

Memorandum

TO: John Partner
FROM: Spencer T. Proffitt
DATE: April 10, 2009
RE: Staffing Company adv. Employee: Liability of Staffing Agencies Under Title VII
for the Alleged, Discriminatory Acts of Their Clients

STATEMENT OF FACTS

Our Client (“Agency”) is a staffing agency which places temporary workers with its clients. Agency placed Plaintiff (“Plaintiff”) in a temporary employment assignment to Agency’s client, Company (“Company”). Agency paid Plaintiff’s paychecks, and may have had some limited authority to remove temporary workers from a particular assignment. Company trained and supervised Plaintiff, and directed her in her duties. Company also had absolute authority to terminate temporary workers from their assignment at Company.

At some point during this assignment, Company allegedly discriminated against Plaintiff because she was pregnant. It is not clear who notified Agency of the alleged discrimination; however, at some point Agency became aware of Plaintiff’s concerns. Agency immediately contacted Plaintiff’s supervisor and offered to find Plaintiff alternative placement with a different client. Plaintiff declined Agency’s offer of reassignment.

Sometime after Agency was notified of the alleged discrimination, Company requested that Plaintiff be taken off the assignment, citing “attendance and availability” issues. Agency was contractually bound to honor this request and had no authority to require Company to retain Plaintiff. Agency therefore removed Plaintiff from her assignment with Company and found her an alternative assignment within a few days.

Plaintiff subsequently filed a complaint with the Equal Employment Opportunity Commission (the “EEOC”). The EEOC has filed a complaint in the federal court for the District of Arizona. In the complaint, the EEOC charges that Agency engaged in “unlawful employment practices,” in violation of Sections 703(b) and 704(a), Title VII of the Civil Rights Act of 1964, as amended, (“Title VII”), 42 U.S.C. §§ 2000e-2(b) and 3(a), which apply to employment agencies. The only example of such practices given by the EEOC is “honoring [Company’s] retaliatory request to terminate Ms. Plaintiff’s work assignment.”

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ISSUES PRESENTED

- I) Did Agency violate the Title VII provisions that apply to “employment agencies” when it honored Company’s request to remove Plaintiff?
- II) Is Agency an “employer” in an “employment relationship” with Plaintiff, such that the requirements of Title VII relating to employers would apply?
- III) If Agency were found to be an employer, could it be held liable for Company’s alleged, discriminatory actions?

BRIEF ANSWERS

- I) NO. Agency complied with the provisions of Title VII that apply specifically to “employment agencies.” Agency did not discriminate in referring Plaintiff for employment. In addition, Agency did not retaliate against Plaintiff for opposing unlawful employment practices.
- II) PROBABLY NOT. Although Agency meets the statutory definition of “employer,” it must also have had an employment relationship with Plaintiff in order to have violated Title VII. There is some question as to which test to apply in order to determine whether there is such a relationship. The tests differ as to how much weight to give to an entity’s authority to hire and fire an alleged employee. Under the test applied by a plurality of the courts which have examined the issue in the staffing agency context, Agency should not be liable as Plaintiff’s employer. However, it is uncertain which test the Ninth Circuit would apply.
- III) NO. Agency itself committed no discriminatory action. Company is not Agency’s agent such that Agency could be held liable under an agency theory of liability. Although an employer may be held liable for the harassment of an employee by independent third parties if the employer is aware of the harassment and does not take prompt and adequate remedial action, there is no harassment alleged here. Even if the third party liability standard for harassment could be extended to tangible employment actions such as discriminatory termination, Agency took remedial action that was both prompt and adequate.

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DISCUSSION

Title VII prohibits various discriminatory employment practices. *See* 42 U.S.C. § 2000e *et seq* (2006). Different prohibitions apply depending on whether an entity is classified as an “employer” or an “employment agency.” *Compare* § 2000e-2(a) (prohibiting employers from engaging in certain practices) *with* § 2000e-2(b) (prohibiting employment agencies from engaging in certain, different practices).

The definition of employment agency is relatively straightforward: “any person regularly undertaking with or without compensation to procure employees for an employer, or to procure for employees opportunities to work for an employer and includes an agent of such person.” § 2000e(c). A “person” is “one or more individuals . . . partnerships, associations, [or] corporations . . .” § 2000e(a). Since Agency regularly places temporary workers with its clients, it probably qualifies as an employment agency.

The definition of employer is very broad: “a person engaged in an industry affecting commerce who has fifteen or more employees. . . .” § 2000e(b). Although the protections of Title VII are not strictly limited to “employees” as defined by the act, standing to assert a Title VII violation against an “employer” requires some form of employment relationship, whether current, prospective, or in the past. *E.E.O.C. v. Pac. Maritime Ass’n*, 351 F.3d 1270, 1273 (9th Cir. 2003); *Williams v. Caruso*, 966 F. Supp. 287, 295 (D. Del. 1997) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (defining a covered employee under ERISA)); Lex K. Larson, *Larson’s Employment Discrimination* § 3.02 (1999).

