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Third Circuit Rules that Temporary Worker Assigned by Staffing Agency Can Bring Race Discrimination Claim Against Company Where He Was Placed

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The Third Circuit's decision should cause companies to review their relationships with temporary workers, assess the risk of their being viewed as joint employers and, if appropriate, restructure the relationships to minimize that risk.

The U.S. Court of Appeals for the Third Circuit recently held that a temporary employee assigned by a staffing agency to Tuesday Morning, Inc. was an employee of Tuesday Morning, as well as the staffing agency, and therefore could bring a race discrimination claim against Tuesday Morning under Title VII. *Faush v. Tuesday Morning, Inc.*, 2015 U.S. App. LEXIS 19977 (3d Cir. Nov. 18, 2015) (available at http://www2.ca3.uscourts.gov/opinarch/141452p.pdf).

Background

Plaintiff Matthew Faush was employed by Labor Ready, a staffing firm that provides temporary employees to various clients, including Tuesday Morning, a closeout home goods retailer. Labor Ready and Tuesday Morning were parties to an Agreement to Supply Temporary Workers (Agreement).

Over the course of a month, Labor Ready sent Faush and other temporary employees to Tuesday Morning to unload merchandise, set display shelves and stock merchandise on the shelves to prepare for the store's opening. Faush was assigned to the store for 10 days. He alleges that, during those 10 days, the store manager accused him and the other African-American temporary employees of stealing and that the store owner's mother told Faush and two other African-American temporary employees to "work in the back of the store with the garbage until it was time to leave." When Faush and the other employees went to complain to the manager, a white employee blocked their path and used a racial slur. The manager refused to listen to their complaints and told them that they were not permitted on the floor because of a concern about loss prevention. Faush contends that he and his African-American co-workers were subsequently terminated, and he sued Tuesday Morning for race discrimination under Title VII and the Pennsylvania Human Relations Act (PHRA).

Third Circuit's Decision

The district court granted Tuesday Morning's motion for summary judgment, holding that Tuesday Morning was not Faush's employer pursuant to Title VII and the PHRA, and, therefore, Faush could not sue Tuesday Morning under those laws. The Court of Appeals for the Third Circuit reversed the lower court's ruling and held that a rational jury could find that Tuesday Morning was Faush's employer. In reaching its ruling, the Third Circuit applied the test enunciated by the U.S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Under the *Darden* test, a court evaluates a list of nonexhaustive factors to determine whether an employment relationship exists.[1] The *Darden* test focuses on "the hiring party's right to control the manner and means by which the product is accomplished." 513 U.S. at 323.

The Third Circuit evaluated several facets of the relationship between Tuesday Morning and the temporary employees supplied by Labor Ready:

- Tuesday Morning "was obligated under the Agreement to notify Labor Ready if any 'government mandated minimum statutory wage' should be paid to temporary employees, and it retained the 'primary responsibility' for ensuring compliance with prevailing-wage laws."

- Tuesday Morning indirectly paid the temporary employees' wages when it paid Labor Ready for each hour worked by each individual temporary employee at an agreed-upon hourly rate and paid legally required overtime (although Labor Ready set the temporary employees' pay rates and withheld taxes and social security).
- Tuesday Morning had ultimate control over whether a temporary employee worked at its store.
- Tuesday Morning exercised control over the daily activities of the temporary employees. Tuesday Morning's personnel "gave Faush assignments, directly supervised him, provided site-specific training, furnished any equipment and materials necessary, and verified the number of hours he worked on a daily basis." Labor Ready, on the other hand, disclaimed responsibility for supervising the work of the temporary employees.
- Tuesday Morning managed its temporary workers in the same way as it managed its employees.
- Tuesday Morning used temporary workers from Labor Ready to perform unskilled tasks similar to those assigned to Tuesday Morning employees.

In addition to analyzing the employer-like responsibilities that Tuesday Morning exercised, the Third Circuit reviewed the language in the Agreement and concluded that it too supported the conclusion that a rational jury could find that Faush was an employee of Tuesday Morning. The Agreement provided that Labor Ready would send temporary employees to Tuesday Morning with time cards to record time worked, and Tuesday Morning would review and approve the time cards. The Agreement characterized Faush and the other workers as temporary employees, rather than independent contractors. Tuesday Morning agreed to "provide a workplace free from discrimination and unfair labor practices," and Tuesday Morning committed to "comply with all applicable federal, state and local laws and regulations concerning employment, including but not limited to: wage and hour, breaks and meal period regulations, the hiring and discharge of employees, Title VII and the [Fair Labor Standards Act]."

In vacating the district court's entry of summary judgment on Faush's Title VII and PHRA claims and remanding for further proceedings, the Third Circuit recognized that the relationship between Labor Ready and Tuesday Morning is likely similar to "a large number of [other] temporary employment arrangements, with attendant potential liability under Title VII for the clients of those temporary employment agencies." The court nevertheless downplayed the effect of its decision, explaining that it did not anticipate

that its decision would "vastly expand such liability, as entities with over fifteen employees are already subject to Title VII."

Implications

Notwithstanding the Third Circuit's comment with respect to joint employer status under Title VII, the risk exists under other statutes as well. As we reported previously, the National Labor Relations Board (NLRB) also recently evaluated a temporary worker arrangement and found a joint employer relationship to exist under its newly created standard, which makes it easier to prove joint employer status. *See Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). (For more information on the *Browning-Ferris* decision, see our Pepper@Work Alert, "Guidance for Employers on Addressing the NLRB's Joint Employer Decision," available at http://www.pepperlaw.com/publications/guidance-for-employers-on-addressing-the-nlrbs-joint-employer-decision-2015-09-10/).

The Third Circuit and NLRB decisions should cause companies to review their relationships with temporary workers, assess the risk of their being viewed as joint employers and, if appropriate, restructure the relationships to minimize that risk. If a company wants to supervise the day-to-day activities of temporary workers and control other aspects of their work, it may not be feasible to structure the relationship in a way that would avoid joint employer status. If, however, a company concludes that it can benefit from temporary workers' services without controlling their assignments, pay and other indicia of an employment relationship, it should assess whether the terms of its contracts with staffing agencies and the way that it treats temporary workers can be modified to reduce the risk that the company will be held to be a joint employer.

Endnote

1 The *Darden* nonexhaustive list of factors include "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."