury in 2019, and then a couple months later at his trial as well. During those two events, Internal Affairs started an investigation into her. They said that she made a false statement, that she was actually the one who assaulted someone at the nightclub, and that she failed to report this. So this investigation took a little while—about a year later, after Sergeant Koushall was already convicted, Internal Affairs interviewed her. There was some other state court litigation where she was trying to block the investigation that was unsuccessful, and then they filed these disciplinary charges. Following these charges, she was suspended, but with pay. So then after that—now we're in 2020—about a year later, she files an EEOC complaint, basically saying she was discriminated against and retaliated against by being suspended, and again she pointed to other white officers who also made false statements who were not suspended. Nonetheless, despite this complaint, the disciplinary charges proceeded. She had an administrative hearing, and the charges were sustained. Now this administrative hearing raised some more problems, because according to Ms. Johnson, the testimony that she was the one who assaulted someone was based on a false report filed by another Baltimore PD officer, and she alleges that the Internal Affairs investigator who shepherded this hearing along also made false statements at the hearing. So then, after the hearing, the charges were sustained, and she alleges she was forced to resign. She then filed an internal complaint about this conduct at the hearing, and the day after she filed that complaint, she alleges she was forced to resign. So a year later, she filed suit in federal court, and she brings a Title VII claim for racial discrimination, again pointing to those other officers she says committed false statements who were not fired and were white, a retaliation claim, and she brought a Monell claim as well, basically alleging First Amendment retaliation, but the only allegation she had was the events of this case, and then the analogous state law claim for discrimination.

A

Anthony Sanders 26:57

And she doesn't sue any individuals right? It's just the city of Baltimore.

C

Carl Wu 27:03

Correct, it's just the city—all these claims, yeah, correct. And so at the district court, the first complaint was dismissed with leave to amend. She filed another one, and the district court dismissed all of the claims. And so we're now at the Fourth Circuit. The Fourth Circuit reversed the district court on the Title VII claim and affirmed the rest. So for the sake of time, I'm just going to focus on the Title VII. I'll note briefly the retaliation claim was affirmed because basically they said you didn't meet the causation inquiry—the protected activity is the EEOC complaint, not what you might intuitively think is the testimony against another officer. And so that claim was gone. And the Monell claim—you have to show a policy or practice, and that just wasn't alleged because there...

A

Anthony Sanders 27:53

And basically they say the fix was in against her before she filed the EEOC complaint. And so you can't point to the EEOC.

C

Carl Wu 28:01

Correct, yeah. And so that Title VII—you might think there's a standalone kind of First Amendment claim outside of the Monell claim, perhaps—that wasn't brought. And so now basically the Title VII claim is what's at issue, and I'll just set the stage. So Title VII prohibits an employer from discharging any individual or otherwise discriminating on the basis of race. And so we're on a motion to dismiss, and the standard here is plausibility—you just have to plead facts that go above a speculative level. But employment discrimination is often hard to plead. You never have this kind of smoking gun evidence of racial discrimination. And so courts adopt, at the pleading stage as well as at the summary judgment stage—and that's heavily disputed—this McDonnell Douglas framework. And so McDonnell Douglas can be useful, I think, at the motion to dismiss stage, because it helps frame the complaint, especially if you don't have that direct evidence, because you're basically allowed to point to comparators and say, look, these people did the same thing, they engaged in similar conduct, they weren't fired, I was fired—that's a kind of plausible inference.

A

Anthony Sanders 29:12

They're not my race, and so therefore it's evidence that I was discriminated against because of my race.

