

The CHECKOFF

Oncale — A Misapplication of Title VII

by Dabny D. Ware

In *Oncale*, the Supreme Court had the right rule on the wrong facts. The plain language of Title VII states that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The legislation does not define the term discriminate, and a reading of the statute does not make it clear that discrimination based on sex may take the form of harassment. The prohibition of sexual harassment instead stems from judicial interpretation of Title VII and has its roots in the EEOC guidelines concerning sex discrimination. The now familiar definition in 29 CFR §1604.11 states:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of

unreasonably interfering with an individual's work performance or creating intimidating, hostile, or offensive working environment. (footnote omitted)¹

It is critical to note that these EEOC definitions do not rely on the plain language of Title VII, which refers to discrimination.

The EEOC regulation describes three scenarios under which sexual harassment would be actionable based on Title VII. The first two possibilities are related. Sex harassment is prohibited by Title VII when submission is a condition of employment or when the submission to or rejection of such behavior is a factor in an employment decision. The very nature of the descriptions used, *i.e.*, submission to or rejection of sexual advances or requests for sexual favors, seems to assume an interaction based on sexual attraction or desire. Harassment falling into these two categories is commonly referred to as "quid pro quo."²

The third possibility describes what is commonly referred to as "hostile work environment."³ The Supreme Court first recognized hostile work environment as a violation of Title VII in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, Vinson claimed that during her employment, her supervisor requested sexual favors, fondled her and even raped her.⁴ Her supervisor categorically denied these allegations.⁵ The district court did not determine whether there was a sexual

relationship, but denied relief finding that, if a sexual relationship did exist, it was voluntary.⁶

The Court of Appeals for the District of Columbia reversed and remanded, and the Supreme Court granted certiorari. In deciding *Meritor*, the Court reviewed the history and development of hostile work environment claims. The Court characterized the EEOC precedent as concluding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."⁷ After discussing lower court cases decided based upon the EEOC principles, it concluded that "[n]othing in Title VII suggests that a hostile work environment based on discriminating sexual harassment should not be likewise prohibited."⁸

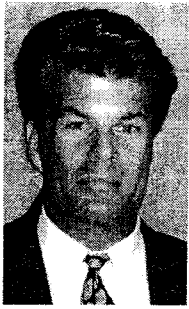
More recently, the Court recognized a hostile work environment claim in

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Chair's Message



It's been a busy year! We have established a website, provided Section research to the Constitutional Revision Commission, certification is again rearing its controversial head and we have held some exceptionally well received

seminars for our membership. I would like to thank the following individuals for their hard work on behalf of the Section:

Kevin Hyde, my Chair-elect (who I whined to all year); **Rob Sniffen** (the Prince of CLE); **Damon Kitchen** for threatening timely sub-

missions from busy lawyers; **Debbie Crumbley** and **Cary Singletary** for their patience in entertaining an obnoxious amount of questions from me as I sought guidance on "Chair issues"; all seminar chairpersons — **Cathy Beveridge** and **Damon Kitchen**; **Eric Holshouser** and **Michael Spellman**; **Steve Meck** and **Mike Grogan**; and **Rich McCrea**; **Cathy Stutin** and **Susan Dolin** for their hard work on *Check-off* and **Ron Rosengarten** for the thankless yet clearly important job of Council Secretary; **Walter Aye** for his good work in establishing the Section's website; **Stu Rosenfeldt** for his hard work and the work of his committee as regards certification; all the **Committee Chairs** for their

work and finally the **Executive Council** for their support and good work this year.

Finally, I would like to offer my personal and the Council's collective thanks and appreciation to **Fay Yeny**, our Section Coordinator. Fay is retiring this year to a life of leisure. If Fay attacks her retirement with the same enthusiasm and competence she has Section activities, AAA is in for a clearly enhanced workload. Fay, on behalf of myself and all other Council members, let me honestly suggest that we could not have accomplished our work without you. Your guiding hand and grace will be missed and we wish you the very best.