Currently, the EEOC is only claiming violation of Title VII provisions that apply to employment agencies. Agency is likely not liable for violation of those provisions because it did not discriminate in the referral process, and because it did not retaliate against Plaintiff for opposing unlawful employment practices. If the EEOC later amends its complaint to claim that Agency is liable as an employer, Agency is still likely not liable because 1) Agency is probably not Plaintiff’s employer for the purposes of Title VII, and 2) even if Agency were Plaintiff’s employer, it did not violate the provisions of Title VII relating to employers.

I. Liability as an Employment Agency:

Agency has likely not committed an unlawful employment practice as an employment agency. Title VII describes the unlawful employment practices of employment agencies as follows: “It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his . . . sex . . . , or to classify or refer for employment any individual on the basis of his . . . sex” 42 U.S.C. § 2000e-2(b) (2006). It also prohibits both employers and employment agencies from retaliating against a complaint of discrimination:

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It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

§ 2000e-3(a).

Plaintiff was neither discriminated against in the referral process, nor did Agency engage in retaliation.

A. Discrimination in Client Referrals:

Agency did not discriminate in the referral process. To determine whether an agency has “fail[ed] or refuse[d] to refer for employment, or otherwise discriminate[d] against any individual,” courts use the “disparate treatment” and / or “disparate impact” analysis. *Hill v. Miss. State Employment Svc.*, 918 F.2d 1233, 1238 (5th Cir. 1991). Because the EEOC does not allege that pregnant persons in general are disparately impacted by Agency’s practices and policies, this discussion will focus on the “disparate treatment” analysis.

A finding of disparate treatment requires a showing of discriminatory animus. *Hill*, 918 F.2d at 1238. Such animus may be shown directly or inferred from circumstantial evidence. *Id.* A plaintiff can make a prima facie showing of discrimination in the referral process by showing 1) her membership in a protected group; 2) her qualification and availability for an assignment for which a staffing agency is making referrals; 3) her failure to secure a referral, and 4) the staffing agency’s later referral of non-members of the protected group. *See id.* at 1239. Once the prima facie case has been made, the staffing agency may rebut with a legitimate, non-discriminatory reason for its practices. *Id.* The plaintiff may overcome such a rebuttal by showing that the legitimate reason is a mere pretext for discrimination. *Id.*

Here, the EEOC can meet the first prong; the protected group is pregnant persons. The EEOC can also meet the second prong because Plaintiff qualified for a number of the Agency’s available referrals. However, she fails to meet her burden on the third prong. She secured a referral from Agency in her initial assignment to Company. In addition, she later received and accepted two additional referrals after her tenure at Company was terminated. Moreover, she received several other referrals which she turned down, until she ultimately requested to be taken off Agency’s contact list.

Even if Plaintiff can maintain that her reassignment from Company constituted a “failure to secure a referral,” Agency has a legitimate, nondiscriminatory reason for the reassignment: Company requested it. Because the reassignment is more likely to be viewed as a retaliation claim, and because a legitimate, nondiscriminatory reason is also a defense against retaliation, it will be discussed in more detail below.

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B. Retaliation:

To establish a prima facie case for retaliation, a plaintiff must show 1) that she engaged in a statutorily protected activity; 2) that the employer took an adverse personnel action; and 3) that a causal connection existed between the two. *Morgan v. Fed. Home Loan Mortg. Corp.*, 328 F.3d 647, 651 (D.C. Cir. 1985). Reassignment with the option of alternative placement is not an adverse action if it is instigated by the client and not the staffing company. *See Coles v. Kelly Services, Inc.*, 287 F. Supp. 2d 25, 32-33 (D.D.C. 2003); *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680, 686-87 (M.D.N.C. 1997). Reassignment may be adverse, however, if it is instigated by the staffing company for a discriminatory reason. *Cf. Sunkett v. Olsten Temp. Svcs.*, No. C-94-20027 RPA, 1995 WL 507044 (N.D. Cal. Aug. 17, 1995). The request of a client for reassignment of a temporary worker constitutes a legitimate, nondiscriminatory reason which will rebut a prima facie case absent a showing of pretext. *Coles*, 287 F. Supp. 2d at 33-34.

