

Joint Employment in Spotlight Again

Article By:

Kaitlin L. Robidoux

The legal concept of joint employment has been buzzing in 2015, and a new opinion from the U.S. Court of Appeals for the *Third Circuit* – covering primarily Pennsylvania and New Jersey – recently addressed the issue. As those who read this blog regularly know, the Fourth Circuit addressed the question a few months ago, and back in August, the **National Labor Relations Board** issued its much-discussed **Browning-Ferris** ruling, which we discussed [here](#).

In *Faush v. Tuesday Morning, Inc.*, the 3rd Circuit Court concluded that Faush, an employee of a staffing firm, Labor Ready, could also be an employee of the entity for which he performed temporary work and which Labor Ready had a contract with – Tuesday Morning, Inc. When Tuesday Morning was preparing to open a new store in Pennsylvania, it needed extra workers to perform tasks such as setting up display shelves and unloading and stocking merchandise. Faush was assigned to work as a “temporary employee” for Tuesday Morning for ten days.

In his lawsuit against Tuesday Morning, Faush alleged that he was subjected to racial discrimination while on assignment with Tuesday Morning. Among other statutes, Faush sued under Title VII of the Civil Rights Act of 1964. The District Court originally granted summary judgment to Tuesday Morning, but the 3rd Circuit overturned that determination on appeal.

In considering the case, the 3rd Circuit applied the *Darden* test, which comes from a 1992 opinion of the United States Supreme Court and requires a court to “consider the hiring party’s right to control the manner and means by which the product is accomplished.” Factors relevant to this test include, among others: the skill required for the work, the source of tools, the location of the work, the duration of the parties’ relationship, whether the hiring party may assign additional projects, whether the hired party has discretion over when and how long to work, the method of payment, the provision of employee benefits, and the tax treatment of the hired party. No single factor is determinative, but the Court noted that it has generally focused on who paid the employees’ salaries, hired and discharged them, and controlled their employment activities day-to-day. The Court noted that, under the *Darden* test, more than one entity may be considered an employer, making them joint employers or co-employers for purposes of Title VII.

Considering the facts, the Third Circuit decided that Faush had more than enough evidence to overcome Tuesday Morning’s Motion for Summary Judgment. Although Labor Ready set Faush’s pay rate, maintained workers’ compensation insurance on his behalf, and paid his wages, taxes, and social security, Tuesday Morning also committed to certain employment responsibilities in its contract with Labor Ready. In particular, the Court noted the following:

- The contract obliged Tuesday Morning to notify Labor Ready if temporary employees were entitled to a minimum wage;
- The contract gave Tuesday Morning primary responsibility for ensuring compliance with prevailing-wage laws;
- Tuesday Morning’s temporary employees were similarly situated to its permanent employees, putting it in the best position to evaluate compliance with labor laws;
- Tuesday Morning paid Labor Ready an hourly rate for each hour Faush worked and was obligated to pay overtime charges required by law, rather than paying Labor Ready a fixed rate for completion of a project, which the Court found to mean that Tuesday Morning was essentially paying wages plus an administrative fee to Labor Ready;
- Tuesday Morning had control over whether Faush was permitted to work at its store and had the right to demand a replacement from Labor Ready;
- Tuesday Morning had control over Faush’s daily activities and exercised that control by

giving him assignments, directly supervising him, providing training, furnishing all needed equipment and materials, and verifying the number of hours he worked each day – a factor which the Court opined “overwhelmingly favors Faush”;

- Tuesday Morning managed Faush the same way it managed its permanent employees;
- Faush worked at a Tuesday Morning store, not at a site controlled by Labor Ready;
- When a Labor Ready supervisor visited the job site, she “merely relayed instructions from the Tuesday Morning manager to the Labor Ready employees, and did not, herself, exercise any supervisory functions over” them;
- Faush was not hired for a specialized skill set and performed only unskilled tasks that were no different from tasks assigned to Tuesday Morning’s permanent employees;
- Labor Ready and Tuesday Morning characterized Faush as a “temporary employee”;
- In the contract, Labor Ready expressly disavowed that it was a contractor or subcontractor; and
- In the contract, “[m]ost significantly, Tuesday Morning pledged to ‘provide a workplace free from discrimination and unfair labor practices’ and 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 FLSA.’”

The Court summarized: “unlike a contractor relationship, in which an agency is hired to perform a discrete task and oversees its employees’ work in the completion of that project, the Labor Ready employees were hired on an hourly basis to perform services under the supervision of Tuesday Morning management, which exercised control over the temporary employees’ daily work activities.” Emphasizing that Faush could have defeated summary judgment with less evidence than he had, the Court stated, “Tuesday Morning’s extensive control over Faush’s activities could suffice to make him [an employee] even though Labor Ready paid him and had the ultimate power to fire him.” Consistent with that view, the 3rd Circuit sent the case back to the District Court.

The Court acknowledged that its decision would “pertain to a large number of temporary employment arrangements, with attendant potential liability under Title VII for the clients of those temporary employment agencies.” Nevertheless, the Court stated that, because Title VII already applies to entities with more than fifteen employees, it anticipated that its holding, which is limited to the Title VII context, would not “vastly expand such liability.”

The upshot of this decision for employers in the Third Circuit is not unlike what employers everywhere are now facing: a greater impetus to determine whether or not engaging in staffing and related contractual arrangements where some degree of control is retained (if not actually exercised) is necessary for business in the first instance. If it is determined to be necessary, then it’s more important than ever to have competent counsel review those contractual agreements to see if the language could entangle your company in an employment relationship you do not wish to be in.

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