C

Carl Wu 29:18

Right, and so again, at the pleading stage you don't need to make the whole McDonnell Douglas prima facie case, which looks to membership in a protected class, satisfactory job performance, adverse employment action, and similarly situated comparators. And the dispute here between the majority and dissent is how specific those comparators need to be. So the district court dismissed the claims, even though Ms. Johnson pointed to 13 comparators—these were white and non-Black officers who committed misconduct, and this is quite a list: using racial slurs, multiple DUIs, fleeing the police—officers fleeing other officers—excessive force against the public, domestic violence, assaulting other officers, disorderly conduct, tampering with investigations, and the kicker, multiple false statement allegations, which is what Ms. Johnson was allegedly terminated for, as well as the assault. None of these officers were forced to resign, but the district court held that they weren't similarly situated comparators, even at the pleading stage, because they didn't have that adjudicated finding of disciplinary charges. So the Fourth Circuit majority said no, we don't need this kind of one-to-one match at the pleading stage—there are sufficient facts. At oral argument they said maybe you only need one or two, and there are 13 here, and they took a higher level of generality. So under that standard, the comparators were all officers, they had similar offenses, and they were all kept on the job while Ms. Johnson was terminated. And so the idea is that even if you have a lot of rotten apples, again Ms. Johnson contests that, you can't just fire the Black one or the one who's not white—that's discrimination, treating people differently. And so this case will go back down for discovery, or it might settle, but there will be pretty voluminous discovery into the internal investigation practices of the Baltimore Police Department, which might be even more revealing. Judge Wilkinson has a dissent, and he makes two points. First, he adopts the district court's idea that you need this kind of strict comparison—he thinks the idea of an adjudicated finding is determinative even on a motion to dismiss. But then he makes this other point where he talks about the internal functions of police departments and how they operate on a theory of trust, and that courts should defer to the internal adjudications of police departments because they're trying their best, and that a Title VII claim like this will set back the department's inner workings. I'm not that sympathetic to that position—I think the majority is right here. Again, we're at the pleading stage, you don't need that one-to-one match, and the closer a fit you require, the more you implicitly credit the reason for the termination, which is the whole point of discovery, because maybe the adjudicated finding is a relevant factor, maybe it's not, maybe it's all pretext, and they're only sending non-white people to adjudication or something like that. He has a line in the opinion where he says because the claim will fail on the merits, we shouldn't let this play out against the Baltimore PD—but again, this is a motion to dismiss.

A

Anthony Sanders 33:02

Yeah, and it seems like a pretty thin read. He's looking under the hood—he makes this big point about how the officer who was convicted is actually Black, even though there's something in the record or the allegations suggesting he isn't. But even if he is Black, you can still have these comparators—it's not like you have to allege you're the only person of your race, or that no one else has had bad things happen to them. In any case, thanks for that summary, Carl. Again, I am still very confused as to what's actually going on here, but Kirby, can you help me out?

K

Kirby Thomas West 33:50

I don't know if I can help you out, but the Wilkinson dissent made me think of the case we just discussed out of the Sixth Circuit when he says we should trust the internal affairs of police departments and things like that. It's like, the internal affairs officer in the Detroit Police Department looking into this towing scam couldn't be bothered to read the memos about the fraud, so he found, oh, nothing wrong here. Luckily, there was the criminal investigation that kind of undermined that and showed all this evidence. But I don't think we should just assume that all these internal affairs investigators are doing a great job. I'm sure many of them do, but I don't think it's proper for the court to say they can do our job for us—we can trust them so much that we don't even need to look into it. The other thing I'm reminded of when we're talking about this case and how Title VII works is, in finding these comparators, it almost rings of qualified immunity analysis, where you have to find, are you going to be held to find something that's exactly the same case as yours? And just how tricky that is, because that's not how real life works—different people are different, and different circumstances are different. And I think it's just unreasonable, both in the qualified immunity context and here, to say the people you're pointing to have to be exactly the same as you in exactly the same situation in every possible context, except that they're white and you're Black—that's just totally impracticable.

C

Carl Wu 35:27

And they're both kind of judge-made doctrines, right, that put the thumb on the scale on the side of the defendant—employer or officer. One thing I will say, to Judge Wilkinson's point, I mean his whole philosophy, or a lot of it, is rooted in this kind of restraint and trust in the democratic political process and letting that play out. I don't really know how that tracks to the internal affairs of police department adjudications. I mean, yes, the executive branch and whatnot, but Title VII—originally it was for private employers, but Congress specifically amended it to apply to public employers. So it's supposed to apply to officers, and to the extent you're thinking about the judicial role, if Congress is explicit that this should apply, then to take a step back and say, well, let's give them some breathing room...

A

Anthony Sanders 36:25

It's a judicial gloss, right?

K

Kirby Thomas West 36:27

Yeah, and I think it's messier once you get to the summary judgment stage or you're getting to a final determination, in terms of what evidence you actually need to marshal to show that this is racial discrimination—that can be more difficult, I think. But at least at the pleading stage, it seems like there shouldn't be such a heavy burden just to get to discovery and try to make your case.