In *Mullis*, a temporary worker was allegedly being subjected to sexual harassment. *Mullis*, 994 F. Supp. at 682. She notified her supervisor at the client's premises as well as her contact at the staffing agency. *Id.* at 683. The staffing agency later told her that she would not be returning to work at the client's premises. *Id.* The facts of the case are silent on the cause for the reassignment. *See generally id.* The plaintiff filed suit under various causes of action including retaliation. *Id.* at 682. The judge granted the staffing agency's motion to dismiss the retaliation claim because it found that the plaintiff's removal was not an adverse action. *Id.* at 686. The court reasoned that occasional reassignment was part and parcel of temporary work assignments, and as such could not be adverse absent some allegation that the staffing company refused to find alternate placement or that the alternate placement offered was somehow inferior. *Id.* at 686-87.

Similarly, the plaintiff in *Coles* complained to both the staffing agency and its client of sexual harassment. *Coles*, 287 F. Supp. at 28. The agency's client later requested that the plaintiff be removed from the client's service, claiming that she falsified her time card and assaulted an employee. *Id.* at 28-29. The agency honored the client's request. *Id.* The judge granted the staffing company's motion for summary judgment on a retaliation claim. *Id.* at 34. This judge also expressed doubts as to whether a removal from a temporary work assignment could be an adverse action because there was evidence that the plaintiff was eligible for reassignment. *Id.* at 32. Assuming, without deciding, that such an action would be adverse, the judge still granted the staffing agency's motion for summary judgment because they had a legitimate, nondiscriminatory reason for the action—the client's request. *Id.* at 33-34. Because of such a request, even if a discriminatory motive had existed, the agency "would have made the same decision in the absence of the unlawful motive, [and] the [c]ourt cannot say that retaliation was the 'but for' cause of [the plaintiff's] termination." *Id.* at 33 (internal quotations omitted).

Still, there are some situations where a staffing company's removal of a temporary worker may constitute an adverse action. In *Sunkett*, a case regarding the Americans with Disabilities Act ("ADA"), the plaintiff was prone to seizures. 1995 WL 507044 at *1. During a seizure, the plaintiff allegedly struck a representative of the staffing agency and wandered off the job site. *Id.*

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at *1-2. The staffing agency's agent conferred with the client and **both** determined that the plaintiff should be terminated from the assignment due to his behavior, which may have been related to his disability. *Id.* at *2. The agency later attempted to contact the plaintiff to see if he was available for other assignments. *Id.* The judge determined, without much reasoning, that the termination from the temporary assignment was an adverse action, regardless of whether the plaintiff were eligible for reassignment.

Like the plaintiff in *Mullis*, who was on a temporary assignment with the staffing agency's client, Plaintiff was on a temporary assignment with Company. Reassignment is a common occurrence with temporary assignments and should not be considered an adverse action if the temporary worker is eligible for reassignment. Indeed, Agency located an alternative assignment for Plaintiff within a few days. Although it might be argued that the result here should be the same as in *Sunkett*, the facts of these cases are quite different. First, *Sunkett* was interpreting the ADA, not Title VII. But more importantly, the agency in *Sunkett* took part in the termination decision. Agency, on the other hand, like the agency in *Coles*, only acted on the instructions of its client, and made no independent decision. Thus, Agency's decision to reassign Plaintiff should not be considered an adverse action.

Even if the reassignment were an adverse action, Agency should still not be liable for retaliation because it had a legitimate, nondiscriminatory reason for its action. Like the agency in *Coles*, Agency received a request from its client to remove the temporary worker from the work site. Agency does not have the authority to keep a temporary worker on an assignment once its client has requested that the worker be reassigned. Thus, Agency can show that it "would have made the same decision in the absence of [any] unlawful motive." *Coles*, 287 F. Supp. at 33. This would arguably be true even if Company had given a discriminatory reason for the termination. The case here is even stronger, however, because Company cited attendance and availability, not pregnancy, for the discharge. Even if Plaintiff can show that the "attendance and availability" excuse is mere pretext, it would be pretext on behalf of Company, not Agency. Agency's reason for reassignment is the same reason as that in *Coles*—the request of a client. As the judge in *Coles* found, such a reason is legitimate and nondiscriminatory. The result here should be the same and Agency should not be liable for retaliation.

II. Agency's Status as Employer under Title VII:

In certain cases, an employer may be liable for the actions of its agents or of third parties. *See, e.g., Powell v. Las Vegas Hilton Corp.*, 841 F. Supp 1024 (D. Nev. 1992) (holding that an employer may be liable for sexual harassment of an employee by the employer's customers if the employer knows about the harassment and fails to take corrective measures). However, employment agencies are not liable for the full range of unlawful employment practices that are prohibited to employers. *Kellam v. Snelling Personnel Svcs.*, 866 F. Supp. 812, 816-17 (D. Del. 1994)). In *Kellam*, the plaintiff argued that the words "otherwise discriminate" in the employment agency statute incorporates the unlawful employment practices prohibited to employers into the statutory provisions for employment agencies. *Id.*; *see* 42 U.S.C. § 2000e-2(b). The judge in

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Kellam reasoned that the language “to otherwise discriminate” modifies only “to fail or refuse to refer for employment” and could not incorporate the full panoply of unlawful employer activities into the limited unlawful employment agency activities. *Kellam*, 866 F. Supp. at 817; see 42 U.S.C. § 2000e-2(b). As discussed above, Agency did not engage in any discriminatory employment agency activities. Thus, for Agency to be held liable for the alleged, discriminatory actions of Company, it must first be found to be an employer under Title VII.