The Contingent Workforce: Who is the Employer Under EEO Laws?¹

by Rebecca S. Daffin

With the rising popularity of the contingent workforce,² courts are increasingly faced with the problem of establishing who is an "employee" and "employer" as those terms are defined by state and federal employment laws. Employers continue to embrace this alternative work relationship in hopes of reducing the costs, responsibilities, and liability of employing a traditional workforce of common-law employees. While the relative costs and benefits of contingent workers are beyond the scope of this article, it is important to note that liability for violations of the EEO laws may still attach regardless of the label attached to the worker and regardless of who pays the worker's salary.

On December 8, 1997, the Equal Employment Opportunity Commission (EEOC) released its Enforcement Guidance on Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Enforcement Guidance). The Enforcement Guidance, which appeared *in toto* in the March 1998 *Checkoff*, is to clarify the EEOC's position on

the application of anti-discrimination statutes to temporary, contract, and other contingent employees. While not controlling, the Enforcement Guidance will undoubtedly provide some instruction to litigants and courts wrestling with these issues.

This article, like the Enforcement Guidance, focuses on a large subgroup of the contingent workforce — those who are hired and paid by a "staffing firm" or other entity but whose employment conditions are controlled in whole or in part by the clients to whom they are assigned. With few exceptions, the Enforcement Guidance maintains that the staffing firm and its client are "joint employers" for purposes of EEO laws, and both will be jointly and severally liable for any make-whole damages. Punitive damages under Title VII and liquidated damages under the ADEA, however, should be individually assessed only against the culpable party.

The joint employer doctrine is not new.³ It first arose in the context of the National Labor Relations Act (NLRA) and the cases construing it. In *Boire v. Greyhound Corp.*,⁴ the

Supreme Court addressed whether two companies exercised sufficient control over employees so as to constitute a joint employer under section 9(c) of the NLRA. In the cases that followed *Boire*, the courts looked at a number of considerations as factually relevant in the determination. In *National Labor Relations Board v. Browning-Ferris Industries*,⁵ an oft-cited opinion from the Third Circuit, the court noted the following factors as cogent in establishing whether two entities shared or co-determined those matters governing the essential terms and conditions of the employees in question: 1) who has the right to hire and fire; 2) who supervises and directs the workers; 3) who establishes the work schedule; 4) who devises the workplace rules; and 5) who disciplines the workers.⁶

Because the NLRA was used as a framework for Title VII, the joint employer doctrine has been bootstrapped into Title VII litigation and adopted, in various forms, by the federal courts. In *Magnuson v. Peak Technical Services, Inc.*,⁷ the court denied defendants' motion for summary judgment because the court

found there were sufficient disputed facts to support a finding that three co-defendants were joint employers for purposes of Title VII liability. Although Plaintiff was paid by Defendant Peak Technical Services, Inc. (Peak), she was assigned by Peak to work with the other two defendants who trained her and supervised her work. Considering all the circumstances surrounding the work relationship, the court held there was sufficient dispute about the nature and extent each of the defendants controlled the manner and means of the Plaintiff's work.

In *Rivas v. Federacion de Asociaciones Pecuarria de Puerto Rico*,⁸ a discrimination case under the ADEA, the court found a grain mill operator was not a joint employer with a shipping company because the shipping company alone dictated the selection of the stevedores, paid the stevedores and, to a large extent, disciplined the stevedores pursuant to the procedures dictated by the collective bargaining agreement between the shipping company and plaintiffs. Relying on *Boire, NLRB v. Browning-Ferris*, and their progeny, the court did not believe the evidence indicated the grain mill operator exercised sufficient control over the essential terms of plaintiffs' employment to constitute a joint employer under the ADEA.⁹

The Eleventh Circuit utilized the joint employer doctrine in a 1994 employment decision; however, it failed to mention it in a recent opinion deciding the same issues. In *Virgo v. Riviera Beach Associates, Ltd.*,¹⁰ the court found that an employee in a Title VII action was jointly employed by the hotel where she worked and by the management company hired to operate the hotel. Although the hotel contracted with the management company to run the hotel and make the day-to-day decisions, the hotel reserved final authority and responsibility over any labor negotiations respecting employees. More importantly, the management agreement between the two entities required that all employees remain in the employ of the hotel and all compensation be paid by the hotel. The hotel argued it was not the employer because it had never exercised its power to make employment decisions. The court noted that while ac-

tual control is a factor to be considered, the authority or power to control is also "highly relevant."¹¹