A

Anthony Sanders 36:55

Carl, let me kind of open the hood here on my confusion about the case, and I think what you said in your presentation is helping me out. So what I was confused about is it seems like maybe there's racial discrimination here—maybe—but I think probably what's going on is the Baltimore Police Department is as corrupt as it's portrayed in *The Wire*, and so for some reason she was, as they say in the opinion, blackballed—they use that word—because she testified against this cop who it seems legitimately did a really bad thing, which is take a swing at someone who was part of this bachelorette party. They don't say if the victim was female or male, but it seems to have been a non-police officer who was just part of this party—female, right, okay. So that's bad, and he was punished, and part of that process was her testimony, the plaintiff's testimony. So it's easy to see that there could have been all kinds of repercussions, especially because this prosecutor told her that the storm was coming for her, basically. But she doesn't allege that as protected speech as part of her retaliation claim, and it just dawned on me when you were explaining the case—I'm guessing that's because this is a Title VII retaliation claim, and for that you need to point to the actual EEOC complaint. But for a First Amendment retaliation claim, you could talk about your grand jury testimony, but then if she sued the individuals, she'd have to worry about qualified immunity, and she tried against the city of Baltimore for a Monell claim, but she wasn't able to prove a pattern or practice, and so then she has to do this kind of weird workaround that didn't work very well. Am I right?

C

Carl Wu 39:02

Yeah, that's right. So actually, in the district court, on the first complaint, she argued that the protected activity for the Title VII claim was the testimony. The district court rejected this because that's not considered protected activity—even though, intuitively, you might think it should be, like, I'm in the employment context and I'm testifying against another officer—but no, it's the complaint itself. And so that became a causation issue, because the investigation started before the first complaint.

K

Kirby Thomas West 39:29

Yeah, I think, Anthony, that clarifies it for me too, because I definitely had the same question where I'm just like, this is a First Amendment retaliation case. I mean, maybe there's also racial discrimination, and like I said, with all those comparators, you should at least get past the pleading stage. But it does seem like, okay, you read the facts and we can all see what's going on here. But I think you're right that the hoops you have to jump through to vindicate constitutional rights against individual officers are so ridiculous that I can understand why someone would feel funneled into this Title VII claim instead.

C

Carl Wu 40:04

And even in the complaint, when you read the allegations, it is that she was fired because of this retaliation and racial discrimination. So again, I think you're right, Anthony—the smell test when you read it is like, well, obviously she was fired because of that. But again, we're at the pleading stage. I'll note one thing—this wasn't in the complaint, it was actually discussed at oral argument—that Sergeant Kushal was sued civilly by the off-duty officer, and that resulted in a \$5.2 million jury verdict with an additional \$2.1 million in attorney's fees that the city is paying. The city represented Sergeant Koushall, so we're now talking about a \$7 million cost, and this officer is still on the force. And here's the kicker: an internal investigation into his conduct found that the use of force was reasonable and there was no de-escalation technique required. So it's really kind of frustrating to read this and to see the lack of accountability internally within the police department, when it's so difficult to get accountability externally when you sue officers for violations of your rights.

A

Anthony Sanders 41:11

Wow. So that's not this plaintiff, that's the woman who was actually hit by the punch.

C

Carl Wu 41:18

Correct, and this incident—and here's the last kicker—apparently went viral. There was a video of this that was online circulating, so not a good look for the Baltimore PD. To Wilkinson's credit, he says they're improving, so we hope so, right. There was that 2016 DOJ investigation that resulted in a consent decree, and maybe things are getting better, but...

A

Anthony Sanders 41:45

And this incident was what, 2018?

C

Carl Wu 41:48

Yes, I mean, we're talking now, this is six years down the line, and we're just starting discovery into this

A

Anthony Sanders 41:55

Eight years.

**C** Carl Wu 41:55  
Yeah, eight years. That's right, yeah.

**K** Kirby Thomas West 41:58  
Was the victim, like, really hurt? The damages seem really high. Or is that typical?

**C** Carl Wu 42:04  
I don't think so. In the district courts, I was kind of parsing the docket, and the district court made a comment, the jury returned an astonishing verdict of 5.2 so liability wasn't contested and it was just a damages trial.