As mentioned previously, to be held liable as an employer, the entity must not only meet the broad statutory definition, but must also have some form of employment relationship with the person making the claim. *E.E.O.C. v. Pac. Maritime Ass’n*, 351 F.3d 1270, 1273 (9th Cir. 2003); *Williams v. Caruso*, 966 F. Supp. 287, 295 (D. Del. 1997) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (defining a covered employee under ERISA)); Lex K. Larson, *Larson’s Employment Discrimination* § 3.02 (1999). Staffing companies present a unique problem because the temporary workers are often on the agency’s payroll, but do the majority of their work elsewhere. See Larson, *supra*, § 6.01.

A variety of legal theories exist to address the situation where an employee may be employed by more than one entity. The integrated employer theory does not apply here because it assumes the two companies are not independent. *Takacs v. Fiore*, 473 F. Supp. 2d 647, 656 (D. Md. 2007). It is generally only utilized in the parent / subsidiary context and then “only in extraordinary circumstances.” *Id.* An indirect employer theory of liability must be asserted against the entity at whose facility a discriminatory action occurred, and thus is also not relevant here. *Pacific Maritime*, 351 F.3d at 1274. Therefore, Agency must be an employer or a joint employer in order to be held liable as an employer under Title VII. *Cf. id.*

A. Judicial Tests for an Employer:

In 1992, the Supreme Court announced that the test of an employment relationship under ERISA must be found using the general analysis for agency under the common law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318. The *Darden* test stated that the foremost consideration for finding an employment relationship was the “right to control the manner and means by which the product is accomplished.” *Id.* at 323-324. The court also listed several factors to consider: 1) The skill required; 2) the source of instrumentalities or tools; 3) location of the work; 4) duration of the relationship; 5) whether the hiring party has the right to assign additional duties to the hired party; 6) the extent of the hired party’s discretion over when and how long to work; 7) the method of payment; 8) the hired party’s role in hiring or paying assistants; 9) whether the work is part of the regular business of the hiring party; 10) whether the hiring party is in business; 11) the provision of employee benefits; and 12) the tax treatment of the hired party. *Id.*

The hybrid test likewise emphasizes control. *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 935 (D.S.C. 1997) (citing *Garrett v. Phillip Mills, Inc.*, 721 F.2d 979, 981-82 (4th Cir. 1983)). Indeed, much like the *Darden* test, the “main focus” of the hybrid test is control over the “means and manner” of the workers’ performance. *Oestman v. Nat’l Farmers Union Ins. Co.*, 958

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F.2d 303, 305 (10th Cir. 1992). The hybrid test gives eleven additional factors: 1) type of occupation; 2) skill required; 3) who furnishes the equipment; 4) length of time worked; 5) method of payment; 6) how the relationship is terminated; 7) whether annual leave is available; 8) whether the work is an integral part of the employer's business; 9) whether the employer provides retirement benefits; 10) whether the employer pays social security taxes; and 11) the intention of the parties. *Id.*

These two tests overlap a great deal. The only apparent difference is that the hybrid test gives more deference to the intention of the parties and how the relationship is terminated.

B. Joint Employer Theory:

Because employees who arguably work for more than one employer are becoming more common, the courts have recognized that more than one person could meet the definition of employer for a single employee. *Caldwell v. ServiceMaster Corp.*, 966 F. Supp. 33, 46 (D.D.C. 1997); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344, 349 (S.D.N.Y. 1984). A finding of a joint employment relationship also hinges on control, such as when "one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1360 (11th Cir. 1994). Thus, a joint employer relationship exists when "[t]wo or more employers . . . control the terms and conditions of employment of the employee." *E.E.O.C. v. Pac. Maritime Ass'n*, 351 F.3d 1270, 1275 (9th Cir. 2003) (internal citations omitted).