In a more recent decision, the Eleventh Circuit again addressed who is the employer of a contingent worker for purposes of Title VII liability; however, the court never mentions the joint employer doctrine, nor does the panel cite the *Virgo* decision or any of the relevant factors set forth therein. In *Reynolds v. CSX Transportation*,¹² the plaintiff sued CSX Transportation, Inc. ("CSXT") alleging claims of harassment and retaliation under Title VII. Plaintiff was a temporary staffer assigned to work in the medical records room at CSXT. She did not sue the staffing firm. In finding that CSXT was Plaintiff's employer for Title VII purposes, the court relied upon a 1982 Eleventh Circuit decision, *Cobb v. Sun Papers, Inc.*,¹³ and *Amarnare v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*,¹⁴ a 1984 district court decision from New York. The *Cobb* decision, however, dealt with whether an independent contractor is an "employee" under Title VII; it does not address the issue of whether the defendant was a joint employer.

As for the *Amarnare* decision, the court does examine whether the plaintiff is jointly employed by Merrill Lynch and the temporary agency by whom plaintiff was paid. In finding that plaintiff was jointly employed by the two businesses, the court utilized the loaned servant doctrine which evolved from the common law principles of agency law.¹⁵ The evidence that Merrill Lynch controlled her work assignments, hours of service, and the other "usual" aspects of an employee-employer relationship was more persuasive than the single fact that the temporary agency paid her salary.

Undoubtedly, the Eleventh Circuit in *Reynolds* would have reached the same conclusion utilizing the joint employer doctrine of *Virgo* or the loaned servant doctrine in *Amarnare*. What is less certain is whether the test for determining employee/independent contractor status has any relevance in establishing who is an "employer" for Title VII purposes.¹⁶

In a somewhat different twist, the district court in Delaware refused to find that the temporary staffing agency who employed plaintiff was

an "employer" as that term is defined by Title VII. In *Williams v. Caruso*,¹⁷ Plaintiff filed a sexual harassment and retaliation complaint against Law Access, Inc., a co-worker at Law Access, and Western Staff Services, Inc., the temporary staffing agency that placed her at Law Access, Inc. Utilizing common-law agency principles, the Court held the temporary staffing agency was not the Title VII "employer" because it did not play a role in "the manner and means" by which Plaintiff's work was accomplished. (citing *Kellam v. Snelling Personnel Services*, 866 F.Supp. 812 [68 FEP Cases 195] (D. Del. 1994), *aff'd* 65 F.3d 162 [69 FEP Cases 768] (3rd Cir. 1995). The fact that the staffing agency paid Plaintiff's salary and controlled her work assignments was not sufficient to support a finding that Plaintiff was an employee of the staffing agency.¹⁸

The *Caruso* court held that the relationship between the plaintiff and the temporary staffing agency was not an employee/employer relationship but rather an independent contractor relationship, despite the fact that for tax purposes, the temporary employees were considered employees of the employment agency. Consequently, only the employment agency's permanent employees could sue for unlawful employment practices under Section 2000e-2 of Title VII. The court noted, however, that Title VII provides a remedy for unlawful employment agency practices; but in this case the plaintiff could not state a cognizable claim under that theory because the employment agency did not discriminate against her.¹⁹

From the brief survey of the law set forth above, it is clear courts have no shortage of theories to apply in determining who is the employer of the contingent worker. While the EEOC's Enforcement Guidance provides much-needed education and direction in this confused and unsettled area of the law, it may take the divine guidance of the courts and Congress to finally resolve this issue.

Endnotes:

¹ This article is an excerpt from a paper that will be presented at the 1999 Mid-Winter Meeting of the Employee Rights and Responsibilities Committee of the Labor and Employment Law Section of the American Bar Association. The final paper will be a col-

continued...