**A** Anthony Sanders 42:18  
I bet that jury had feelings about the Baltimore PD.

**C** Carl Wu 42:21  
I would think so.

A

Anthony Sanders 42:26

Well, that clears things up for me, so thank you, Carl. So we are going to move on now—so we've been to Detroit, Baltimore, now we're going to be moving on to Boston, right, big city, and then the environs of New England. So a little tiny bit of background here about the circuit courts of appeals. So we are always talking about the federal appellate courts—we also call them the U.S. Courts of Appeals—and we have the U.S. Courts of Appeals for the First Circuit, for the Second Circuit, blah, blah, blah. So that whole system of appellate courts, where you have district courts with district court judges, then you have the courts of appeals above that, where you have judges who are specifically set for that court of appeals, and then you have the Supreme Court above that. And the courts of appeals take the district court stuff—they also take some administrative stuff and like weird courts Congress has made, like the NLRB, places like that—but basically we have these appellate courts. They were established in 1891. Well, what did we have before that? Before that, we had the circuit courts. This gets a little confusing—we're not going to do the whole history lesson—but basically, part of what the circuit courts did was the justices of the U.S. Supreme Court would ride circuit, and they would go around to their circuits, and some would be assigned to various circuits. And essentially, after over 100 years of doing that—pretty much exactly 100 years—they were fed up. They were fed up moving around the country, and so they said, we're just going to have an appellate judiciary, an intermediate judiciary, to do that. So the First Circuit was established at that time, and it's a little circuit, a little baby circuit. It is Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico, which does add to its docket load and the population in its states. So it's basically New England and Puerto Rico, but minus Connecticut and Vermont. It has only six authorized by Congress full-time judges—when I say full-time, that's full circuit judges. Now it has senior judges, like all circuits do, when a judge can go senior, usually when they can get their pension and they're tired of being a circuit judge—they get a reduced workload as a senior judge, but still get a salary. And so they have five senior judges. They used to have six—or maybe they didn't actually have six at one time—but anyway, Judge Selya, who we loved in the Short Circuit newsletter because of all the weird words he would use in his opinions that no one had ever heard of—we loved to summarize those—he passed away last year. So there are five senior judges. There was just a new judge appointed and confirmed last year, a Trump appointee, and of the six judges, there are a bunch of Biden judges on the court too. So six judges—that's really small for a circuit. That's, I think, way smaller than any other circuit. I think we'll get to this over the course of the year, but I think every other circuit is at least like 10 or 11, other than the Federal Circuit. And so it takes cases from those states. It uses Courier font in its opinions, which I am not happy about, but Carl tells me in its orders sometimes now they use Times New Roman.

C

Carl Wu 45:59

At least one- I saw the other day was times new roman single spaced. So that was a refreshing read.

A

Anthony Sanders 46:04

I'm still not a fan of Times New Roman, but it is better than Courier—better than Courier, I mean, my goodness. Fundamental change once it gets into the West reporter, they do whatever they do, but if you're just pulling it off the website, like we do for the Short Circuit newsletter, it's quite annoying. I'm just going to repeat that once again for our First Circuit clerks who may be listening. So that is the First Circuit—any nuggets of wisdom you guys have about it? We've litigated there at times over the years, some of our—we've had a couple school choice cases pass through there in the last few years—but not a heck of a lot. It is a little circuit.

K

Kirby Thomas West 46:45

I don't have much to pass on, but the Carson case obviously was in the First Circuit, so that's a school choice case for law students listening. I don't know if this is true—I think it's true—occasionally they do sit in Puerto Rico.

A

Anthony Sanders 47:01

Yeah, Boston and Puerto Rico.

K

Kirby Thomas West 47:08

- that would be an appealing setup for people considering clerking on the First Circuit. You might get a trip to Puerto Rico out of it.

A

Anthony Sanders 47:33

Wow. And also, Carl and I were talking in the green room a little bit earlier about this—they do have an en banc procedure in the First Circuit, but as you might imagine, with only six judges, that's just double a panel. Of course, the senior judges go on the panels, but there's less kind of crying out for en banc, and they have a system where they can review opinions with each other. They sometimes will reverse an older opinion without going en banc because it's just so small. When you get bigger, things get, as we'll see in future episodes, more complicated. Also, finally, each circuit gets a justice who oversees that circuit, basically to keep tabs on things, be in touch with people, go speak at their circuit conference, but usually how most people run into this is if you ask for an extension of time or some emergency relief from that circuit, it first goes to that justice. And that is Justice Jackson, and I believe she has that circuit because Justice Breyer, who before that was Judge Breyer on the First Circuit, was naturally assigned to it, so he was in charge of it. And I think she has just stepped in. In the future, perhaps they'll rearrange as we have more turnover on the Supreme Court. So that's the first circuit.

**C** Carl Wu 49:04

He still sits occasionally. I know he did like a sitting little while ago on the First Circuit. Justice Breyer.

**A** Anthony Sanders 49:10

Right, retired justices can do that. I think Justice Kennedy did for a bit, I know Justice O'Connor did for a while after she first retired, so that's how they can keep in the game. Well, I think maybe Justice Souter did too, because he was a First Circuit

**K** Kirby Thomas West 49:26

I think that's right.

**A** Anthony Sanders 49:28

So anyway, there's a lot going on in the First Circuit, and there's a lot going on at Short Circuit too, and we're going to hear more about that in future episodes. But for now, I'd like to thank my colleagues and thank you for listening, and please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. And remember to get engaged.