The Ninth Circuit has utilized a detailed test for the joint employment relationship known as the "economic realities test." *Id.* This test emphasizes control over the "terms and conditions" of employment rather than the "manner and means" of production. The test considers "all factors relevant to the particular situation" to examine the extent of control exercised by each employer. *Id.* Such factors overlap with those relevant to the single employer inquiry and include, but are not limited to: 1) The degree of the organization's right to control the manner in which the work is to be performed; 2) the alleged employee's investment in equipment or materials required for the task; 3) the alleged employee's employment of helpers; 4) whether the service rendered requires a special skill; 5) whether the service rendered is an integral part of the organization's business; 6) ownership of property or facilities where work occurred; 7) whether the organization can hire or fire the individual; 8) whether the organization can set the rules and regulations of the individual's work; 9) the degree of supervision the organization exercises over the alleged employee's work; 10) the extent of the influence the alleged employee may exert over the organization; and 11) whether the parties intended an employment relationship. *Id.* at 1275-76.

Although the Ninth Circuit has not yet applied this test in the specific context of a staffing agency, several courts have addressed whether a staffing agency may be an employer under Title VII.

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C. Precedent and Application:

The application of the tests for an employment relationship under Title VII as it relates to staffing agencies has differed somewhat among the various jurisdictions. Some judges have avoided the issue altogether by assuming that a staffing agency is an employer, but absolving them of alleged discrimination at an employer's workplace for other reasons. *see, e.g., Takacs v. Fiore*, 473 F. Supp. 2d 647, 656-58 (D. Md. 2007) (assuming, without finding, that a staffing company is a joint employer, but finding that the staffing agency could not be liable for a client's alleged sexual harassment because the agency had no notice of the harassment); *Coles v. Kelly Services, Inc.*, 287 F. Supp. 2d 25, 30-32 (D.D.C. 2003) (finding that there was no hostile work environment, and that if there was the agency took reasonable remedial measures, while not addressing the threshold issue of whether the agency was the plaintiff's employer). Of the cases that have analyzed the employment relationship in detail, many have found that a staffing agency is not an employer.

1. Staffing Agency is Not an Employer

Several courts have found that the staffing agency is not the employer of the temporary workers it places with its clients. *See, e.g., Watson v. Adecco Employment Svcs., Inc.*, 252 F. Supp. 2d 1347, 1356 (M.D. Fla. 2003); *Williams v. Caruso*, 966 F. Supp. 287, 296 (D. Del. 1997); *Kellam v. Snelling*, 866 F. Supp. 812, 815-16 (D. Del 1994), *aff'd* 65 F.3d 162 (3d Cir. 1995).

In *Watson*, a staffing agency assigned two workers to a school cafeteria. 252 F. Supp. 2d at 1349. Pursuant to the contract, the client had "complete discretion to terminate a temporary employee's service." *Id.* A manager employed by the client trained and supervised the workers, and dictated uniform dress requirements. *Id.* The staffing agency issued paychecks, withheld taxes, and issued "general guidelines about appropriate attire." *Id.* The workers refused, for religious reasons, to wear Santa hats during the holidays. *Id.* The staffing agency later allegedly removed the two workers from the assignment at the client's request. *Id.* at 1350-51. The workers continued to be eligible for reassignment by the agency to other clients. *Id.* at 1351. Applying the general agency principles of *Darden*, and the definition of joint employer in *Virgo*, the judge in *Watson* found that the agency did not retain the requisite control over the "essential terms and conditions of employment" to be considered the workers' employer or joint employer. *Id.* at 1354-56; *see Darden*, 503 U.S. 323-24; *Virgo*, 30 F.3d at 1360. Rather, the judge found that the main balance of control was held by the client, which supervised the workers and dictated their job duties, rather than by the agency, which issued only general guidelines and handled payroll issues. *See id.* at 1349, 1356.

Similarly, in *Caruso*, the judge found that a staffing agency did not exert the requisite control to be an employer under Title VII. 966 F. Supp. at 296. There the worker was allegedly subjected to sexual harassment by the client's employee, and had reported it to the staffing agency.

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Id. at 289. The client trained and supervised the worker, and the worker did not report daily to the staffing agency. *Id.* at 296. The client could terminate the assignment at its discretion. *Id.* at 296 n.8. However, the agency was in charge of payroll matters. *Id.* at 296. Again, the judge found that the agency was not an employer under Title VII. *Id.* at 296. In doing so, the judge seemed to rely on the fact that the *Darden* court set out that control over the “manner and means” of the work product was one of the “foremost factors,” and the staffing agency had very little control over the manner and means of the work product, even if they had some control over the pay. *See id.*

The judge in *Kellam* likewise relied on the fact that the *Darden* test placed the “greatest emphasis . . . on the hiring party’s right to control the manner and means by which the work is accomplished.” 866 F. Supp. at 815. Applying the several *Darden* factors, the judge reasoned that, although 1) the agency was “in business;” 2) the temporary workers were “employees” of the agency for tax purposes; 3) the duration of the temporary workers’ relationship with the staffing agency may last several years; and 4) the agency delivered paychecks to the workers, the balance of the evidence supported an “independent contractor relationship” rather than an employment relationship. *Id.* The workers were not assisting with the agency’s “regular business” of finding temporary workers for the agency’s clients; the workers were not obligated to accept an assignment offered by the agency; and the agency did not provide any of the materials with which the work would be undertaken. *Id.* In addition, the client, and not the agency, had control over when and how long the workers worked. *Id.* The judge placed the greatest emphasis on the “manner and means” portion of the test, noting that it was the client who trained, directed, supervised and evaluated the workers and their work product. *Id.* Importantly, the judge also noted that, although the agency may have the authority to unilaterally remove the worker from an assignment or from the agency’s availability list, such removal “could not prevent the temporary worker from continuing to work for the client if the client so desired.” *Id.* This seems to suggest that the authority to hire and fire may not play as big a role in the staffing agency context as it might in others. *Cf. id.* Although this analysis was undertaken in *Kellam* only in the context of determining whether the agency had enough employees to satisfy the statutory definition of “employer,” *see* 42 U.S.C. § 2000e(b) (2006), the analysis—the *Darden* test—is the same as that for determining whether there is an “employment relationship.”

2. Staffing Agency Is an Employer

Unfortunately, not all courts that have addressed the issue have found that a staffing agency does not have an employment relationship with the workers it assigns to its clients. However, the two courts that have found an employment relationship since *Darden* was decided do not apply the agency principles as set forth in *Darden*. *See, e.g., Dewitt v. Lieberman*, 48 F. Supp. 2d 280, 292 (S.D.N.Y. 1999) (applying the “payroll method”); *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680, 685 (M.D.N.C. 1997) (applying the “loaned servant doctrine”). Neither case should apply here.

Dewitt uses the somewhat simplistic “payroll method,” which states that all workers on the payroll are employees. 48 F. Supp. 2d at 292. This method should not be applied here. First, the

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judge utilizes the payroll method only to determine whether the staffing agency has fifteen or more employees as required by Title VII. 48 F. Supp. 2d at 292 (citing *Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202 (1997)). In doing so, it ignores the *Darden* Court's admonition that an employment relationship should be analyzed through the common law of agency. *Cf. id.* In addition, the only Title VII charge against the staffing agency in *Dewitt* is retaliation, which is forbidden to employers and employment agencies alike. *Id.*; see 42 U.S.C. § 2000e-3(a). Thus the determination that the staffing agency is an employer is arguably dicta.

Similarly, *Mullis* should also not be followed. In *Mullis*, the court cites *Darden*'s general proposition that the existence of an employment relationship should be analyzed under the common law of agency. 994 F. Supp. at 685. It then states that the loaned servant doctrine is just such a common law principle of agency. *Id.* The loaned servant doctrine states that "an **employee** directed or permitted to perform services for another 'special employer' may become the special employer's employee while performing those services." *Id.* (emphasis added). The court further states that "where the special employer controls the means and manner of the temporary employee's work, the temporary employee is considered an employee of **both** the temporary agency and the special employer." *Id.* (emphasis in original). This reasoning is not persuasive for two reasons. First, the definition of a "loaned servant" already assumes that the temporary worker is an "employee" of the temp agency. Thus, a court must undergo an inquiry under the common law doctrine of "control" before it can even apply the loaned servant doctrine. Second, the application of the loaned servant doctrine without such an inquiry regarding control ignores the *Darden* court's emphasis of control over the manner and means of production.

3. Status as Employer is a Question of Fact for the Jury

Finally, one court has stated that whether a staffing agency and a temporary worker have an employment relationship should be a question of fact for the jury. *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 936 (D.S.C. 1997). Unlike the other courts, the *Grimes* court used the hybrid test. *Id.* at 935. The judge noted that the staffing agency paid the worker's wages, managed her benefits, and handled complaints regarding her employment status. *Id.* at 936 In addition, the judge in *Grimes* appeared to place the greatest weight on the fact that the staffing agency had the ability to hire and fire the worker. *Id.* Indeed, the judge called this ability the "ultimate means of control." *Id.* These factors were enough for the judge to decide that the employment relationship could not be decided on summary judgment, and was instead a matter for the jury. *Id.*

4. Application

The facts in the case at bar are similar to those in *Grimes*, which followed the hybrid test, but are also similar to those in *Watson*, *Caruso*, and *Kellam*, which used the *Darden* test. Agency handled Plaintiff's wages and benefits, and may have had the authority to address Plaintiff's complaints. It is also probable that Agency had the authority to remove Plaintiff from an assignment or remove her from their list of prospective workers. Company, however exerted all other control over the "manner and means" of work production, including training, supervision,

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and evaluation. It was also responsible for defining Plaintiff's duties while on assignment. In addition, Company had extensive control of the initiation and termination of the work assignment, if not Plaintiff's eligibility as a temporary worker for Agency. Thus, whether Agency may be an employer under Title VII may hinge on whether the District of Arizona follows the *Darden* line of cases rather than the hybrid line.

It is difficult to determine how the District of Arizona or the Ninth Circuit will evaluate the employment relationship. The Ninth Circuit endorsed the *Darden* test in the context of the Occupational Safety and Health Act (OSHA). *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F. 3d 938 (9th Cir. 1994). However it later utilized the "economic realities test" in a case more similar to the one at bar. See *E.E.O.C. v. Pac. Maritime Ass'n*, 351 F.3d 1270, 1275-77 (finding that a stevedoring association, which paid the wages of longshore workers at a stevedore company but had no supervisory authority or capacity to hire or fire, was not a joint employer). Unfortunately, the judge in *Pacific Maritime* also seemed to place great emphasis on the ability to hire and fire. *Id.* However, there are a few of reasons why the court should give little weight to Agency's limited authority to hire or fire Plaintiff.

First, the *Darden* test is endorsed by the U.S. Supreme Court, whereas the hybrid test and the economic realities test are not. Given the similarity of the tests, this may not make much difference. However, it does undermine the *Grimes* and *Pacific Maritime* courts' reliance on the power to hire and fire, which is not an explicit factor in *Darden*. That reliance is further undermined by the judge's argument in *Kellam*—that a staffing agency's power to remove the worker from its list of available workers does not affect the worker's ability to work for the client if the client so desires. Finally, too much emphasis on the authority to terminate a work assignment ignores the focus, present in both *Darden* and the hybrid test, on the "manner and means" of production. Company, not Agency, held almost total control of the manner and means by which Plaintiff did her work. Thus, Agency should not be considered an employer in terms of Title VII liability.

III. Agency's Liability as an Employer for the Discriminatory Acts of its Client:

Even if Agency were found to be Plaintiff's employer for the purposes of Title VII, Agency should still not be liable for the alleged, discriminatory actions of Agency. As stated above in Part I, relating to liability as an employment agency, Agency's only act—honoring Company's request—was not a discriminatory act. Indeed, the EEOC is not alleging that Agency discriminated directly. Furthermore, the retaliation statute applies to employers and employment agencies alike. 42 U.S.C. § 2000e-3(a). Thus the analysis in Part I.B relating to retaliation should be similarly relevant for retaliation as an employer. As was the case for employment agency liability, Agency did not retaliate as an employer either.

So for Agency to held liable for "unlawful employment practices," it must somehow be liable for the alleged actions of Company. A staffing agency's client is not the agent of the staffing agency, so an agency theory of liability is not at play here. See *Williams v. Grimes Aerospace Co.*,

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988 F. Supp. 925, 933 (D.S.C. 1997). Thus, for Agency to be liable for the alleged, discriminatory acts of its client, there must be another third party liability theory at work.

Agency is not liable for the alleged, discriminatory actions of Company because 1) An employer is generally not liable for the discriminatory actions of independent third parties except in cases of harassment, and there is no harassment alleged here; and 2) even if the harassment standard could be applied to Agency, Agency's remedial actions were both adequate and prompt.

A. The Harassment Standard:

An employer may be held liable for sexual harassment, even if that harassment is perpetrated by independent third parties. *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1028 (D. Nev. 1992) (holding that a casino may be held liable for sexual harassment of a casino employee by customers of the casino in the proper circumstances). An employer may be liable for the sexual harassment of an employee by an independent third party if the employer 1) knew or should have known of the harassment; and 2) failed to take prompt and adequate remedial action. *See, e.g., Moore v. Kuka Welding Sys.*, 171 F. 3d 1073, 1079 (6th Cir. 1999); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 485 (5th Cir. 1989). This standard arose in the harassment context and is rarely applied to tangible employment actions such as discriminatory hiring and firing. *See Daniel P. O'Gorman, Paying for the Sins of their Clients: The EEOC's Position that Staffing Firms Can Be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 Penn. St. L. Rev. 425, 432-34 (2007).

Indeed, O'Gorman argues that an extension of the harassment standard for third party liability to tangible employment action has no statutory authority and should be avoided. O'Gorman, *supra*, at 459-63. In the context of staffing agencies, the standard for third party liability has largely been applied in cases of harassment. *See, e.g., Takacs v. Fiore*, 473 F. Supp. 2d 647 (D. Md. 2007); *Coles v. Kelly Svcs., Inc.*, 287 F. Supp. 2d 25 (D.D.C. 2003); *Riesgo v. Heidelberg Harris, Inc.*, 36 F. Supp. 2d. 53 (D.N.H. 1997). The few staffing agency cases that **do** apply a third party negligence standard to tangible employment actions cite cases whose authority is ultimately traceable to harassment cases. O'Gorman, *supra*, at 456; *see, e.g., Watson v. Adecco Employment Svcs., Inc.*, 252 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003); *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 937 (D.S.C. 1997). Further, no case has found that a staffing agency was liable for the discriminatory actions of its clients outside of a harassment context. O'Gorman, *supra*, at 456. Thus, the Title VII statutes, as well as case law related to staffing agencies, provide scant authority for the application of the third party liability standard outside the context of harassment.

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B. Adequate Remedial Action:

Even if such a standard were applied to Agency, it met any duty to take prompt remedial action. Once an employer is made aware of sexual harassment by a third party, it is under a duty to take “prompt and adequate remedial action.” *Mullis v. Mechanics and Farmers Bank*, 994 F. Supp. 680, 685 (M.D.N.C. 1997) (citing *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996)). When determining whether a remedial action is adequate, a court asks whether the action is “reasonably calculated to prevent further harassment.” *Williams v. Caruso*, 966 F. Supp. 287, 298 (D. Del. 1997); *Coles*, 287 F. Supp. 2d at 32. The remedial action must also be “feasible and reasonable under the circumstances.” *Riesgo*, 36 F. Supp. 2d at 59 (citing *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980)).

Several cases have addressed whether a particular response by a staffing agency was adequate. In those cases, wherever a staffing agency contacted the client to investigate and offered to remove the worker from the client’s employ, the judge always found such a response to be adequate. *See, e.g., Coles*, 287 F. Supp. 2d at 31; *Caruso*, 966 F. Supp. at 298; *Caldwell v. Servicemaster Corp.*, 966 F. Supp. 33, 48 (D.D.C. 1997). Indeed, since removal and reassignment is “reasonably calculated to prevent further [discriminatory action],” some of these judges even stated in dicta that removal combined with an offer to find substitute placement would be an adequate remedial action in itself, even absent an investigation. *See, e.g., Caruso*, 966 F. Supp. at 298; *Caldwell*, 966 F. Supp. at 48.

In fact, there is only one case that found that a staffing company’s remedial action was not sufficient. *See, e.g., Mullis*, 994 F. Supp. 680. In *Mullis*, a staffing agency assigned the plaintiff to a bank. *Id.* at 683. There, a bank employee allegedly subjected her to sexual harassment. *Id.* When she made the staffing agency aware of the alleged harassment, the agency responded only by telling her to “hang in there.” *Id.* The plaintiff was removed from the assignment at the client’s request six to eight weeks later. *See id.* The plaintiff later brought charges of sexual harassment against the staffing agency. *Id.* at 683-84. The staffing agency argued that the mere removal of the plaintiff was an adequate remedial response. *Id.* at 686. The judge did not rule out that removal may have been adequate, but held that it was not “prompt” because it did not happen until several weeks after the plaintiff complained to the agency. *Id.*

Here, Agency immediately contacted Company upon receiving the complaint, presumably to investigate Plaintiff’s allegations. In addition, Agency offered to reassign Plaintiff shortly after receiving her complaint. These remedies were “reasonably calculated to prevent further [discrimination].” *Caruso*, 966 F. Supp. at 298. Indeed, they are very nearly the same as those remedies that were found adequate in *Coles* and *Caruso*. In addition, the remedies that Agency undertook go beyond what little was offered the plaintiff in *Mullis*, and they were also more prompt. Thus, even if Agency can be considered Plaintiff’s employer, and even if the third party liability standard for harassment can be extended to tangible employment actions in the staffing agency context, Agency’s response was both prompt and adequate.

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CONCLUSION

Agency should not be held liable for the alleged, discriminatory actions of Company. Agency did not itself commit any discriminatory act prohibited to an employment agency. Presently, the EEOC's complaint only includes claims against Agency under the provisions of Title VII that apply to employment agencies. Thus, the fact that Agency did not discriminate in the referral process and did not retaliate should end the inquiry.

However, even if the complaint were amended to include claims against Agency as an employer, Agency should still not be liable. Agency is not Plaintiff's employer such that it can be held liable under the Title VII provisions relating to employers. Further, even if Agency were considered Plaintiff's employer, the only theory of liability that fits the facts as alleged is the third party liability theory for harassment. Since Plaintiff is not alleging harassment, such a theory must fail. Even if third party liability could be extended to tangible employment actions, Agency met its burden of taking prompt remedial action. Thus, Agency should not be liable.